THE

LAW OF CRIMES

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PREFACE TO THE TENTH EDITION.

SINCE the publication of the last edition six new Acts amending the provisions of the Indian Penal Code or substituting new ones have been enacted, and seven hundred fresh cases bearing on the provisions of the Code have been reported in law reports, official and non-official. Besides, several sections of the Code of Criminal Procedure have been amended by Act XVIII of 1923. The present edition has been carefully revised and brought up-to-date in the light of statutory changes and fresh case-law. To keep the book handy this edition is printed on tough and thin paper specially ordered out from England, and the type is also slightly altered. Even with the addition of seventy pages of new matter the bulk of the book has not increased but diminished.

January, 1926.

R. R.
D. K. T.

EXTRACTS FROM THE PREFACE
TO THE THIRD EDITION.

THE commentary under each section is divided into three Parts; first comes Comment; secondly, Cases; and thirdly, matter pertaining to Practice.

As to COMMENT.—The object of a section as foreshadowed in the Note of the authors of the Code, or in the two Reports of the Indian Law Commissioners or in the Proceedings of the Legislative Council, has been fully stated. Wherever the scope of a section has been the subject of judicial criticism it has been carefully explained. Wherever the meaning or principle of a section is elucidated in a judicial pronouncement excerpts from it have been given. Every judicial interpretation and construction of a word, phrase or clause, in a section, has been given, as much as possible, in the *ipsissima verba* of Judges.

For facility of reference the words, expressions and clauses commented upon are capped with figures in the text and are repeated in the Comment as sub-headings with corresponding numbers.

The conflicting opinions—the nice, sharp quillets of law—of the different High Courts, on a few points, have been duly traced and prominently noticed.

A careful and systematic comparison of the several leading provisions of the Code and of the English criminal law has been made where they differ materially.

As to CASES.—The cases bearing on each section have been arranged into cognate groups, each group illustrating some clause.

As to PRACTICE.—This part is sub-divided into two main headings; first comes Evidence, and secondly, Procedure.

Under Evidence all points necessary for the prosecution to prove, in order to bring a charge home to the accused, are categorically stated; and questions relating to onus, mode of proof, and admissibility or non-admissibility of evidence are discussed.

Under Procedure fall the contents of the second schedule of the Code of Criminal Procedure; questions concerning Jurisdiction, Sanction, and measure of Punishment; references to Criminal Circulars issued for the guidance of subordinate Judiciary and Magistracy by all the High Courts, Chief Courts, and Judicial Commissioners' Courts; and lastly, forms of charges for various offences.

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A. C.	..	Appeal Cases, Law Reports, from 1891—
A. H. C. G. R. (Cr.)	..	Allahabad High Court General Rules (Criminal), 1911.
A. & E.	..	Adolphus and Ellis, 1834—1840; New Series, 1841—1852.
A. L. J. R.	..	Allahabad Law Journal Reports, from 1904—
A. W. N.	..	Allahabad Weekly Notes, 1881—1906.
Agra	..	Agra High Court Reports, 1866—1868.
Alison	..	Alison's Criminal Law of Scotland.
All.	..	Indian Law Reports, Allahabad series, from 1876—
App.	..	Appendix.
Archbold	..	Archbold's Criminal Law (23rd Edn., 1905).
Austin	..	Austin's Jurisprudence.
Bacon	..	Bacon's Abridgment of the Law.
B. & A.	..	Barnwell and Alderson, 1817—1822, K. B.
Bac. Abr.	..	Bacon's Abridgment of the Law.
Beav.	..	Beavan's Reports, 1838—1866, Rolls.
Bentham	..	Bentham's Principles of Moral and Legislation.
Beng. L. R.	..	Bengal Law Reports, 1868—1875.
Bing.	..	Bingham's Cases, 1834—1840 C. P.
Bishop	..	Bishop's Criminal Law.
Blackstone	..	Blackstone's Commentaries on the Laws of England.
Bom.	..	Indian Law Reports, Bombay Series, from 1876—
B H. C	..	Bombay High Court Reports, 1862—1875.
Bom. Cr C	..	Bombay High Court, Criminal Cases, from 1911—
Bom. Cr Circu.	..	Bombay Criminal Circulars, 1915.
Bom. L. R.	..	Bombay Law Reporter, from 1899—
Boul.	..	Boulnois' Reports, 1862—1875, Calcutta.
B. & C.	..	Barnwell and Creswell, 1822—1830, K. B.
B & S.	..	Best and Smith, 1861—1869, Q. B.
Burma L. R.	..	Burma Law Reports, 1895—1908.
B. L. J.	..	Burma Law Journal, from 1922—
B. L. T.	..	Burma Law Times, from 1906—
Burr.	..	Burrow's Reports, 1757—1771, K. B.
Cal.	..	Indian Law Reports, Calcutta Series, from 1876—
Cald.	..	Caldecott's Settlement Cases.
C. L. J.	..	Calcutta Law Journal, from 1905—
C. L. R.	..	Calcutta Law Reports, 1878—1883
C. P. L. R.	..	Central Provinces Law Reports, from 1882—1905.
C. W N.	..	Calcutta Weekly Notes, from 1896—
Camp.	..	Campbell's Reports, 1808—1816, N. P.
C. H. C. R & O.	..	Calcutta High Court Rules and Circular Orders, 1910.
C. B.	..	Common Bench Reports, 1845—1856, C P.
C. P.	..	Central Provinces Reports.
C. P. Cr. C.	..	Criminal Circulars issued by the Judicial Commissioner of the Central Provinces and Berar, 1915.
C P. D.	..	Common Pleas Division, Law Reports, 1875—1890

C. & K.	.. Carrington and Kirwan, 1843—1850, N. P.
Car. & M.	.. Carrington and Marshman, 1840—1842, N. P.
C. & M.	.. Crompton and Meeson, 1832—1834, Exch.
C. & P.	.. Carrington and Payne, 1823—1841, N. P.
Ch. D.	.. Chancery Division, Law Reports, 1875—1890.
Cl. & F.	.. Clark and Finnelly, 1831—1846, N. P.
Coke	.. Coke's Reports, 1752—1816.
Collett	.. Collett's Comments on the Indian Penal Code.
Cox	.. Cox's Criminal Cases from 1843—
Cr. & J.	.. Crompton and Jervis, 1830—1832.
Cranch	.. Cranch's Reports, Supreme Court of the United States, 1800—1815.
Cr. R.	.. Criminal Rulings of the Bombay High Court, 1862—1910.
Crim. P. C.	.. Criminal Procedure Code, 1898.
Cro. Car.	.. Croke's Reports, in the reign of Charles I.
Cro. Eliz.	.. Croke's Reports in the reign of Elizabeth.
D. & B.	.. Dearsley and Bell, 1856—1858, Crown Cases.
D. & P.	.. Dearsley and Pearce's Crown Cases.
Day E. C.	.. *Day's Election Cases.*
Dears	.. Dearsley's Crown Cases, 1852—1856.
Den. Cr. C.	.. Denison's Crown Cases, 1844.
Doug.	.. Douglas's Reports, 1778—1784, K. B.
East	.. East's Reports, 1801—1812, K. B.
East P. C.	.. *East's Pleas of the Crown*
E. & B.	.. Ellis and Blackburn, 1852—1858, Q. B.
Esp.	.. Espinasse's Reports, 1793—1797, N. P.
Exch.	.. Exchequer Division, Law Reports, 1875—1890.
F. B.	.. Full Bench.
F. & F.	.. Foster and Finlayson, 1858—1867, N. P.
Foster	.. Foster's Crown Law.
Gaz. of Ind.	.. Proceedings of the Supreme Legislative Council, *The Gazette of India Part VI.*
Hagg.	.. Haggard's Reports.
Hale's P. C.	.. Hale's *Pleas of the Crown.*
Hare	.. *Hare's Reports, 1841—1853.*
Hawkins P. C.	.. Hawkins's Pleas of the Crown.
Hay	.. Hay's Reports, 1862—1863, Calcutta.
H. & C.	.. Hurlstone and Coltman, 1862—1865, Exch.
H. L.	.. House of Lords.
Hob.	.. Hobbart's Reports.
Hyde	.. Hyde's Reports, 1863—1864, Calcutta.
I. A.	.. Indian Appeals.
I. R.	.. *The Irish Reports.*
Ilbert	.. Ilbert's Government of India.
Ind. Jur. N. S.	.. Indian Jurist, New Series, 1866—1867, Calcutta.
" " O S.	.. Indian Jurist, Old Series, 1862, Calcutta.
J. P.	.. Justice of the Peace, from 1836—
Keb.	.. Keble's Reports, K. B.
Kel.	.. Sir John Kelyng's Reports, 1673—1706, K. B.
L. B. C. M.	.. [illegible] Court Manual 1912
L. B. R.	.. [illegible]
L. J. C. P.	.. [illegible]

L. J. Ch.	..	Law Journal Chancery.
„ Ex.	..	„ „ Exchequer.
„ M. C.	..	„ „ Magistrates' Cases.
„ Mat.	..	„ „ Matrimonial Cases.
„ P. M. & A.	..	„ „ Probate, Matrimonial and Admiralty.
„ Q. B.	..	„ „ Queen's Bench.
L. L. J.	..	Lahore Law Journal, from 1920—
L. R. C. P.	..	Law Reports, Common Pleas, 1866—1875
L. R. C. C. R.	..	„ „ Crown Cases Reserved.
„ Ch.	..	„ „ Chancery.
„ Ex.	..	„ „ Exchequer.
„ H. L.	..	„ „ House of Lords.
„ I. A.	.	„ „ Indian Appeals.
„ P.	..	„ „ Probate
„ Q. B.	..	„ „ Queen's Bench
L. & C.	..	Leigh and Cave's Crown Cases.
L. T.	..	Law Times, 1845—1858
L. T. N. S.	..	Law Times, New Series, from 1859—
L. W.	..	Law Weekly, Madras, from 1914—
Lah.	..	Indian Law Reports, Lahore Series, from 1920—
Lah. Cas.	..	Lahore Cases, from 1924—
Ld. Raym	..	Lord Raymond's Reports, 1694—1734, K. B. and C. P.
Leach	..	Leach's Crown Cases, 1730—1788.
Lee Warner	.	Lee Warner's Native States of India.
Lewin	..	Lewin's Crown Cases, 1822—1833
Livingstone		Livingstone's System of Penal Code for Louisiana
Lof.	..	Lofft's Reports, K. B.
Mad.	..	Indian Law Reports, Madras Series, from 1876—
Mad. Jur.		Madras Jurist.
M. H. C.	..	Madras High Court Reports, 1862—1875.
M. H. C. R. P.	..	Madras High Court Rules of Practice, 1912.
M. L. J. R.	..	Madras Law Journal Reports, from 1891—
M. L. J.	..	Madras Law Times, from 1906—
M. W. N.	..	Madras Weekly Notes, from 1910—
Marsh	..	Marshall 1813—1816, C. P. Marshall 1862—1863, Calcutta
Maxwell	..	Maxwell on the Interpretation of Statutes.
Mayne	..	Mayne's Criminal Law of India
M. Dig.	..	Morley's Digest, Calcutta.
M. & M.	..	Morgan and Macpherson's Indian Penal Code.
Mood Cr. C.	..	Moody's Crown Cases Reserved, 1824—1844.
M. I. A.	..	Moore's Indian Appeals, 1836—1873, P. C.
M. & Mal.	.	Moody and Malkin's Reports, 1827—1830.
M. & R.	..	Moody and Robinson, 1831—1844, N. P.
M. & Sel.	..	Maule and Selwyn, 1813—1817, K. B.
M. & W.	..	Meeson and Welby, 1836—1847, Exch.
Mod.	.	Modern Reports, 1669—1732, K. B.
N. A. C.	..	Nizamut Adawlat Cases, Bengal.
N. A. R.	..	Nizamut Adawlat Reports, Bengal.
N. L. R.	..	Nagpur Law Reports, from 1906—
Note	..	Notes appended to the Draft Penal Code 1836

N. W. P.	..	N. W. P. High Court Reports, 1862—1875
O. C.	..	Oudh Cases from 1868—
O. S. C.	..	Oudh Select Cases.
O. C. D.	..	Oudh Criminal Digest.
O. M. & H.	..	O'Malley & Hardcastle's Election cases.
P. C.	..	Privy Council.
P. C. R. & O.	..	Punjab Chief Court Rules and Orders, 1911.
P. J. L. B.	..	*Printed Judgments of Lower Burma*, 1863—1900
P. L. C.	..	Proceedings of the Legislative Council of the Governor-General of India.
P. L. J.	..	Patna Law Journal, from 1916—
P. L. R.	..	Punjab Law Reporter, from 1900—
P. L. T.	..	Patna Law Times, from 1920—
P. L. W	..	Patna Law Weekly, from 1917—1918.
P. R.	..	Punjab Record, from 1862—1919.
P. W. R.	..	Punjab Weekly Reporter from 1906—
Palm.	..	Palmer's Reports 1619—1669, K. B.
Parl. Rep.	..	Parliamentary Reports.
Pat. L. R.	..	Patna Law Reporter, from 1923—
Paterson	..	Paterson on the Liberty of the subject.
Perry O. C	..	Perry's Oriental Cases.
Phillimore	..	Phillimore on the International Law.
Phillips	..	Phillip's Comparative Criminal Jurisprudence.
Price.	..	Price's Reports, Exch.
Q. B.	..	Queen's Bench Law Reports, from 1891—
Rang.	..	Indian Law Reports, Rangoon Series, from 1923—
Rep. 1st	..	First Report on the Penal Code by the Indian Law Commissioners, 1846.
Rep. 2nd	..	*Second Report on the Penal Code by the Indian Law Commissioners*, 1847.
R. J. P. J.	..	*Revenue, Judicial and Political Journal*, Calcutta.
R. R.	..	*Revised Reports.*
R. & R.	..	Russell and Ryan's Crown Cases, 1799—1823.
Rob.	..	Robert's Reports.
Roscoe	..	Roscoe's Criminal Evidence.
Russell	..	Russell on Crimes and Misdemeanours.
R. & R.	..	*Russell on Ryan's Crown Cases Reserved.*
S. J. L. B.	..	Select Judgments, Lower Burma (1872—1892).
Salk.	..	Salkeld's Reports, 1669—1712.
Stephen	..	Stephen's History of the Criminal Law of England.
Stephen Dig. Cr. L.	..	Stephen's *Digest of Criminal Law.*
Step. Com.	..	*Stephen's Commentaries on the Laws of England.*
Stokes	..	Stokes' Anglo-Indian Codes.
Str.	..	Strange's Reports, 1795, K. B.
St. Tr.	..	State Trials.
Sw. & Tr.	..	Swabey and Tristam, 1858—1865.
Sty.	..	Style's Reports, K. B.
Taunt.	..	Taunton's Reports, 1807—1819, C. P.
T. L. R.	..	The Times Law Reports, from 1885—
T. R.	..	*Durnford and East's Term Reports*, 1785—1800, K. B.
Tupper	..	Tupper's Our Indian Protectorate.

Ubi sup	..	See above.
Unrep. Cr. C	..	Unreported Criminal Cases of the High Court of Bombay 1862—1898.
U. B. C. M.	..	Upper Burma Court Manual.
U. B. R.	..	Upper Burma Rulings, from 1892—
U. P. L. R.	..	United Provinces Law Reporter, from 1919—
Vent.	..	Ventries Reports, 1688—1691, K. B. & C. P.
Ves.	..	Vesey's Reports, 1789—1817.
Weir	..	Weir's Law of Offences and Criminal Law (4th Edition, 1905).
Wharton	..	Wharton's Law Lexicon.
Wilson	..	Wilson's Reports, 1805—1817, K. B. & C. P.
W. R.	..	Sutherland's Weekly Reporter, 1862—1875, Calcutta.
W. R. Cr. L.	..	Sutherland's Weekly Reporter, Criminal Letters.
W. R. (Eng.)	..	Weekly Reports, (Eng), 1882—1906.
Wym. Cr.	..	Wyman's Revenue and Criminal Rulings.

(3) That he so delivered it, or attempted to induce some one to receive it, as a genuine coin, or as a coin of a different description.

(4) That at the time he did so, he knew that it had been operated upon.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, delivered to AB (*or* attempted to induce AB to receive) as genuine a coin, to wit——, in respect of which an operation as is mentioned in s. 246 (*or* s. 247 *or* 248 *or* 249) of the Indian Penal Code, to wit——, had been performed, and you thereby committed an offence punishable under s. 254 of the Indian Penal Code and *within my cognizance.*

And I hereby direct that you be tried on the said charge.

Counterfeiting Government stamp.

255. Whoever counterfeits,[1] or knowingly performs any part of the process of counterfeiting, any stamp[2] issued by Government[3] for the purpose of revenue, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

COMMENT.

The remaining sections of this Chapter deal with offences relating to Government stamps. These stamps are impressions upon paper, parchment, or any material used for writing made by Government, mostly for the purpose of revenue.

This section is similar to s. 241 which deals with counterfeiting of coins.

1. **'Counterfeits.'**—See s. 28, *supra.* Engraving a stamp, like in some part to a genuine stamp, and unlike in others, and then cutting out the unlike parts, and concealing the part cut out, amounts to conterfeiting a stamp.[1]

2. **'Stamp.'**—This word is used in this and the following sections to denote the impression or mark set upon the paper, parchment, etc. It includes postage stamps.[2]

The word 'stamp' must be construed according to its ordinary meaning in the English language. An obliterated stamp can be a stamp in the ordinary use of the English language. A stamp does not cease to be a stamp because it is cancelled. A person selling a forged stamp, although it bears a cancellation mark, commits an offence of selling forged stamps.[3]

3. **'Government.'**—See s. 17, *supra,* and 263-A (4), *infra.*

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purposes of revenue.

(2) That the accused made such counterfeit; or that he knowingly performed any part of the process of counterfeiting.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

[1] *Thomas Collicot,* (1812) 2 Leach 1048.
[2] Indian Post Office Act, VI of 1898, ss. 16 and 17.
[3] *Lowden,* [1914] 1 K. B. 14[illegible].

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Adivigadu 869
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„ Shah 511, 516
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Ahsan Ali 484
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„ Mirza 56, 831
„ Muhammad 588
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„ (3 Cox 270) 783
„ (10 Cox 405) 24
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„ v. Lloyd 541
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Allington Elliot 579
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„ „ (P. R. No. 9 of 1878). 918
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„ (1 Mad. 55) 31
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or agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts or defaults, and even where they were against his orders.[1] The same view is taken in India.[2] The following are the exceptions to the principle that a master is not criminally liable for the acts of his servant.

1. *Statutory liability.*—A statute may impose criminal liability upon the master as regards the acts or omissions of his servants. But in all such cases the question is whether upon the true construction of the statute in question the master is intended to be made criminally responsible for acts done by his servants in contravention of the statute, where such acts are done within the scope or in the course of their employment.[3] The master is relieved from criminal responsibility where he proves that he acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the statute. Similarly, it a servant does that for which he is not employed[4] or if he acts for his own personal benefit the master will not be liable.[5]

License cases form a class by themselves in which the master is generally held responsible.

Licenses to keep ale-houses are granted only to persons of good personal character, and it is obvious that the object of so restricting the grant of licenses will be defeated if the licensed person can, by delegating the control and management of the house to other persons who are altogether unfit to keep it, free themselves from the responsibility for the manner in which the house is conducted.[6] Personal knowledge in the licensed person of the acts of his servants is not always necessary; otherwise enactments granting licenses to good persons would be of no effect. Where the servant of a licensed victualler knowingly supplied liquor to a constable on duty without the authority of his superior officer as required by a statute, it was held that the licensed victualler was liable to be convicted under 35 & 36 Vic., c. 94, s. 16, sub-s. 2, although he had no knowledge of the act of his servant.[7] In the case of license-holders it has been again and again decided that the responsibility should be upon the licensee for acts done by an employee within the scope of his authority although contrary to the licensee's orders.[8] The same principle is followed in India. Where, therefore, the manager of a licensed vendor of arms, ammunition and military stores, sold certain military stores without previously ascertaining that the buyer was legally authorized to possess the same, it was held that the licensee was liable to punishment under s. 22 of the Arms Act though the goods were not sold with his knowledge and consent.[9] Similarly, where the servant of a licensed vendor of opium sold opium to a boy under the age of fourteen years the licensed vendor was held liable under s. 9 of the Opium Act.[10]

[1] Halsbury's Laws of England, Vol. IX, p. 235. Approved of and followed in *Varaj Lall*, (1924) 51 Cal. 948, 951.

[2] *Suffer Ally Khan* v. *Golam Hyder Khan*, (1866) 6 W. R. Cr. 66.

[3] *Coppen* v. *Moore (No. 2)*, [1898] 2 Q. B. 306, 313. See *Chundi Churn Mookerjee*, (1884) 9 Cal 849, which establishes the non-liability of the master under s. 22 of the Indian Ports Act (XII of 1876), on the ground that the provisions of that section were not meant to apply to masters. See *Jeetmaji*, (1907) 9 Bom. L.R. 967, in which it is held that under sub-s. 1 of s. III of the Indian Emigration Act the Legislature intended to make the master liable for his servant's acts. See also *Haji Shaik Mahomad*, (1907) 9 Bom. L.R. 1059; *Jaffer Haji*, (1908) 10 Bom. L. R. 1052. See *Zawar Husain*, (1923) 21 A.L.J.R. 481, where the accused was convicted for possessing cocaine without lawful justification.

[4] *Boyle* v. *Smith*, [1906] 1 K. B 432 See *Behari Lal*, (1911) 34 All. 146, where the servant's act in taking unauthorized tolls was outside the scope of his employment, and the master was held not responsible. See *Uttam Chand*, (1911) 39 Cal. 344.

[5] *Anglo-American Oil Company, Limited* v. *Manning*, [1908] 1 K B 536. See also *Somerset* v. *Hart*, (1884) 12 Q B D. 360.

[6] *Massey* v. *Morrise*, [1894] 2 Q B. 412. See also *Brooks* v *Mason*, [1902] 2 K B. 743; *Emary Nolloth*, [1903] 2 K B. 264.

[7] *Mullins* v. *Collins*, (1874) L. R. 9 Q. B. 292.

[8] *Commissioners of Police* v. *Cartman*, [1896] 1 Q. B. 655. See *Bosely* v. *Davies*, (1876) 1 Q. B. D. 84.

[9] *Tyebali*, (1900) 2 Bom. L. R. 52, s.c. 24 Bom. 423.

[10] *Babu Lal*, (1912) 34 All. 319.

Where a particular intent or state of mind is not of the essence of an offence, a master is criminally liable for the act of his servant expressly prohibited by a statute, but he cannot be so made liable, if the statute provides for liability for permitting or causing a particular act, unless it is shewn that such act was done with the master's knowledge and assent, express or implied.[1]

Statutes passed for the benefit of the public health and sanitation are construed in the same way as licensing Acts.[2] Similar is the case with statutes dealing with revenue matters.[3]

2. *Public nuisance.*—The owner of works carried on for his profits by his agents is liable to be indicted for a public nuisance caused by acts of his agents, in carrying on the works, though done by them without his knowledge and contrary to his general orders.[4] If persons for their own advantage employ servants to conduct works, they must be answerable for what is done by the servants even though they are personally ignorant of the way in which the work is carried on and [illegible] proprietor, if not living in the premises, might be liable for abetment. The English cases above referred to were held to be of no authority on the construction of the provision of the Penal Code.[6]

3. *Neglect of duty.*—If a person neglects the performance of an act, which is likely to cause danger to others, and entrusts it to unskilful hands he will be in certain cases criminally liable. Where an engineer employed to manage a steam-engine engaged to draw up miners from a coal pit, left the engine in the charge of an ignorant boy, who told him that he was unable to manage it, and in the absence of the engineer a man was drawn up, who was killed from the want of skill in the boy to manage the engine, it was held that the engineer was guilty of manslaughter.[7] [illegible] did not apply proper precautions against its misuse.[8] But if a skilful person is employed the employer will not be liable in the absence of express malice.[9]

The liability of a proprietor of a newspaper for acts of the editor in allowing libellous matter to be published is now restricted by statute 6 & 7 Vic., c. 96, s 7.[10] Before the passing of the statute the proprietor was considered *prima facie* answerable for what appeared in his paper, but this presumption arising from mere proprietorship was rebuttable.[11] If the master as well as the servant are made liable under a statute for a certain course of conduct the servant alone will be responsible for an act done in contravention of the statute[12] But the master may be liable unless he shows good faith Thus, the provisions of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, which make it an offence to sell goods to which a forged trade-mark or false trade-description is applied, make a master criminally

[1] *Varaj Lall*, (1924) 51 Cal. 948.

[2] *Brown* v. *Foot*, (1892) 66 L. T. 649, under Sale of Food and Drugs Act, 1875 Followed in *Sew Karan* v. *Corporation of Calcutta*, (1912) 39 Cal. 682. *Collman* v. *Mills*, [1897] 1 Q. B. 396 under the Public Health Act, 1898.

[3] *Att.-Gen.* v. *Siddon*, (1830) 1 Cr. & J. 22[illegible]. Where a trader harbours and conceals smuggled goods he is liable in penalties for the illegal act of a servant, done in the conduct of the business, with a view to protect smuggled goods, though the master be absent at the time, and the act is done by the servant upon the exigency of the occasion. [illegible] n Ram,

[7] *Lowe*, (1850) 3 C. & K. 123.

[8] *Dixon*, (1814) 3 M. & S. 11

[9] *Srish Chandra Sircar*, (1918) 17 A. L. J R. 343.

[10] *Holbrook*, (1878) 4 Q B. D. 42.

[11] *Gutch Fisher*, (1829) 1 M & Mal. 433.

[12] *Massey* v. *Morriss*, [1894] 2 Q. B. 412.

liable for acts done by his servants in contravention of the section.[1] It was held, similarly, where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who was in charge of the premises, but without any knowledge on the part of the licensed person.[2]

2 'And not otherwise.'—These words repeal all former laws for the punishment of any offence which is made punishable by the Code. On the strength of this section the Calcutta High Court has held that English precedents cannot be followed to enlarge the scope of the exceptions to s. 499 of the Penal Code, which should be regarded as exhaustive.[3] The Law Commissioners[4] say: "We do not advise the general repeal of the penal laws now existing in the Territories for which we have recommended the enactment of the Code. We think it will be more expedient to provide only that no man shall be tried or punished (except by a Court Martial) for any facts which constitute any offence defined in the Code, otherwise than according to its provisions." Acts or omissions made penal by any other statute but not by the Code will be governed by that statute. See s. 5 *infra*, as to the laws not affected by the Penal Code.

3. 'Act or omission.'—See s. 33 *infra*.

4. 'Contrary to the provisions thereof.'—"All penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."[5] Criminal enactments are not to be extended by construction. When an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal statute, the Court must be satisfied, not only that the spirit of the legislative enactment has been violated, but also that the language used by the legislature includes the offence in question, and makes it criminal.[6] Nothing is to be regarded as within the meaning of the statute which is not within the letter —which is not clearly and intelligibly described in the very words of the statute itself.[7] Also in the interpretation of Acts the elementary rule is to give full and accurate effect to every word used in them.[8] The Courts, in the exposition of penal statutes, are not to narrow the construction. They are to look to the words in the first instance, and where the words are plain, they are to decide on them. If the words be doubtful, they are then to have recourse to the subject matter; but at all events it is only a secondary rule.[9] The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of

[1] *Coppen* v. *Moore* (*No. 2*), [1898] 2 Q. B. 306.

[2] *Bond* v *Evans*, (1888) 21 Q. B. D. 249; *Redgate* v. *Haynes*, (1876) 1 Q. B. D. 89. See *Somerset* v. *Hart*, (1884) 12 Q. B. D. 360, where under similar circumstances the master was not held liable because he was not in charge of the premises.

[3] *Kori Sing*, (1912) 17 C.W.N. 297.

[4] Com.'s 2nd Rep. ss. 536-538 and (1866) 2 M. H. C. App. vi.

[5] Per James, L.J., in *Dyke* v *Elliott*: *The "Gauntlet,"* (1872) L. R 4 P. C. 184, 191. See also *Lord Huntingtower* v. *Gardiner*, (1823) 1 B. & C. 297, 299.

[6] Per Willes, J., in *Britt* v. *Robinson*, (1870) L. R 5 C. P. 503, 513, 514.

[7] *Koka Lolang*, (1881) 8 Cal. 214; *Mussamat Kesar*, (1918) 4 P. L. J. 74, F.B.

[8] *Mirchia*, (1896) 18 All. 364, 365.

[9] *The Inhabitants of Hodnett*, (1786) 1 T. R. 96, 101

a Judge to disregard or go outside the letter of the enactment according to its true construction.[1]

In the construction of codes the language of the statute and its natural meaning must be first examined, uninfluenced by any consideration of the previous law on [illegible] the plain language of a statute [illegible] the legislature not to depart [illegible]

A penal statute should, when its meaning is doubtful, be construed in the manner most favourable to the liberties of the subjects, especially so when it is of an exceptional nature.[3]

The following principles, as laid down in Maxwell,[4] will generally govern the construction of penal laws.

The paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning, and to promote its object. It is for the legislature, not the Court, to define a crime and ordain its punishment. It is unquestionably a reasonable expectation that, when [illegible] strict construction does not indeed require or sanction that suspicious scrutiny of the words, or those hostile conclusions from their ambiguity or from what is left unexpressed, which characterize the judicial interpretation of affidavits in support of *ex parte* applications, or of Magistrate's convictions, where the ambiguity goes to the jurisdiction. Nor does it allow the imposition of a restricted meaning on the words, wherever any doubt can be suggested, for the purpose of withdrawing from the operation of the statute a case which falls both within its scope and the fair sense of its language This would be to defeat, not to promote, the object of the legislature; to misread the statute and misunderstand its purpose. A Court is not at liberty to put limitations on general words which are not called for by the sense, or the objects, of the mischiefs of the enactment; and no construction is admissible which would sanction a fraudulent evasion of an Act. But the rule of construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. Where an enactment may entail penal consequences, no violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language. To determine that a case is within the intention of a statute, its language must authorize the Court to say so; but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions, so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented, it is not competent to a Court to extend them. It is immaterial, for this purpose, whether the proceedings prescribed for the enforcement of the penal law be criminal or civil.

The degree of strictness applied to the construction of a penal statute depended in great measure on the severity of the statute When it merely imposed a pecuniary

[1] Per Lord Davey in *Gokul Mandar* v *Padmanund*, (1902) 29 Cal. 707, 715, 4 Bom L. R. 793, 796, P C.

[2] *Satish Chandra Chakravarti* v. *Ram Dayal De*, (1920) 48 Cal 388.

[3] *Bhiku bin Madanna*, (1876) 1 Bom. 308, 311.

[4] On the Interpretation of Statutes (5th Edn.), Ch. X, p. 425. See also Blackstone's Commentaries on the Laws of England (4th Edn.), Vol I, p. 62.

penalty, it was construed less strictly than where the rule was invoked in *favorem vitæ*.

A strict construction requires, at least, that no case shall fall within a penal statute which does not comprise all the elements which, whether morally material or not, are in fact made to constitute the offences as defined by the statute. As illustrative of the rule of strict construction, it has been said that while remedial laws may extend to new things not *in esse* at the time of making the statute, penal laws may not. Omissions, which are available from the text and are the result of accident, cannot be supplied in penal laws though they may probably be supplied in remedial laws.

The rule of strict construction, however, whenever invoked, comes attended with qualifications [illegible] other rules no less important; and it is by the light which each contributes [illegible] determined. Among them is the rule that that sense of [illegible] with the context, and promotes in the fullest manner [illegible] legislature. The paramount objects, in construing penal as well as [illegible] is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are, indeed, frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or to use Lord Coke's words, to suppress the mischief and advance the remedy.

The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes, with a more rational regard to the aim and intention of the legislature, than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind; for it is required by the spirit of our free institutions that the interpretation of all statutes should be favourable to personal liberty; and it is still preserved in a certain reluctance to supply the defects of language, or to eke out the meaning of an obscure passage by strained or doubtful inferences The effect of the rule of strict construction might almost be summed up in the remark, that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention; and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence.

The phrase 'intention of the legislature' is, says Lord Watson in *Salomon v. Salomon & Co.*,[1] a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

Reports of the Indian Law Commissioners.—Reference is permissible to these reports.[2]

[1] (1897) A. C. 22, 38.

[2] *In re Mew*, (1862) 31 L. J. Bankcy. 87; *Shaik Moosa v. Shaik Esa*, (1884) 8 Bom. 241; *Chunilal v. Monishanker*, (1893) 18 Bom. 616, 625; *Ghulet*, (1884) 7 All. 44; *Romesh Chunder Sannyal v. Hiru Mondal*, (1890) 17 Cal. 852; contra, *Tarucknath Sircar v. Proseno Coomar Ghose*, (1873) 19 W. R. 48, 53.

Proceedings of the Legislative Council.—Reference to these is not permissible,[1] but in England these are referred to.[2]

Reports of Select Committees of the Legislative Council.—The Privy Council has disapproved of any reference to these reports,[3] but in England they are referred to.[4] They have been referred to by the Madras High Court in a case after the Privy Council decision.[5]

Statements of Objects and Reasons.—The Privy Council has disapproved of any reference to these[2] but they were referred to by the Bombay High Court in a case[6] after the Privy Council decision.

Headings.—The headings of different portions of a statute can be referred to, to determine the sense of any doubtful expression in a section ranged under any particular heading.[7] In cases of doubt Courts may be guided by the position in an Act of a particular section.

Marginal Notes.—The marginal notes to sections of an Act cannot be referred to for the purpose of construing the Act.[8] They are no part of the Act.[9] A marginal note is merely an abstract of the clause intended to catch the eye.[10]

Provisos.—In construing a section full and natural meaning should be given to a proviso if any.[11]

Illustrations.—Illustrations do not, in legal strictness, form part of an Act, and are not binding on the Court.[12] They furnish some indication of the presumable intention of the legislature. They are not binding when inconsistent with the language of the section.[13] They ought not to be construed as limiting the right given by the section.[14] They may be useful so far as they explain the meaning of the section, but must never be allowed to control its plain meaning, especially when the effect would be to *curtail a right*, which it would, in its ordinary sense, confer.[15] But the Privy Council has laid down that illustrations to an Indian statute are to be taken as part of the statute.[16]

Punctuation.—Punctuation is to be taken into consideration in interpreting an Act.[17]

5. '*Within the said territories.*'—*That is, the territories* mentioned in 21 & 22 Vic., c. 106. If the offence is committed outside these territories it is

[1] *Bal Gangadhar Tilak*, (1897) 22 Bom. 125, 128; *The Administrator-General of Bengal* v. *Prem Lal Mullick*, (1895) 22 Cal. 788, P.C.; *Krishna Ayyangar* v. *Nallaperumal Pillai*, (1919) 22 Bom. L. R. 568, P.C.; *Dina Nath Pal* v. *Raja Sati Prasad*, (1922) 36 C. L. J. 220.

[2] *In re Mew*, (1862) 31 L. J. Bankcy. 87; *Hebbert* v. *Purches*, (1871) L. R. 3 P. C. 648, 649; *Bishop of Oxford*, (1879) 4 Q. B. D. 525.

[3] *The Administrator-General of Bengal* v. *Prem Lal Mullick*, sup.; *Krishna Ayyangar* v. *Nallaperumal Pillai*, sup., *Dina Nath Pal* v. *Raja Sati Prasad*, sup.

[4] *Drummond* v. *Drummond*, (1866) L. R. 2 Ch. App. 32, 45.

[5] *Assan* v. *Pathuma*, (1897) 22 Mad. 491, 504.

[6] *Chunilal* v. *Manishanlar*, (1893) 18 Bom. 616.

[7] *The Directors, etc., of the Hammersmith & City Ry.* v. *Brand*, (1869) L. R. 4 H. L. 171.

[8] *Balraj Kunwar* v. *Jagatpal Singh*, (1904) 26 All. 393, 406, s.c. 11 Bom. L. R. 516, P.C.; *Mahomed Ayoob*, (1900) 2 Bom. L. R. 918; *Sheikh Chamman*, (1919) 1 P. L. T. 11.

[9] *Dulhi Mullah* v. *Halway*, (1895) 23 Cal. 55, 59; *Claydon* v. *Green*, (1868) L. R. 3 C. P. 511, *Sutton* v. *Sutton*, (1882) 22 Ch. D. 511.

[10] *Attorney-General* v. *Great Eastern Railway Co.*, (1879) 11 Ch. D. 449, 465.

[11] *Mangamonjori Dabee* v. *Soumonoi Dabee*, (1882) 8 Cal. 637.

[12] *Dubey Sahai* v. *Ganesh Lal*, (1875) 1 All. 34, 36, F.B.

[13] *Fakirapa*, (1890) 15 Bom. 491, 496; *Satis Chandra Chakravarti* v. *Ram Dayal De*, (1920) 48 Cal. 390; *Nga Myn*, (1915) 8 L. B. R. 306, 311, F.B.

[14] *Govinda Pillai* v. *Thayammal*, (1904) 28 Mad. 57.

[15] *Koylash Chunder Ghose* v. *Sonatum Chung Barooie*, (1881) 7 Cal. 132, 135; *Mahomed Syedol* v. *Yeoh Oos*, (1916) 19 Bom. L. R. 157, P.C.

[16] *Lala Balla Mal* v. *Ahad Shah*, (1918) 21 Bom. L. R. 558, P.C.

[17] *Taylor* v. *Bleach*, (1914) 17 Bom. L. R. 56; *Anantapur* v. *Kalekhan*, (1912) 12 M. L. T. 224.

not punishable under the Penal Code,[1] unless it has been made so by means of special provisions such as ss. 3, 4, 108-A, etc., of the Penal Code.

By the terms of the Statute 24 & 25 Vic., c. 104, the exercise of jurisdiction in any part of His Majesty's Indian territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council. An exercise of legislative authority by the Governor-General in Council, whereby any place or territory is removed from the jurisdiction of the High Courts, is one expressly contemplated by the Statute 24 & 25 Vic., c. 104, and by the Letters Patent issued under that statute.[2]

Territorial jurisdiction.—The general territorial jurisdiction of a State extends into the sea as far as a cannon shot will reach, which is usually calculated to be a marine league, or three miles. The territories, strictly speaking, of a State include, therefore, not only the compass of land, in the ordinary acceptation of the term, belonging to such State, but also that portion of the sea lying along and washing its coast, which is commonly called its 'maritime territory.' It is by the assent of nations that the three-mile belt of sea has been brought under the dominion of every State. In the *Franconia case*[3] the question arose whether the British Courts had jurisdiction over a foreigner in command of a foreign ship, who whilst passing within three miles of English shores, ran into a British ship and caused loss of life. It was held by seven out of thirteen judges that in the absence of statutory enactment the central criminal Court had no power to try such an offence. This decision led to the passing of the Territorial Waters Jurisdiction Act,[4] which has been extended to India.

Prior to this decision and before the enactment of the Territorial Waters Jurisdiction Act, the Bombay High Court had held that an offence committed on the high seas but within three miles from the coast of British India was punishable under the Penal Code as being committed within the territorial limits of British India. In this case certain of the inhabitants of a village sallied out in boats and pulled up and removed a number of fishing-stakes lawfully fixed in the sea within three miles from the shore by the villagers of a neighbouring village and it was held that the local criminal Court had jurisdiction over the offenders, and that the Penal Code was the substantive law applicable to the case.[5]

Section 2 of the Territorial Waters Jurisdiction Act says: "An offence committed by a person, whether he is or is not a subject of His Majesty, on the open sea, within the territorial waters of His Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly."

"Offence," as used in this Act, means, "an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable according to the law of England" (s. 7). The "jurisdiction of the Admiral" includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person, the territorial waters shall be deemed to be within the jurisdiction of any Judge, Magistrate, or Officer having power to issue warrants for arresting persons charged with offences committed within the jurisdiction of such Judge, Magistrate, or Officer (*ibid*). "Territorial water" means "such part of the sea adjacent to the coast as is deemed by international law to be within the territorial sovereignty of His Majesty; and for the purpose of any offence under

[1] See *Moorga Chetty*, (1881) 5 Bom. 338, F.B. Act VIII of 1882, s. 9, was passed to nullify the effect of this decision in respect of stolen property.

[2] *Burah*, (1878) 4 Cal. 172, P.C.

[3] Or *Keyn*, (1876) L. R. 2 Ex. D. 63. See *Att.-Gen. for British Columbia* v. *Att.-Gen for Canada*, [1914] A. C. 153, 174; *Secretary of State for India* v. *Sri Rajah Chelikani Rama Rao*, (1916) 18 Bom. L. R. 1007, P.C.

[4] 41 & 42 Vic., c 73.

[5] *Kastya Rama*, (1871) 8 B. H. C. (Cr. C.) 63

this Act it means any part of the open sea within one marine league of the coast measured from low-water mark" (*ibid*).

"Proceedings for the trial and punishment of a person, who is not a subject of His Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any Court of the United Kingdom, except with the consent of one of His Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the [illegible]

be instituted." (s. 3.)

It has been acknowledged by all nations that the Courts of a State have jurisdiction over its ports and harbours, the mouths of its rivers, and its land locked bays. This principle has been followed in an old Bombay case.[1] A foreigner committing an offence in any such place will be amenable to the jurisdiction of British Courts, whether or not his act amounted to an offence in his country. The accused was indicted for an unnatural offence committed on board of an East India ship, lying in St. Katherine's Docks. It was argued that he was a native of Bagdad where his act would not have amounted to an offence. But the Court held that that was not a legal defence.[2]

Amendment.—After the word 'territories' there was the clause "on or after the said first day of January, 1862," but it was omitted by Act XII of 1891, Schedule I.

PRACTICE.

Jurisdiction.—Where it is doubtful whether the offence is committed in British or foreign territory, the question of jurisdiction cannot be fully determined unless the Magistrate proceeds with the investigation and states what in his opinion is proved by the evidence of the witnesses.[3]

Punishment of offences committed beyond, but which by law may be tried within, the territories.

3. Any person liable, by any law passed by the Governor General of India in Council,[1] to be tried for an offence committed beyond the limits of the said territories shall be dealt with according to the provisions of this Code for any act[2] committed beyond the said territories in the same manner as if such act had been committed within the said territories.

COMMENT.

This section only applies to the case of a person who, at the time of committing the offence charged, was amenable to British Courts.[4] This and the following section relate to the extra-territorial operation of the Code.

1. 'By any law passed by the Governor General of India in Council.'—The effect of these words is apparently to restrict the operation of the section to the cases specified in the Indian Extradition Act[5] and ss. 186 and 188 of the Criminal Procedure Code. If an Indian commits an act in England which is not an offence in that country (*e.g.*, adultery) but is punishable under the Penal Code, he may be prosecuted in India. A native Indian subject of His Majesty, being a soldier in

[1] *Essub Ibrahim*, (1845) Perry's Oriental Cases, 577. See arguments in *De Sylva*, (1909) 11 Bom. L. R. 221.

[2] *Esop*, (1836) 7 C. & P. 456.

[3] *Mole Chand v. Mohendronath Haldar*, (1868) 9 W. R. 29.

[4] *Pirtai*, (1873) 10 B. H. C. (Cr. C.) 356. *Roda*, (1889) P. R. No. 30 of 1889; *Ibrahim*, (1893) P. R. No. 7 of 1894.

[5] XV of 1903.

the Indian Army, committed a murder in Cyprus while on service in such army, and was charged with this offence at Agra. It was held that he *might be dealt with* in respect of such offence by the criminal Court at Agra.[1]

Legislative Power.—The Government of India, says Ilbert,[2] is the creation of statute. Its powers are derived wholly from [illegible] with reference to persons, places, and subject-[illegible] *by which they* are conferred. The power of the [illegible] was conferred:

(*a*) *As to servants* of Government in allied Native States by s. 22 of the Indian Councils Act, 1861[3];

(*b*) As to all British subjects of His Majesty within the territories of Native Princes whether in the service of the Government of India or otherwise by s. 1 of the Government of India Act[4];

(c) As to all persons being native Indian subjects of His Majesty, without and beyond, as well as within, the Indian territories under the dominion of His Majesty by s. 1 of the Indian Councils Act, 1869[5];

(*d*) *As to* His Majesty's Indian Army serving anywhere by s. 73 of the Government of India Act,[6] save by the Indian Councils Act, 1861.[7]

2. **'Act.'**—It includes omission as well (s. 32 *infra*).

Extension of Code to extra-territorial offences.

4. The provisions of this Code apply also to any offence committed by—

(1) Any native Indian subject[1] of Her Majesty in any place without and beyond British India[2];

(2) Any other British subject within the territories of any Native Prince or Chief in India;

(3) Any servant of the Queen,[3] whether a British subject or not, within the territories of any Native Prince or Chief in India.

Explanation.—In this section the word 'offence' includes every act committed outside British India which, if committed in British India, would be punishable under this Code.

ILLUSTRATIONS.

(*a*) A, a coolie, who is a native Indian subject, commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found

(*b*) B, a European British subject, commits a murder in Kashmir. He can be tried and convicted of murder in any place in British India in which he may be found.

(*c*) C, a foreigner, who is in the service of the Punjab Government, commits a murder in Jhind. He can be tried and convicted of murder at any place in British India in which he may be found

(*d*) D, a British subject living in Indore, instigates E to commit a murder in Bombay. D is guilty of abetting murder.

COMMENT.

Object.—The present section 4 (introduced by Act IV of 1898) shows the extent to which the Code now applies to offences committed outside British India. "At the time the Indian Penal Code was passed, that is to say, in 1860, Parliament had conferred on the Indian Legislature the power of dealing with extra-territorial

[1] *Sarmukh Sing*, (1879) 2 All. 218, F.B.
[2] Government of India, Ch. VII, p. 442.
[3] 24 & 25 Vic., c. 67.
[4] 28 & 29 Vic., c. 17.
[5] 32 & 33 Vic., c. 98.
[6] 3 & 4 Will. IV, c. 85.
[7] 24 & 25 Vic., c. 67, s. 22.

offences in one particular case, namely, where the offence was committed by a servant of Government .....But since 1860 Parliament has conferred various extra-territorial powers on the Indian Legislature.....We think it is right and convenient, in the case of the Code like the Indian Penal Code, that the extent of its extra-territorial operation should appear on the face of the Code itself."[1]

Principle.—Under the first clause Native Indian subjects of His Majesty the King-Emperor will be triable in British India for offences committed by them at any place out of British India. Under the second clause any European British subject who commits an offence within the territories of any Native Prince or Chief in India will be triable in British India If such person commits an offence within the French or Portuguese territory in India he cannot be tried in British India. Clause 3 gives jurisdiction to try servants of His Majesty, whether British or Indian, for offences committed by them in the territories of any Native Prince or Chief in India.

1. **'Native Indian subject.'**—These words mean only native subjects *de jure* and not *de facto*. Occasional residences in British territory cannot be taken to render a person who is not *de jure* a subject, a subject for the purpose of criminal jurisdiction being exercised over him for an act committed in a foreign territory, which, if committed within British territory, would have been an offence cognizable by British Courts [2] The term 'Native Indian subject of His Majesty' does not include 'servants of His Majesty.'[2] It has been so held by the Bombay High Court in a case in which the accused was a Talati in the British territory but his family belonged to a village in the Baroda State and he was born there. His services were lent by the British Government to the Cambay State. While serving there he took bribes and was convicted by the First Class Magistrate of Ahmedabad within whose jurisdiction he was found and arrested. It was held that the accused was not a 'Native Indian subject of His Majesty' within the meaning of s. 188 of the Code of Criminal Procedure, and that as 'servant of the Queen' the Magistrate had no jurisdiction to try him for an offence committed in a foreign state.

The legislative authority of the Government of India is expressly declared to extend to all native Indian subjects by s. 1 of the Indian Councils Act, 1869.[4]

2. **'British India.'**—See s 15, *infra*, as to the definition of this term. The General Clauses Act says that 'British India' shall [illegible] within His Majesty's dominions which are for the [illegible] Majesty through the Governor-General of India or [illegible] officer subordinate to the Governor-General of India.[5]

The word 'India' means British India, together with any territories of any Native Prince or Chief under the suzerainty of His Majesty exercised through the Governor-General of India, or through any Governor or other officer subordinate to the Governor-General of India [6]

3. **'Servant of the Queen.'**—See s. 14, *infra* The legislative authority of the Government of India is expressly declared to extend to "all servants of the Government of India within the dominions of Princes and States in alliance with His Majesty."[7] The servant may be a Native Indian subject or a European British subject or a foreigner.

Crimes committed outside British India.—Where an offence is committed beyond the limits of British India but the offender is found within its limits two contingencies arise :—

[1] G. I., (1897) Part VI, p. 238.
[2] *Fakir*, (1884) P. R. No 1 of 1885.
[3] *Natwarai*, (1891) 16 Bom. 178.
[4] 32 & 33 Vic, c. 98, s. 1.
[5] Act X of 1897, s. 3 (7); The Interpretation Act, 52 & 53 Vic., c. 63, s. 18 (4).
[6] The General Clauses Act, s. 3 (27); The Interpretation Act, s. 18 (5).
[7] 24 & 25 Vic, c. 67, s. 22

(I) The offender may be given up for trial in the country where the offence was committed (*Extradition*).

(II) The offender may be tried in British India (*Extra-territorial* or *Ex-territorial jurisdiction*).

(I) **Extradition.**—The scene of offence committed outside British India may be—

(1) Any of the Native States in which the Governor-General or Governor has a power and jurisdiction through a Political Agent;

(2) a foreign state; or

(3) some part of His Majesty's Dominions.

(1) Before the passing of the Foreign Jurisdiction and Extradition Act (XXI of 1879), extradition, as between the British Government and some of the Native States, was governed by virtue of special treaties.[1] "But such treaties have become obsolete owing to the passing of the above Act which afforded a much quicker remedy." Many of the Native States have by subsequent agreements given up their rights under treaties after the Act came into operation. This Act has been substituted by the Indian Extradition Act of 1903, s. 7 (1) of which says: "Where an extradition offence (*i.e.*, any such offence as is described in the first schedule of the Indian Extradition Act) has been committed or is supposed to have been committed by a person, not being a European British subject, in the territories of any state not being a foreign state and such person escapes into or is in British India and the Political Agent in or for such state issues a warrant, addressed to the District Magistrate of any district in which such person is believed to be, or if such person is believed to be in any Presidency Town to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly."[2] The Political Agent is not empowered by this Act to demand the extradition of a European British subject. Such a person will be dealt with under s. 188 of the Code of Criminal Procedure.

Such requisition must come through the Political Agent for such state if there is any.

Magistrates in British India may issue warrants to arrest persons having committed offences in Natives States on such information or complaint and on such evidence as would justify the issue of a warrant if the offence had been committed within the local limits of his jurisdiction, and surrender them to the states within whose limits the offences are committed even without a requisition (s. 10).

But the provisions of the Act shall not derogate from the provisions of any treaty for the extradition of offenders, and the procedure provided by any treaty shall be followed (s. 18).

(2) Where the scene of offence is some foreign state (*i.e.*, a state to which, for the time being, the Extradition Acts 1870[3] and 1873[4] apply) the fugitive criminal may, if the Government of India or the Local Government thinks fit and the offence is one of the offences mentioned in the first schedule of the Indian Extradition Act and is not of a political character, be surrendered on a requisition.[5]

In order to constitute an offence of a political character, there must be two (more parties in the State, each seeking to impose the Government of their own

[1] See Aitchison's Treaties and Sunnuds, and Lee Warner's Native States of India, p. 337.

[2] A District Magistrate who is addressed with a view to execution of a warrant issued by a Political Agent of a Native State under this section must act in pursuance of such warrant and has no authority to ascertain whether a *prima facie* case exists against the accused or not: *Giyan Chand*, (1908) P. R. No. 3 of 1909.

[3] 33 & 34 Vic., c. 52.

[4] 36 & 37 Vic., c. 65.

[5] The Indian Extradition Act, s. 3. See the procedure laid down in this section

section refers to offences said to have been committed in any territory and not to offences committed on the high seas.[1]

The word 'found' in the section must be taken to mean, not where a person is discovered, but where he is actually present.[2] A man brought into a place against his will can be said to be found there.[3] In the Nasik Conspiracy case the question arose whether the Special Tribunal had power to try one of the accused who had escaped at Marseilles from the custody of Police Officers, charged with the duty of bringing him from London to Bombay, but was re-arrested there and brought to Bombay and committed for trial by the Special Magistrate at Nasik. It was held that where the accused was in the country and was charged with an offence under the Penal Code it would not avail him to say that he was brought there illegally from a foreign country.[4]

Cases.—Where a certificate under s. 188 of the Criminal Procedure Code is granted.—A Native Indian subject of His Majesty committed theft in the territory of a Native State, and was discovered in the territory of another Native State, and from there brought down or came of his own accord to Ahmedabad. A certificate was granted by the Political Agent that the offence ought to be inquired into in British India. It was held that the Sessions Court at Ahmedabad was competent to try the accused.[1]

Where no certificate is obtained under s. 188 of the Criminal Procedure Code.—The accused, Native Indian subjects of His Majesty, were charged with committing criminal breach of trust in respect of certain property entrusted to them as carriers. The offence was alleged to have been committed in the Portuguese territory, and they were found at a place in British India. It was held that they could be tried, where found, under s. 188 of the Criminal Procedure Code, and the proviso to that section had no application as there was no Political Agent in the Portuguese territory.[5] A minor girl (under sixteen years) was taken by the accused from Sholapur to Tuljapur (foreign territory), and there dedicated to the goddess Amba, with intent or knowing it to be likely that she would be used for purposes of prostitution. The accused was convicted of an offence under s. 372 by the District Magistrate of Sholapur. It was held that as the offence of the disposal of the minor took place out of British India, the Magistrate had no jurisdiction to try the offence in the absence of a certificate of the Political Agent or the sanction of the Local Government as required by s. 188, Criminal Procedure Code.[6] Where a District Magistrate instituted criminal proceedings in British India against a Native Indian subject, in respect of certain offences committed by him in French territory, without a certificate under s. 188, Criminal Procedure Code, it was held that although the Magistrate was the Political Agent who might have certified under that section, the proceedings were void for want of such certificate.[7] The Allahabad High Court has similarly held that the absence of the certificate of the Political Agent is an absolute bar to the trial.[8]

The accused enticed away a married girl, under sixteen years, from the house of her father, where she was temporarily staying, in the territory of the Maharaja of Kashmir. The girl was made to leave her home on a deceitful message, and was subsequently persuaded to go away with the accused. The accused induced her to file a petition at Gujarat, in the British territory, to the effect that she was without a guardian and was going to settle there to practise prostitution. He also

[1] *Manuel Philip*, (1917) 19 Bom. L. R. 527, 3 Bom. Cr C. 111.

[2] *Maganlal*, (1882) 6 Bom. 622.

[3] *Sattler*, (1858) 27 L. J. (M. C.) 48.

[4] *Vinayak Damodar Savarkar*, (1910) 13 Bom. L. R. 296, 304; 1 Bom. Cr. C. 26, 34. See *Shwe Bun*, (1891) 7 Burma L. R. 83, 86, in which the Chief Court of Burma has taken a different view of the Privy Council decision in *Mukammad Yusuf-ud-din*, (1897) 24 I. A. 137 referred to in this case.

[5] *Daya Bhima*, (1888) 13 Bom. 147.

[6] *Baku Tukaram*, (1899) 1 Bom. L. R. 678, 24 Bom. 237; *Sirdar Meru v. Jethabhai Amirbhai*, (1906) 8 Bom. L. R. 512.

[7] *Kathaperumal*, (1889) 13 Mad. 423; *Bapu Dada*, (1882) 5 Mad. 23.

[8] *Ram Sundar*, (1896) 19 All. 109.

rented a shop for her to carry on the said profession. No certificate was obtained from the Political Agent, but no objection was taken on behalf of the accused in the lower Court. The Chief Court of the Punjab held (1) that, as the girl was induced to leave her home in consequence of a deceitful message and persuaded to go away with the accused, who actually seduced her with an intent to illicit intercourse, the offence committed was covered by s. 366 of the Code; (2) that the objection to the defect arising from the want of a certificate was made too late and the trial of the case without a certificate was, therefore, an irregularity which was cured by s. 537, Criminal Procedure Code, no prejudice having been alleged or proved.[1]

Subsequent annexation or transfer of the territory where the offence is committed.—A person, after having committed dacoity attended with murder, absconded to Bhootan, which was subsequently annexed by the British Government. It was held that he could be tried and convicted for the offence by the British Courts.[2] Similarly, where certain persons were charged with committing an offence at a place in British India and committed to a Court of Session and the place where the offence was committed became part of a Native State subsequently, it was held that the British Courts were not deprived of jurisdiction inasmuch as at the time of the transfer of the place where the offence had been committed the accused were in British India in custody, in point of law, of a Court of competent jurisdiction.[3]

Breach of contract under Act XIII of 1859.—The accused, having contracted in a foreign territory to labour for the complainant in the British territory, broke his contract. He was arrested in the foreign territory, brought into the British territory and tried there. It was held that the British Court had no jurisdiction, "both the contract and the breach having taken place in foreign territory."[4] The accused having received an advance of money from the complainant, contracted to labour for him in a foreign territory. The accused broke the contract, for which he was prosecuted in British India. It was held that the British Court could not entertain the case.[5]

Jurisdiction over Christian British subjects in Native States.—The Governor-General in Council can by order authorize and empower any High Court to exercise all or any portion of the jurisdiction and powers, conferred or to be conferred on it by His Majesty's Letters Patent, in respect of Christian subjects of His Majesty resident within the dominions of Princes and States of India in alliance with His Majesty. In exercise of the powers thus conferred by the Indian High Courts Act, s. 3 (28 & 29 Vic., c. 15), which corresponds to s. 103, sub-s.(1), of the Government of India Act, 1915 (5 & 6 Geo. V., c. 61), the Governor-General in Council has issued the following three Notifications:—

I. In supersession of the notification of the Government of India in the Foreign Department, No. 178-J., dated the 23rd September 1874, as subsequently amended, except in so far as it relates to Berar and to the parganas of Todgarh, Dewair, Saroth, Chang and Kot Karana in Merwara, the Governor-General in Council is pleased to direct that original and appellate criminal jurisdiction over European British subjects of His Majesty, being Christians, resident within the territories, save the portions aforesaid, of the States of India named below shall, until the Governor-General in Council otherwise orders, be exercised by the High Courts of Judicature established at Fort William, Madras, Bombay and Allahabad, respectively, as follows:—

[1] *Fateh Din*, (1901) P. R. No. 4 of 1902, F.J. See also *Mahamadbaksh Karimbaksh*, (1906) 8 Bom. L. R. 507.

[2] *Roopa*, (1865) 2 W. R. (Cr.) 49.

[3] *Ram Naresh Singh*, (1911) 34 All. 118. See *Mahabir*, (1911) 33 All. 578; *Saheb Din*, (1911) 8 A. L. J. R. 705; *Ganga*, (1912) 34 All. 451.

[4] *Siddha v. Bilgiri*, (1884) 7 Mad. 354.

[5] *Gregory v. Vadakkan Kanyani*, (1886) 10 Mad. 21.

By the High Court at Fort William in—

Nepal. Sikkim.
The States in the political control of the Government of Fort William in Bengal
The States in the political control of the Chief Commissioner of Assam.

By the High Court at Madras in—

Mysore. Banganapalle.
Pudukkottai. Sandur.
The portions of the Kalahandi State occupied by the Raipur-Vizianagram section of the Bengal-Nagpur Railway.

By the High Court at Bombay in—

Baroda. Hyderabad.
[illegible]
Railway.
The States in the political control of the Government of Bombay.
The Makrai State.

By the High Court at Allahabad in—

The States in Central India in the Baghelkhand and Bundelkhand Agencies :—

BAGHELKHAND.	BUNDELKHAND.	
Baraundha.	Ajaigarh.	Garrauli.
Bhaisaunda.	Alipura.	Gaurihar.
Jaso.	Banka Pahari.	Jigni.
Kamta Rajaula.	Baoni.	Lughasi.
Kothi.	Beri.	Naigawan Rebai.
Maihar.	Bihat.	Orchha.
Nagod.	Bijawar.	Panna.
Pahra.	Bijna.	Samthar.
Paldeo.	Charkhari.	Sarila.
Rewa.	Chhatarpur.	Tori-Fatehpur.
Sohawal.	Datia.	The Alampur Pargana of Indore.
Taraon.	Dhurwai.	

The portions of the Bharatpur State occupied by the Agra-Delhi Chord Railway and by the Cawnpur-Achnera section of the Rajputana-Malwa Railway.
The portions of the Patna State occupied by the Raipur-Vizianagram section of the Bengal-Nagpur Railway.
The States in the political control of the Government of the United Provinces of Agra and Oudh.
The States in the political control of the Chief Commissioner of the Central Provinces other than the Makrai State.
Provided that all proceedings pending at the date of this notification shall be carried on as if this notification had not been issued.[1]

By the High Court at Patna in—

Th[illegible]

By the Chief Court of the Punjab[3] *in—*

Patiala.	Loharu.	Bhajji.
Jind.	Dujana.	Mailog.
Nabha.	Chamba.	Balsan.
Kapurthala.	Bilaspur.	Dhami.
Mandi.	Bashahr.	Kothar.
Maler Kotla.	Nalagarh (Hindaur)	Kumhar.
Faridkot.	Keonthal.	Mangal.
Suket.	Baghal.	Bija.
Nahan (Sirmur)	Baghat.	Darkuti.
Kalsia.	Jubal.	Taroch.
Pataudi.	Kumharsain.	Sangri.

[1] Notification No. 853 I. B., dated 19th August 1916, G. I., 1916, Part I, p. 1121.
[2] Notification No. 1589 I. B., dated 2nd April 1913, G. I., 1913, Part I, p. 406.
[3] Notification No. 639 I. A., dated 14th February 1902, G. I. 1902, Part I, p. 135.

Kaneti.	Madhan.	Dhadi.
Dalti.	Ghond.	Bahawalpur.
Kotu.	Ratesh.	
Theog.	Rawin.	

II. In supersession of so much of the notification of the Government of India in the Foreign Department, No. 178-J., dated the 23rd September, 1874, as has not been cancelled, the Governor-General in Council is pleased to direct that, until further orders, original and appellate criminal jurisdiction shall be exercised by the High Court of Judicature at Bombay over European British subjects of His Majesty, being Christians, resident in Berar, and by the High Court of Judicature at Allahabad over European British subjects of His Majesty, being Christians, resident in the parganas of Todgarh, Dewair, Saroth, Chang and Kot Karana in Merwara.[1]

III. Original and appellate criminal jurisdiction over European British subjects of His Majesty shall be exercised by the High Courts of Judicature established at Madras, Bombay and Allahabad, respectively, as herein provided, that is to say,

(1) *By the High Court of Judicature at Madras in—*

Coorg.

(2) *By the High Court of Judicature at Bombay*[2] *in—*

The Pargana of Manpur in Central India.

(3) *By the High Court of Judicature at Allahabad in—*

Ajmer-Merwara.[3]

Appeal from criminal jurisdiction exercised by Political Agents—The Revenue Commissioner shall exercise the jurisdiction of a High Court, as described in the Code of Criminal Procedure, in respect of offences over which the jurisdiction of a Court of Session is exercised by the Political Agent, subject to the following limitations :—

(*a*) In the case of every appeal by a person convicted of an offence punishable with death or by a co-accused of such convict, the said jurisdiction shall be exercised by the Governor in Council,

(*b*) In every case decided by the Commissioner the Governor-in-Council reserves jurisdiction to call for the record and pass orders as he thinks fit.[4]

Acts done within British as well as foreign territory.—A person who is a British subject is liable to be tried by the Courts of this country for acts done by him, partly within and partly without the British territories, provided the acts amount together to an offence under the Code.[5]

(B) **High Seas—Admiralty Jurisdiction.**—The jurisdiction to try offences committed on the high seas is known as admiralty jurisdiction. It is founded on the principle that a ship on the high seas is a floating island belonging to the nation whose flag she is flying. It extends over British vessels, not only when they [illegible] but also when at anchor in the rivers of a foreign territory [illegible] where great ships go.[6] [illegible] the bottom of the river by anchor and cable, or to its side by ropes from the quay.[7] The admiralty jurisdiction extends over British ships although they may be at a spot where the

[1] Notification No 834 I B, dated 16th April 1913, G. I, 1913, Part I, p. 407.

[2] In *Emp.* v. *Price*, Cr. Rev. 257 of 1910, decided on 6th October 1910, the Bombay High Court enhanced sentence on an application by the Administration of the Central Provinces.

[3] Notification No. F. 593 23, dated September 1, 1923 (G. I., Part I, September 1, 1923, p. 1114), cancelling the notification No 457, dated April 21, 1913, G. I., Part I., p. 424.

[4] Notification No. 2567, dated 7th June 1905, Bombay Govt. Gaz., 1905, Part I, p. 671.

[5] *Moulvie Ahmudoollah*, (1865) 2 W. R. (Cr.) 60.

[6] *Anderson*, (1868) L. R. 1 C. C. R. 161

[7] *Ibid*

municipal authorities of a foreign country might exercise concurrent jurisdiction, if invoked. Ever since the time of Richard II., this jurisdiction has extended to where great ships go as part of their voyage for the purposes of trading, and to all persons, whether British subjects or foreigners, who happen to be on board such ships, so as to be entitled to the protection of English Law.[1] It makes no difference whether the offender comes voluntarily on board the British ship or is brought and detained there against his will; nor whether he comes voluntarily within the jurisdiction of the particular Court by which he is tried, or is brought within that jurisdiction against his will.[2] If the ship is a British ship and sailing under the British flag the Court will have jurisdiction, and no proof of the register of the vessel is necessary.[3] It is sufficient to show orally that she belongs to British owners, and carries the British flag.[4] If a ship is registered as a British ship and sailing under the British flag, but the owner is not a natural born British subject, the admiralty jurisdiction will not extend to offences committed on board such *ship.*[5] *If the owner is a British subject the jurisdiction will extend to all offences* committed thereon, whether the offenders be British subjects or foreigners. If one foreigner inflicts a blow on another foreigner in a foreign vessel on the high seas, and the person so struck in a few days afterwards lands in England and dies there, the homicide is not cognizable by English Courts.[6]

As to the limits of the admiralty jurisdiction, East, in his treatise on the Pleas of the Crown,[7] says that this jurisdiction does not extend to any river, creek, or port within the body of a county. "The only difficulty which ever occurs is with respect to what shall be considered as the line of demarcation between the county and the high sea. Upon the open sea-shore it is past dispute that the common law and the admiralty have alternate jurisdiction between high and low water mark. But in harbours or below the bridges in great rivers near the sea, which are partly inclosed by the land, the question is often more a matter of fact than of law, and determinable by local evidence. There are, however, some general rules laid down upon this point, which it would be improper altogether to omit. It is plain that the admiral can have no jurisdiction in any rivers or arms or creeks of the sea within the bodies of counties, though within the flux and reflux of the tide: except in the particular instances before shewn, of mayhem and homicide done in great rivers beneath the bridges near the sea; which depend on the Stat. 15 Ric. 2, c. 3. In general, it is said that such parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties, *where persons can see from one side to the other.* Lord Hale, in his treatise *De Jure* Maris, says, 'That arm or branch of the sea which lies within the *fauces terræ*, where a man may *reasonably* discern between shore and shore, is, or at least may be, within the body of a county.' Hawkins, however, considers the line more accurately confined by other authorities to such parts of the sea where a man standing on the side of the land *may see what is done on the other.*" When the haven, creek or river, is within the body of a county the common law tribunals have a concurrent jurisdiction in case of murder.[8]

With regard to the sea-shore, the ordinary criminal Courts and the Court of Admiralty have concurrent jurisdiction between high and low water-mark.[9]

Cases.—The accused, an English sailor, stole three chests of tea out of a British vessel, when it was lying in a river in China. It was urged that as the vessel was twenty or thirty miles from the sea, the offence was not committed on the high seas. It was held that the offence was committed within the Admiralty jurisdiction.[10]

[1] *Anderson*, (1868) L. R. 1 C. C. R. 161; *Carrand Wilson*, (1882) 10 Q. B. D. 76, 86; *Lesley*, (1860) 29 L. J. (M. C.) 97.

[2] *Benito Lopez, Christian Sattler*, (1858) 7 Cox 431.

[3] *Sven Seberg*, (1870) L. R. 1 C. C. R. 264; Merchant Shipping Act, 1854, s. 106.

[4] *Frank Allen*, (1866) 10 Cox 405.

[5] *Bjornsen*, (1865) 10 Cox 74.

[6] *John Lewis*, (1857) 26 L. J. (M. C.) 104.

[7] Vol. II. pp 802, 804.

[8] *John Bruce*, (1812) R. & R. 243, 2 Leach 1003.

[9] 3 Coke 113.

[10] *Thomas Allen*, (1837) 1 Mood. C. C. 494.

below bridges where the tide ebbed and flowed and great ships went. It was held that the ship was within the Admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Central Criminal Court [1] A foreigner, having committed larceny in England, was followed to Hamburgh by an English police-officer, who arrested him without a warrant, and brought him against his will on board an English steamer trading between Hamburgh and London, and there kept him in custody in order that he might be tried for the larceny in England. During the voyage, whilst the steamer was on the high seas, he shot the officer out of malice prepense and not with a view to escape. It was held that he was guilty of murder within the admiralty jurisdiction.[2] Certain bonds were stolen from a British ship, whilst she was lying afloat in the river at Rotterdam, moored to the quay, and were afterwards wrongfully received in England by the prisoners with a knowledge that they had been stolen. The place where the ship lay at the time of the theft was in the open river, sixteen or eighteen miles from the sea, but within the ebb and flow of the tide, and where large vessels usually lay. It did not appear who the thief was or under what circumstances he was on board the ship. It was held that the larceny took place within the admiralty jurisdiction.[3]

The prisoner and the deceased were foreigners, and the latter died at Liverpool from injuries inflicted by the prisoner on board a foreign ship on the high seas. It was held that the offence was not cognizable by English Courts.[4] It was held, similarly, where an alien enemy, who had been a prisoner of war, and was acting as a mariner on board an English merchant ship, killed an Englishman.[5] Where the officers and crew of a foreign vessel which was unlawfully captured as a slave-ship killed their captures who were English, it was held that the English Courts had no jurisdiction to try them for murder.[6]

Jurisdiction of Indian High Courts—The admiralty jurisdiction of the High Courts of Calcutta, Bombay and Madras, is the same as that of the late Supreme Courts. The admiralty jurisdiction was conferred on the Supreme Courts by their respective Charters and by 33 Geo. III., c. 52, s. 156, and 53 Geo. III., c. 155, s. 110. The jurisdiction of the Supreme Court of Bombay was that of the High Court of Admiralty in England as it stood on the 5th [illegible]

admiralty side is the same as that exercised in the Court of Admiralty in England prior to the passing of 3 & 4 Vic., c. 65, and 24 Vic., c. 10, both of which enlarged the admiralty jurisdiction of the Court of Admiralty in England but which did not apply to India.[7] The Act for establishing High Courts in India (24 & 25 Vic., c. 104, s. 9) provided that the High Courts of Calcutta, Bombay and Madras, shall exercise all such Admiralty and Vice-Admiralty jurisdiction as may be vested in [illegible]

of prize causes and other maritime questions, arising in India, as is now vested in

[1] *Anderson*, (1868) L. R. 1 C. C. R. 161.
[2] *Sattler*, (1858) 27 L. J. (M. C.) 48.
[3] [illegible]

[7] "*The Asia*," (1868) 5 B. H. C. (O. C. J.) [illegible] Beng. L. R. 323, 330, 331.

is charged with the commission of any offence in respect of which jurisdiction is given by the said Act (12 & 13 Vic., c. 96), or where any person charged with the commission of any such offence is brought for trial under the said Act to any place in India, if at any time before his trial he make it appear to the Court exercising criminal jurisdiction in the place where he is so charged or brought for trial, that in case the offence charged had been committed in such place he could have been tried only in the Supreme Court of one of the three Presidencies in India, and claimed to be tried by such a Supreme Court accordingly, the said Court exercising criminal jurisdiction as aforesaid shall certify the fact and claim to the Governor of such place or chief Local Authority thereof, and such Governor or chief Local Authority thereupon shall order and cause the person charged to be sent in custody to such one of the Presidencies as such Governor shall think fit for trial before the Supreme Court of such Presidency, and the said Supreme Court and all public officers and other persons in the Presidency shall have the same jurisdiction and authorities, and proceed in the same manner in relation to the person charged with such offence, as if the same had been committed or originally charged to have been committed within the limits of the ordinary jurisdiction of such Supreme Court."

The procedure to be followed in cases where offences are committed on the high seas is the ordinary Criminal Procedure.[1] Three things are essential in cases of trial of offences committed on the high seas :—

(1) The offence charged must be an offence under the English law according to the Calcutta High Court though not according to the Bombay High Court.

(2) The trial must be conducted under the Code of Criminal Procedure.

(3) The punishment must be regulated by the Penal Code.

Piracy.—Piracy is of two kinds, *viz.*, piracy *jure gentium* and piracy by the statute law of England. Piracy *jure gentium* is an offence against all nations. "Piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, for any of the goods, or tackle, apparel or furniture, with a felonious intention, in any place where the Lord Admiral hath, or pretends to have jurisdiction, this is also robbery and piracy. The intention will, in these cases, appear by considering the end for which the act was committed; and the end will be known, if the evidence shall shew you what hath been done."[2] "The offence of piracy, by common law," according to Blackstone,[3] "consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there." To whatever country the pirate may have originally belonged, he is *justissimo le* everywhere, his detestable occupation has made him *hostis humani generis*, and he cannot upon any ground claim immunity from the tribunal of his captor.[4] "The King of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrency with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world; so that if any person, whatsoever, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we have no war, with whom we hold trade and correspondence, and are in amity, shall be robbed or spoiled in the Narrow Seas, the Mediterranean, Atlantic, Southern, or any other seas, or the branches thereof, either on this or the other side of the line, it is piracy within the limits of your enquiry, and the cognizance of this Court."[5] A pirate is one who is a source of danger to the vessels of all nations.

If the subjects of the same state commit robbery upon each other upon the high sea it is piracy. If the subjects of different states commit robbery upon each other, upon the high sea, if their respective state be in amity, it is piracy; if at enmity, it is not; for it is a general rule, that enemies can never commit piracy on each other, their depredations being deemed mere acts of hostility.[6]

By statutes passed at various times and still in force, many artificial offences have been created, which are to be deemed to amount to piracy.[7]

Thus by 11 Will. III, c. 7, ss. 8 & 9, 8 Geo. I., c. 24, s. 1, and 18 Geo. II., c. 30, British subjects committing hostilities against British subjects under a com- [illegible] away
[illegible] irates.
[illegible] person
[illegible] place

[1] *Elmstone*, (1870) 7 B H. C. (Cr. C.) 89; *Thompson*, (1867) 1 Beng. L. R. (O. Cr. J.) 1; *Barton*, (1889) 16 Cal. 238; *Gunning*, (1894) 21 Cal. 782.

[2] Per Sir Charles Hadges in *Joseph Dawson*, (1690) 13 St. Tr. 451, 454, confirmed in *Att. Gen. for Hong Kong* v. *Kwok-a-Sing*, (1873) L. R. 5 P. C. 179, 199, which further holds that there can be no difference between mariners and passengers.

[3] Kerr on Blackstone, Vol. IV, p. 584, (4th Edn.).

[4] Phillimore, Vol. I, p. 488 (3rd Edn.).

[5] Per Sir Charles Hadges in his charge to the jury in *Joseph Dawson*, supra, p. 455.

[6] Coke 154, *vide* Archbold, 23rd Edn., 451.

[7] Report of Comms. of Crim. Law.

as a slave, or being sold or dealt with as such, or the embarking or receiving on board any person for such purpose, is made piracy.

Piracy is dealt with in several statutes, dating from 1536.[1]

The admiralty jurisdiction extends to pirates who are foreigners in the case of piracy *jure gentium only*.

Cases.—Several mariners on board a ship seized the captain, he not agreeing with them, and after putting him on shore, carried away the ship, and committed several piracies. It was held that the force upon the captain and the carrying away of the ship was piracy.[2] But where the master of a vessel loaded goods on board at Rotterdam, consigned to Malaga, which he caused to be insured, and after he had run the goods on shore in England, the ship was burnt with intent to defraud the owners and insurers, it was held that no piracy had been committed but only a breach of trust, and that it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined.[3]

Liability of foreigners in British India for offences committed outside its limits.—There is no express enactment by which the Indian Legislature can assume to render foreigners subject to the criminal law of British India with reference to acts committed by them beyond the limits of British India. In the words of Lord Chief Justice Cockburn "no proposition of law can be more incontestible or more universally admitted than that according to the general law of nations, a foreigner cannot be held criminally responsible to the law of a nation not his own for acts done beyond the limits of its territory."[4] The acts of a foreigner committed by him in the territory beyond the limits of British India do not, therefore, constitute an offence against the Penal Code of British India, and, consequently, a foreigner cannot be held criminally responsible under that Code by the tribunals of that country for acts committed by him beyond its territorial limits. It is only for acts done when the person doing them is within the territory over which the authority of the British law extends, that the subjects of a foreign state owe obedience to that law and can be made amenable to its jurisdiction. Thus, when it is sought to punish a person, who is not a British subject, as an offender in respect of a certain act, the question is not 'where was the act committed,' but 'was the person at the time, when the act was done, within the territory of British India.' For if he was not, the act is not an offence, the doer of it is not liable to be punished as an offender, and he is, therefore, not subject to the jurisdiction of criminal Courts.[5] A foreign subject, resident in a foreign territory, instigating the commission of an offence which, in consequence, is committed in British territory is not amenable to the jurisdiction of a British Court if the instigation has not taken place in British India.[6]

But if a foreigner in a foreign territory initiates an offence which is completed within British territory, he is, if found within British territory, liable to be tried by the British Court within whose jurisdiction the offence was completed.[7]

[1] 28 Hen. VIII., c. 15, 22 & 23 Carr. II., c. 2; 11 Will. III., c. 7, 4 Geo. I., c. 2, s. 7; 8 Geo. I., c. 24; 18 Geo. II., c. 30; 12 Geo. III., c. 20; 7 & 8 Geo. IV., c. 28, s. 2; 9 Geo. IV., c. 54, s. 8; 7 Will. IV. and 1 Vic., c. 88, ss. 2-4; 5 & 6 Vic., c. 28, ss. 16-18, 13 & 14 Vic., c. 26; 41 & 42 Vic., c. 73, s. 6.

[2] *May*, (1696) 2 East P. C. 796.

[3] *Mason*, (1722) 2 East P. C. 796, 8 Mod. 74. See *Richard Curling*, (1807) R. & R. 123.

[4] *Franconia case or Keyn*, (1876) 2 Ex. D. 63. See *Punja Guni*, (1917) 20 Bom. L. R. 98, 4 Bom. Cr. C. 192.

[5] Per Plowden, J., in *Mussummat Kishen Kour*, (1878) P. R. No. 20 of 1878. See also *Roda*, (1889) P. R. No. 30 of 1889, *Baldewa*, (1906) 28 All. 372.

[6] *Pirtai*, (1873) 10 B. H. C. 356, followed in *Raj Bahadur*, (1918) P. R. No. 23 of 1918, *Balwant Singh*, (1918) P. R. No. 31 of 1918. The Chief Court of the Punjab has held that the subject of a Native State is not liable to be punished under the Penal Code by a Court in British India for acts committed in British India, he being at the time of such commission in foreign territory, even if he afterwards be in British India: *Mussummat Kishen Kour*, (1878) P. R. No. 20 of 1878.

[7] *Chhotalal Babar*, (1912) 14 Bom. L. R. 147, 1 Bom. Cr. C. 88, 36 Bom. 524.

There is nothing in s. 188, Criminal Procedure Code, which contravenes the general rule of international law that no Court has jurisdiction over foreigners in respe[illegible] foreigners in respect of acts done by t[illegible] power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.[2]

Cases.—Dacoity in a foreign territory.—Where the accused had committed dacoity in the Patiala State but were found in British territory where they had stayed for three years, it was held that they were not liable to be tried by a British Court as they were foreign subjects and the offence had been committed in foreign territory.[3]

Kidnapping in a foreign territory.—A girl was enticed away in the Faridkot State from the lawful guardianship of her husband by the accused, who were foreign subjects, and was found being conveyed by them by rail from that State to a station in the Bhawalpur State at the railway station of Abdhar in the British territory. It was held that, as the act of kidnapping was complete outside British India, the British Courts had no jurisdiction to try and convict the accused.[4]

Murder on the High Seas.—The accused, a subject of a Native State, was charged with the offence of attempt to murder, on board a ship belonging to him on the high seas some eighteen miles off the coast of Kanara, British territory. He was tried for the offence by a Magistrate in the British territory. It was held that the Magistrate had no jurisdiction to try the accused as the accused was not a British subject and the offence was committed on a non-British ship on the high seas outside the territorial limits.[5]

Abetment in a foreign territory of forgery committed in British India.—The accused who lived at Cambay, a Native State, conspired with his partner A, at Cambay, to get a valuable security forged by a professional forger at Umreth, a place within British territory. To facilitate forgery, the accused sent an account book with A, who proceeded to Umreth and had the book forged there accordingly. The accused was committed for trial to the Sessions Court on a charge of abetment of forgery of a valuable security (ss. 467 and 109). The Sessions Judge, being of opinion that the British Court had no jurisdiction to try the accused, referred the case to the High Court for an order quashing the commitment. It was held that the British Court had jurisdiction to try the accused, inasmuch as his offence was not wholly committed within Cambay territory but having been initiated there was continued and completed within British territory.[6]

Jurisdiction.—Over non-British subjects who have committed offences beyond the limits of British India, the criminal Courts of British India have no jurisdiction, except that conferred by s. 4 (3) of the Code and by ss. 4 and 10 of the Indian Extradition Act. These sections only empower Magistrates to arrest, and, if so ordered by Government, to inquire into the truth of the accusation made.

PRACTICE.

Evidence in cases of piracy.—Prove (1) that the accused has committed acts which amount to robbery (see s. 390, *infra*)

(2) That such acts have been committed within the jurisdiction of admiralty

Procedure.—The Punjab Rules.—It appears that the law on the subject of the trial by British Courts of offenders for offences committed beyond the limits of British India is either not known to the criminal Courts or is not understood.

[illegible] of 1901.

[illegible] f 1881.

[4] *Jaimal Singh*, sup

[5] *Punja Guni*, (1917) 20 Bom. L. R. 98.

[6] *Chhotalal Bakar*, (1912) 14 Bom. L.R. 147, 1 Bom. Cr. C 88.

2. The locality in which an act alleged to be an offence was committed is always of some importance, and is of special importance when the act was not committed within the limits of British India, as the jurisdiction of the Courts over the person accused may be affected.

3. Consequently, in all criminal cases in which a charge is drawn up, the place where the offence is alleged to have been committed should be described in such a manner as to show whether it is within or beyond the limits of British India.

4. But it is often necessary to ascertain the place of commission of an act alleged to be an offence before any charge is drawn up, in order to determine whether the Court has jurisdiction.

5. The locality of an act alleged to be an offence varies in importance according as the person charged with having committed the act is or is not a British subject, and in the former case, according as he is a European British subject or a Native Indian subject of His Majesty.

6. When the act has been committed in British territory the nationality of the offender does not, of itself, prevent him from being subject to the law of India and the jurisdiction of its Courts, and the locality of the act is comparatively unimportant.

7. When the act has been committed beyond the limits of British India, it is necessary to ascertain whether the accused is or is not a British subject.

8. A person not a British subject is ordinarily not bound by the law of India and not subject to the jurisdiction of its Courts in respect of an act done by him outside British India. Whenever it appears to the Court that an alien is liable to its jurisdiction for an act done by him beyond the limits of British India, the special provision of the law which is held to give jurisdiction to the Court should be expressly stated.

9. But by s. 188 of the Code of Criminal Procedure, an Indian British subject or a servant of the Crown (whether a British subject or not) is liable to be dealt with by the British Courts in India for any offence committed by him in any place whatever beyond the limits of British India as if it had been committed at any place in British India at which he may be found; and he is liable to be punished for it, if it is an offence under the Indian Penal Code, by force of s. 3 of that Code.

10. A European British subject is, by force of the same provision, similarly liable in respect of any offence committed by him in any place in the dominions of a Prince or State in India in alliance with His Majesty.

11. But in both the instances last mentioned the proviso to s. 188 of the Code of Criminal Procedure requires that no charge as to any such offence shall be inquired into in British India without the certificate of the Political Agent, if there be one, for the territory in which the offence is alleged to have been committed.

12. This proviso does not merely prohibit a trial upon a charge framed after an inquiry, but even an inquiry into the accusation in the absence of a certificate, when requisite. The section itself, however, still leaves a Court competent to issue process, such as a summons or a warrant, or to take any other step which is mere preliminary to an inquiry.

13. It follows from what has been said that it is the duty of every Court, dealing with an accusation of an act alleged to be an offence and to have been committed in a place near the limits of British territory, to inquire and ascertain and record a clear finding as to whether it has been committed within or beyond those limits.

14. It is also the duty of every Court, dealing with an act alleged or found to have been committed beyond the limits of British India, to inquire and ascertain and record a clear finding as to whether the accused is or is not a British subject, and if he is, whether an Indian or a European British subject. In every formal charge of an offence alleged to have been committed beyond the limits of British

India, it should be explicitly stated either that the accused is not a British subject, or that he is a British subject, Indian or European, as the case may be.

15. It seems expedient to add (1) that a Magistrate is not at liberty to shirk an inquiry into the nationality of an accused person merely because it may appear to him a question of nicety or difficulty; and (2) that a Magistrate is not competent to dispense with enforcement of the law and absolve a British subject from the penal consequences of an offence, *prima facie* established against him, merely because the offence was not committed within the limits of British India. Both these mistakes were found to have been committed in (1893) P. R. No. 9 (Cr.).

16. In cases in which a question of nationality arises the rulings[1] of the Chief Court may be consulted.

17. The term 'Political Agent' is defined in s. 3 (40) of the General Clauses Act, X of 1897, and a list of the Political Agents for the smaller States having political relations with the Punjab Government is given in Part VI of Order No. 23, Vol. III. The Resident in Kashmir is the Political Agent for the Kashmir State.

18. The special attention of all criminal Courts is directed to the contents of this Order in order that they may not, on the one hand, omit to exercise their jurisdiction over offences committed by British subjects in foreign territory, and, on the other hand, may not exceed their jurisdiction by exercising it over persons who are not subject to it. Particular attention is drawn to the instructions conveyed in paragraphs 3, 13, 14 and 15, as an omission to comply therewith may give rise to serious difficulties.[2]

Charge.—When a person is tried before a Court which would not have jurisdiction but for special circumstances, the Court should specify in the charge those circumstances.

The charge should run thus :—

I (*name and office of Magistrate*) hereby charge you——as follows—

That you, being a Native Indian subject (*or* British subject *or* servant) of His Majesty, the King-Emperor, on or about the—day of—, at—, without and beyond British India, did—and thereby committed an offence punishable under ss. 4 and—of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

If the accused is a British subject or servant of the King-Emperor and has committed an offence within the dominions of a Native Prince, the second paragraph in the above charge would run thus :—

That you, being a British subject (*or* a servant) of His Majesty the King-Emperor, on or about the—day of—, at—, within the dominions of—did, etc.

If the offence comes under the Admiralty jurisdiction, the second paragraph of the above charge would generally be as follows :—

That you, on or about the—day of—, then being a British subject (*omit these words if the accused is a foreigner*) on board the British ship—, on the High Seas, did—, and thereby committed an offence punishable, etc

Certain laws not to be affected by this Act.

5. Nothing in this Act is intended to repeal, vary, suspend or affect any of the provisions of the Statute 3 & 4 William IV, Chapter 85, or of any Act of Parliament passed after that Statute in any wise affecting the East India Company, or the said territories, or the inhabitants thereof; or any of the provisions of

[1] *Fakir*, (1883) P. R. No. 22 of 1883; *Ali*, (1893) P. R. No. 9 of 1893. *Fakir*, (1884) P. R. No. 1 of 1885; *Fazal*

[2] P. C. C. R. & O., Vol. II, No. 10.

any Act for punishing mutiny and desertion of officers and soldiers,[1] in the service of Her Majesty....., or of any special or local law.[2]

COMMENT.

This section acts as a saving clause to s. 2. Though the Code was intended to be a general one, it was not thought desirable to make it exhaustive, and hence offences defined by local and special laws were left out of the Code, and merely declared to be punishable as theretofore.[1] Section 2 repealed all existing penal enactments in force on the date from which the Code was to come into operation. The effect of s. 5 was to qualify this general repeal and to declare that, notwithstanding it, offences defined by special and local laws should continue to be punishable as theretofore. If, therefore, a person were required to ascertain from the Penal Code what acts and omissions are punishable in British India as offences, he would properly answer that it appeared from s. 2 and s. 5 that all acts or omissions contrary to the provisions of the Code itself, or of the provisions of special and local laws and some other laws enumerated in s. 5 and these alone and none others were punishable as offences.[2] The preamble to the Code and ss. 1 and 2, read with this section, prescribe that all acts or omissions contrary to the provisions of the Code, or of special and local laws enumerated in this section and none others are punishable as offences.[3]

'Statute 3 & 4 William IV, Chapter 85' is the Government of India Act, 1833.

1. **'Officers and soldiers.'**—The laws relating to Army and Navy here referred to are the several Acts and Articles of War, passed from time to time to punish offences committed by military and naval men. The Code does not affect their provisions. See the Army Act, 44 & 45 Vic., c. 58, as continued and amended by subsequent Annual Army Acts, which provides a special procedure for the trial of offenders by a court-martial, and which gives a list of persons subject to military law; and the Indian Army Act (VIII of 1911).

2. **'Special or local law.'**—No special or local law (*see* ss. 41 and 42) is repealed, varied, suspended, or affected by the enactment of the Code. Although an offence is expressly made punishable by a special or local law, yet it will be punishable under the Penal Code, if the facts come within the definitions of the Code.[4] No such prosecution is admissible, if it appears upon the whole frame of the special Act that it was intended to be *complete in itself*, and to be enforced only by the penalties created by it[5]; but in the absence of any thing in the special Act to exclude the operation of the Code, an intention on the part of the legislature to exclude it should not be inferred.[6] However, a person cannot be punished under both the Penal Code and a special law for the same offence,[7] and it is ordinarily desirable that the sentence should be passed under the special Act.[8] For, it is presumed that the legislature intends that the special form of punishment is appropriate to special cases. The General Clauses Act[9] provides that "where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under any of those enactments, but shall not be liable to be punished twice for the same offence." Where the accused is guilty of a specific offence under the Indian Penal Code he should

[1] (1866) 3 M. H. C. App. 11, 16.
[2] (1866) 3 M. H. C. App. 11, 17.
[3] *Satish Chandra Chakravarti* v. *Ram Dayal De*, (1920) 48 Cal. 388.
[4] *Ramachandrappa*, (1883) 6 Mad. 249; *Sadasiva Pillai*, (1865) 1 Weir 26; *Bayne*, (1906) 8 Bom. L. R. 414. A police constable punished departmentally under the Police Act is liable to be punished under the Penal Code: *Gul Muhammad*, (1915) P. R. No. 26 of 1915.
[5] *Chandi Pershad* v. *Abdur Rahman*, (1894) 22 Cal. 131, 139; *Anon.*, (1876) 1 Mad. 55.
[6] *Imam Bakhsh*, (1884) P. R. No. 10 of 1885; *Sepu Baliah* v. *N. Ramasamiah*, (1917) 6 L. W. 283.
[7] *Husvan Ali*, (1873) 5 N. W. P. 49. Section 26 of the General Clauses Act (X of 1897) makes a similar provision.
[8] *Kuloda Prosad Majumdar*, (1906) 11 C. W. N. 100, 5 C. L. J. 47; *Rup Deb*, (1913) 11 A. L. J. R. 340.
[9] X of 1897, s. 26.

be convicted under the Code if the punishment under the special Act is not adequate.[1]

Common law rights.—This section does not affect the common law principles introduced into the Presidency towns when the late Supreme Courts were established. The High Courts in the Presidencies have power to punish the offence of contempt on a summary proceeding in relation to proceedings before them not by virtue of the Penal Code but by virtue of the common law of England.[2] The Court has power to punish, by commitment for contempt, a libel published while the Court is not sitting.[3] But the Calcutta High Court has decided that it has no jurisdiction to commit a person for contempt of a criminal Court in the mofussil.[4] There is a difference of opinion on the point so far as the Bombay High Court is concerned.[5] All other Courts including the Judicial Commissioners' Courts can only take action for contempt of Court under s. 228 of the Penal Code and ss. 477 and 487 of the Code of Criminal Procedure.[6]

Amendment.—After the words "Her Majesty" were the words "or of the East India Company, or of any Act for the Government of the East India Company"; but they were repealed by Act XIV of 1870.

PRACTICE.

Jurisdiction.—Section 101 of the Mutiny Act (41 Vic., c. 10) does not deprive the Civil (as opposed to Military) Courts of jurisdiction over British soldiers committing offences within the territorial limits of those Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief.[7]

Conviction under special Act not to be quashed.—The circumstance that the act proved would also constitute an offence under a section of the Code, is no reason for quashing a conviction under a special law.[8]

[1] *Fulteh Khan*, (1874) P. R. No. 11 of 1874.

[2] *Legal Remembrancer* v. *Matilal Ghose*, (1913) 41 Cal. 173; *Surendra Nath Banerjee* v. *High Court Judges*, (1883) 10 Cal. 109, F.C.; *Moti Lal Ghose*, (1917) 45 Cal. 169; *M. K. Gandhi*, (1920) 22 Bom. L. R. 368; *Satyabodha Ramchandra*, (1922) 24 Bom. L. R. 928, s.c. 6 Bom. Cr. C. 252; *Marmaduke Pickthall*, (1922) 25 Bom. L. R. 15, s.c. 7 Bom. Cr. C. 1; *Marmaduke Pickthall* (No. 2), (1922) 25 Bom. L. R. 107, s.c. 7 Bom. Cr. C. 43; *Ponnuswami Iyer* v. *Ganapathi Iyer*, (1923) 45 M. L. J. R. 742.

[3] *William Tayler*, (1869) 26 C. L. J. 345; *In re Banks*, (1869) 26 C. L. J. 401.

[4] *In re the Amrita Bazar Patrika*, (1913) 17 C. W. N. 1253, 1282.

[5] *Balkrishna Govind Kulkarni*, (1921) 24 Bom. L. R. 16, s.c. 6 Bom. Cr. C. 130.

[6] *Venkatrao Rajerao*, (1922) 24 Bom L. R. 386, s.c. 6 Bom. Cr. C. 186

[7] *Maguire*, (1879) 5 Cal. 124.

[8] *Kassimuddin*, (1867) 8 W. R. (Cr) 55.

CHAPTER II.

GENERAL EXPLANATIONS.

This Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined a[illegible] and the meanings thus announced are steadily adhered to throug[illegible] Sir James Stephen suggests that the object of [illegible] misunderstanding the Code and [illegible] It does not provide explanations for all cases indiscr[illegible] ses where difficulty may arise, when it will be necessary to refer to this [illegible] see what the meaning of the Code is.[1]

Definitions in the Code to be understood subject to exceptions.

6. Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions," though those exceptions are not repeated in such definition, penal provision or illustration.

ILLUSTRATIONS.

(a) The sections in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(b) A, a Police Officer, without warrant, apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it."

COMMENT

The proper place for this section would be Chapter IV as it refers to exceptions mentioned in that Chapter.

Illustrations are very useful so far as they serve to explain the meaning of the section. But it has been decided that they ought never to be allowed to control the plain meaning of the section itself, when the effect would be to curtail a right which the section in its ordinary sense would confer.[2]

Illustration (a) is based on s. 82 *infra* and (b) on s. 76 *infra*.

Sense of expression once explained.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

COMMENT.

The maxim *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another) or *expressio unius est exclusio alterius* (the mention of one

[1] P. L. C. (1860), p. 1261.

[2] *Koylash Chunder Ghose* v. *Sonatun Chung Barooie*, (1881) 7 Cal. 132.

is the exclusion of another) is the basis of this section. "To say that it shall have a particular meaning everywhere is to say that it shall have no other meaning anywhere...If the words taken grammatically have a definite, certain, and unequivocal meaning, if they constitute a perfectly complete expression susceptible grammatically of that one unequivocal meaning, and of that only, then, however absurd and pernicious the consequences, that meaning is to be followed. If, however, the expression does not include the complete thought of the Legislature, or if the words are equally susceptible of several meanings, we are to seek in other parts of the same statute, or in other statutes, certainly in those *in pari materia* with this, the one of the several possible meanings which ought to be put upon the words."[1]

"Gender."

8. The pronoun "he" and its derivatives are used of any person, whether male or female.

"Number."

9. Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

COMMENT.

The General Clauses Act similarly says that unless there is anything repugnant in the subject or context words in the singular shall include the plural, and *vice versa*.[2]

"Man." "Woman."

10. The word "man" denotes a male human being of any age: the word "woman" denotes a female human being of any age.

COMMENT.

The word 'man,' in a scientific treatise on zoology or fossil organic remains, would include men, women, and children as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense in philosophical or religious disquisitions. But, in almost every other connection, the word 'man' is used in contradistinction to 'woman.' This restricted sense is its ordinary and popular sense.[3]

"Person."

11. The word "person" includes any Company or Association, or body of persons, whether incorporated or not.

COMMENT.

The word 'person' includes both a natural person (a human being) and an artificial person (a corporation).[4] It is, however, used frequently in the Code in a sense in which it is clear from the context that corporate bodies, etc., are not included.[5]

The General Clauses Act says that "person" shall include any company or association or body of individuals, whether incorporated or not.[6] But a limited

[1] Per Holloway, J., in (1866) 3 M. H. C. App. 11, 12.

[2] Act X of 1897, s. 13.

[3] Per Byles, J., in *Chorlton* v. *Lings*, (1868) L. R. 4 C. P. 374, 392.

[4] See *Pharmaceutical Society* v. *London and Provincial Supply Association*, (1880) 5 App. Cas. 857.

[5] See ss. 56, 73, 84-87, 100, 105, 114, 137, 139, 141, 149-151, 153, 157, 159, 170, 191, 216, 220-225, 278, 282, 295, 297, 298, 491, 492, 497 and Ch. XVI.

[6] Act X of 1897, s. 3 (39).

liability company cannot be committed for trial on an indictment.[1] But persons who abet or aid the company would be liable.[2]

The word 'person' is sufficiently wide to include the Government as representative of the whole community.[3] Thus, possession of wood by a Forest Inspector, a servant of Government, is held to be possession of the Government itself; and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, constitutes theft if that consent was unauthorized or fraudulent.[4]

1. **'Incorporated.'**—Incorporation is the formation of a legal body, with the quality of perpetual existence and succession, except as limited by the Royal Charter or Act of Parliament effecting the incorporation.[5]

"Public."

12. The word "public" includes any class of the public or any community.

"Queen."

13. The word "Queen" denotes the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

COMMENT.

In the General Clauses Act it is also provided that 'Her Majesty' or 'the Queen' shall include Her successors.[6]

"Servant of the Queen."

14. The words "servant of the Queen" denote all officers or servants continued, appointed or employed in India by or under the authority of the said Statute 21 & 22 Victoria, Chapter 106, entitled "An Act for the better Government of India,"[1] or by or under the authority of the Government of India or any Government.[2]

COMMENT.

The Statute referred to is the Government of India Act which lays down regulations for the conduct of the Government of India.

1. **'Government of India.'**—See s. 16, *infra*.
2. **'Government.'**—See s. 17, *infra*.

"British India."

15. The words "British India" denote the territories which are or may become vested in Her Majesty by the said Statute 21 & 22 Victoria, Chapter 106, entitled "An Act for the better Government of India"....

COMMENT.

This definition is the same as that in the General Clauses Act of 1868. The definition of 'British India,' as given in the General Clauses Act of 1897, is much wider. According to this Act 'British India' "shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India"[7] But this definition will not affect the meaning to be given to the term 'British India' in Acts amending the Penal Code subsequent to 1897 in view of s. 7 of the Penal Code.

[1] *Daily Mirror Newspaper, Ltd.*, [1922] 2 K. B. 530.
[2] *Ibid.*
[3] *Hanmanta*, (1877) 1 Bom. 610, 622.
[4] *Ibid.*
[5] Wharton, 12th Ed., p. 437.
[6] Act X of 1897, s. 3 (22).
[7] *Ibid.*, s. 3 (7).

Amendment.—This section ended with the clause "except Settlement of the Prince of Wales' Island, Singapore and Malacca"; but that clause was repealed by Act XII of 1891, Sch. I.

"Government of India."

16. The words "Government of India" denote the Governor General of India in Council, or, during the absence of the Governor General of India from his Council, the President in Council, or the Governor General of India alone, as regards the powers which may be lawfully exercised by them or him respectively.

COMMENT.

The General Clauses Act[1] similarly defines this term. The definition here indicates the high officers whose duty it is to carry on the Government of India.

"Government."

17. The word "Government" denotes the person or persons authorized by law to administer executive Government in any part of British India.

COMMENT.

According to this definition 'Government' means the local Government [illegible] Clauses Act, however, says that 'Government' or 'the Government' shall include the local Government as well as the Government of India[2]; and 'Local Government' shall mean the person authorized by law to administer executive government in the part of British India in which the Act or Regulation containing the expression operates, and shall include a Chief Commissioner[4] Act III of 1895 has varied the definition given here so far as ss. 255 to 263-A are concerned. Section 263-A defines what 'government' means in those sections.

"Presidency."

18. The word "Presidency" denotes the territories subject to the Government of a Presidency.

COMMENT.

The General Clauses Act defines "Presidency town." The part of India under the East India Company was divided into three Presidencies: Bengal, Madras and Bombay. The Presidency of Bengal was done away with in 1854, though it has been revived in 1912. Calcutta is a Presidency town under the General Clauses Act.

"Judge."

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

[1] X of 1897, s. 3 (23).
[2] *Bajoo Singh*, (1898) 26 Cal. 158.
[3] Act X of 1897, s. 3 (21).
[4] *Ibid*, s. 3 (29).

ILLUSTRATIONS.

(a) A Collector exercising jurisdiction in a suit under Act X of 1859,[1] is a Judge.

(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge.

(c) A member of a panchayat which has power, under Reg. VII, 1816,[2] of the Madras Code, to try and determine suits, is a Judge.

(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

COMMENT.

Arbitrators.—Arbitrators empowered by law to give a definite judgment are included in the term 'Judge.'[1]

1. **'Act X of 1859.'**—This Act has been repealed in the Chota Nagpur Division of Bengal (except as to the District of Manbhum and the Tributary Mahals) by Bengal Act I of 1879, and in the rest of Bengal (except as to Calcutta, Orissa and the Scheduled Districts) by the Bengal Tenancy Act (VIII of 1885). It is now in force in the district of Manbhum, in the Darjeeling District and in parts of the Jalpaiguri District in Bengal; and such parts of it as are not inconsistent with the portions of Act VIII of 1885 which have been extended to the Orissa Division are in force in that Division.

'Act X of 1859' has also been repealed in the Province of Agra (except as to Scheduled Districts) by the North-Western Provinces Rent Act (XVIII of 1873), and in the Central Provinces by the Central Provinces Tenancy Act (IX of 1883). In the province of Agra read now "the North-Western Provinces Tenancy Act (II of 1901)" for 'Act X of 1859.'

2. **'Reg. VII, 1816, of the Madras Code.'**—This has been repealed by the Madras Civil Courts Act (III of 1873).

"Court of Justice".

20. The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

ILLUSTRATION.

A panchayat acting under Reg. VII, 1816,[1] of the Madras Code, having power to try and determine suits, is a Court of Justice.

COMMENT.

"Court of Justice" does not mean here the place or building where justice is administered, but the judge or judges who conduct judicial proceedings in the due administration of justice. When the judges are transacting merely administrative business, they are not a Court of Justice.[2]

1. **'Regulation VII of 1816.'**—This has been repealed by the Madras Civil Courts Act (III of 1873).

"Public servant."

21. The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:—

First.—Every Covenanted servant of the Queen;

[1] First Rep., s. 76.

[2] *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431.

Second.—Every Commissioned Officer in the Military or Naval forces of the Queen while serving under the Government of India or any Government;

Third.—Every Judge;

Fourth.—Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth.—Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Sixth.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth.—Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government, or to make any survey, assessment or contract on behalf of Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty;

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district.

ILLUSTRATION.

A Municipal Commissioner is a public servant.

Eleventh.—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

Explanation 3.—The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.

COMMENT.

A line is drawn between the great mass of the community and certain classes of persons in the service and pay of Government, or exercising various public functions, who are here included in the words "public servant." Those offences which are common between public servants and other members of the community are left to the general provisions of the Code. But there are several offences which can only be committed by public servants: and on the other hand public servants in the discharge of their duties have many privileges peculiar to themselves.[1] Public servants are dealt with more strictly than other persons for offences committed by them as they enjoy various privileges and possess power and authority. The offences peculiar to them are classed separately in Chapter IX.

The word 'servant' shall be deemed to signify any person duly appointed and invested with authority to administer any part of the executive power of the Crown, or to execute any other public duty imposed by law, whether it be judicial, ministerial, or mixed. This section does not define what a "public servant" means but enumerates the various functionaries who will be designated as public servants. A public servant is one who has to discharge some public duty. All Government servants are not public servants.

Clause 1.—'Covenanted servant.'—The members of the Indian Civil Service were known as covenanted servants as they had to sign a covenant by which they bound themselves to contribute for their pension and not to trade or to receive presents. This covenant was entered into after they were selected by the Board of Directors of the East India Company. Such a covenant is still, as a matter of form, signed by those who are successful in the Civil Service competitive examination.

Clause 2.—Statute 25 & 26 Vic., c. 4, enables His Majesty the King to issue Commissions to officers of the regular Army and Navy. Every officer holding a Commission in the Military or Naval forces of the King—Regular, Auxiliary or Volunteer—will be deemed to be a public servant, while serving under the Government of India or any Government.

Clause 3.—The word "Judge" is defined in s. 19. A member of a Village Panchayat Court is a Judge.[2]

Clause 4.—Peons executing any judicial process[3] or warrants of arrest[4] come under this clause.

Clause 6.—'Referred for decision or report.'—To bring a case within the sub-section, there must be some cause or matter existing in dispute or controversy, in regard to which a competent public authority is desirous of a report to enable it to deal with the matter in dispute between the parties.[5]

[1] M. & M. 20.

[2] *Ponnusamy Thevan*, (1921) 30 M. L. T. 351.

[3] *Bhagai Dafadar*, (1868) 2 Beng. L. R. 21, P.B.

[4] *Sheo Progash Tewari* v. *Bhoop Narain Prosad Pathak*, (1895) 22 Cal. 759; *Dharam Chand Lal*, (1895) 22 Cal. 596.

[5] *Debi Din*, (1886) 6 A. W. N. 295.

Clause 7.—Convict-warders[1] come under this clause.

Clause 8.—Persons appointed by a Government Solicitor to conduct prosecutions[2]; Revenue and Police Patels[3]; the *gorait* of a village[4]; officers of the Society for the Prevention of Cruelty to Animals, appointed under the Bengal Police Act V of 1861[5] or the Madras City Police Act (III of 1888)[6] fall under this clause.

Clause 9.—'Officer.'—This word means a person employed to exercise to some extent a delegated function of Government; he must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of some one who is so armed.[7] It means a functionary or holder of some *officium* or office however humble, to whom in some degree are delegated certain functions of Government.[8]

'Officer in the service or pay of Government.'—This expression means one who is appointed to some office for the performance of some public duty.[9]

Cases.—A surveyor employed by the Collector in the Khas Mehal department[10]; a peon in the service and pay of Government and attached to the office of a Superintendent of the Salt Department[11]; a Putwaree[12]; a supernumerary peon of the Collector's Court, who received no fixed pay, but was remunerated by fees[13]; and a lascar in the service of the Public Works Department distributing water from public irrigation channels[14] are public servants. A manager of an estate employed under the Court of Wards is a public servant according to the Allahabad High Court[15] but not according to the Calcutta High Court[16] A peon employed by such a manager is not a public servant.[17]

Clause 10.—Municipal engineers[18]; municipal servants under the City of Bombay Municipal Act, III of 1888[19]; a clerk in the Cess-collection Department of a Municipality constituted under the Bombay District Municipal Act[20], a Municipal tax collector[21]; a Local Board Sircar[22]; a Union Karnam[23]; and a Chairman of a Union Panchayat[24] are held to be public servants falling under this clause.

Clause 11.—This clause was added by the Indian Elections Offences and Inquiries Act (XXXIX of 1920).

Explanation 1.—This explanation shows that persons who hold offices under local laws, if their duties fall within any of the descriptions here given are public servants.

Explanation 2.—Public servant pro confesso.—Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities and is recognized as filling the position of a public servant, must

[1] *Kallachand Moitree*, (1867) 7 W. R. (Cr) 99; *Muhammada*, (1908) P. R. No. 22 of 1908; *Saifin Rasul*, (1924) 26 Bom. L. R. 267, s.c. 7 Bom. Cr. C. 146.
[2] *Butto Kristo Doss*, (1878) 3 Cal. 497.
[3] *Appaji bin Yadavrao*, (1896) 21 Bom. 517.
[4] *Sidhu*, (1904) 26 All. 542.
[5] *Upendra Kumar Ghose*, (1906) 3 C. L. J. 475.
[6] *Nataraja Pillai*, (1922) 46 Mad. 90.
[7] *Ramajirav Jivbajirav*, (1875) 12 B. H. C. 1.
[8] *Ahad Shah*, (1917) P. R. No 18 of 1918.
[9] *Nazamuddin*, (1900) 28 Cal. 344.
[10] *Bajoo Singh*, (1898) 26 Cal. 158.
[11] *Nazamuddin*, sup.
[12] *Muds-ood-deen*, (1870) 2 N. W. P. 148.
[13] *Ramkrishna Das*, (1871) 7 Beng. L. R. 446.
[14] *Public Prosecutor of Madras* v. *Kimidi Annam Naidu*, (1924) 21 L. W. 704.
[15] *Mathura Prasad*, (1898) 21 All. 127.
[16] *Nazamuddin*, sup.
[17] *Arayi*, (1883) 7 Mad. 17.
[18] *Nantamram Uttamram*, (1869) 6 B. H. C. (Cr. C.) 64.
[19] *Ezekiel*, (1904) 6 Bom. L. R. 54.
[20] *Babulal Kanaiyalal*, (1908) 10 Bom. L. R. 761.
[21] *Government Advocate Bihar and Orissa* v *Ganga Prasad*, (1922) 1 Pat. 423.
[22] *Addaita Bhuia* v. *Kali Das De*, (1907 12 C. W. N. 96.
[23] *Gopalasaminatha Aiyar*, (1893) 1 Weir 128.
[24] *Sheik Abdul Kadir*, [1916] 1 M. W. N. 384.

be regarded as one, and it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a "public servant." "If such a contention were allowed, and the question whether a man was a public servant were to depend wholly upon the test of his receiving or not receiving a salary, very great mischief and difficulty might arise in a country like this, where numerous persons are engaged in the performance of public duties without pay."[1]

According to this explanation the person who in fact discharges the duties of the office which brings him under some one of the descriptions of public servant, is for all the purposes of the Code rightfully a public servant, whatever legal defects there may be in his right to hold the office.[2]

A person serving as a volunteer in a Tahsildar's office[3] and a Zemindari Karnam[4] are held to be public servants.

Explanation 3.—This explanation was added by the Indian Elections Offences and Inquiries Act (XXXIX of 1920).

Statutory public servants.—Some functionaries have been, by local and special Acts, declared to be 'public servants' for the purpose of the Indian Penal Code.[5]

[1] Per *Straight*, J., in *Parmeshar Dat*, (1886) 8 All. 201.

[2] *Rambrishna Das*, (1871) 7 Beng. L. R. 446, 448, 16 W. R. (Cr.) 27.

[3] *Parmeshar Dat*, sup.

[4] *Subramanya v. Somasundara*, (1891) 15 Mad. 127.

[5] See the Police Act (V of 1861), s. 8; the Parsi Marriage and Divorce Act (XV of 1865), s. 23; the Oudh Taluqdars' Relief Act (XXIV of 1870), s. 22; the Cattle Trespass Act (I of 1871), s. 6; the Coroners Act (IV of 1871), s. 5; Broach Thakurs' Relief Act (XV of 1872), s. 17; the Land Revenue Act (XIX of 1873), s. 35; the Chota Nagpur Incumbered Estates Act (VI of 1876), s. 21; the Indian Museum Act (XXII of 1876), s. 14; the Embankment Act (XIII of 1877), s. 14; the Indian Forest Act (VII of 1878), s. 72; the Rangoon Port Commissioners' Act (XV of 1879), s. 64; the Pegu and Sittang Canal Act (II of 1881), s. 14; the Burma Forest Act (XIX of 1881), s. 71; the Broach and Kaira Incumbered Estates Act (XXI of 1881), s. 33; the Madras Forest Act (V of 1882), s. 69; the Presidency Small Cause Courts Act (XV of 1882), s. 52; the Burma Steam Boilers and Prime Movers Act (XVIII of 1882), s. 12 (3); the British Burma Pilots Act (XII of 1883), s. 5 (2); the Merchant Shipping Act (VII of 1880), s. 50, (V of 1883), s. 14 (2); the Inland Steam Vessels Act (VI of 1884), ss. 7 (3), 38 (2); the Inland Steamships Act (VII of 1884), ss. 9 (3), 37 (3); the Indian Telegraph Act (XIII of 1885), s. 31; the Central Provinces Government Wards Act (XVII of 1885), s. 12 (2); the Births, Deaths and Marriage Registration Act (VI of 1886), s. 14; the Allahabad University Act (XVIII of 1887), s. 18 (1); the Kanungos and Patwaris Act (IX of 1889), s. 17; the Railways Act (IX of 1890), ss. 5, 137 (1); the Prisons Act (IX of 1894), s. 23; the Sindh Incumbered Estates Act (XX of 1896), s. 35; the Glanders and Farcy Act (XIII of 1899), s. 4 (2); the Central Provinces Court of Wards Act (XXIV of 1899), s. 19 (2); the Assam Labour and Emigration Act (VI of 190 1), s. 4 (2); Act VIII of 1915, s. 116 C.; the Indian Registration Act (XVI of 1908), s. 84; the Victoria Memorial Act (X of 1903), s. 4; the Indian Census Act (XVI of 1910), s. 3 (2); the Dourine Act (V of 1910), s. 4 (2); the Indian Factories Act (XII of 1911), s. 4 (6); the Inland Steam Vessels Act (I of 1917), ss. 39 (2), 44 (3); the Indian Emigration Act (VII of 1922), ss. 3 (3), 5 (1), 6 (1); the Ranchi Mental Hospital Act (XIII of 1922), s. 11; the Indian Boilers Act (V of 1923), s. 5; the Workmen's Compensation Act (VIII of 1923), s. 20; the Indian Merchant Shipping Act (XXI of 1923), s. 280.

The Ajmere Government Wards Regulation (I of 1888), s. 11 (2). The British Baluchistan Forest Regulation (V of 1890), s. 36; the Assam Forest Regulation (VII of 1891), s. 69; the Angul District Regulation (I of 1894), s 56, III of 1913, s. 55 (3), the Upper Burma Forest Registration Regulation (II of 1897), s. 7 (2); the Upper Burma Oil-fields Regulation (VI of 1910), s. 12; the Hazrare Forest Regulation (III of 1911), s. 52.

The Bombay Civil Courts Act (Bom. Act XIV of 1869), s. 33; the City of Bombay Municipal Act (Bom. Act III of 1888), s. 521; the Bombay Court of Wards Act (Bom. Act I of 1905), s. 21 (2), the Bombay Local Boards Act (VI of 1923), s. 135.

The Civil Courts Act (Beng. Act VI of 1871), s. 33; the Bengal Court of Wards Act (Beng. Act IX of 1879), s. 59 A; the Chittagong Port Commissioner's Act (Beng. Act IV of 1887), s. 63; the Land Records Maintenance Act (Beng. Act III of 1895), s. 33; the Calcutta Municipal Act (Beng. Act III of 1899), s. 646; the Bengal Public Parks Act (II of 1904), s. 7; the Chittagong Port Act (Beng. Act V of 1914), s. 106; the Bengal Medical Act (Beng. Act VI of 1914), s. 14 (4); the Bengal Smoke-nuisances Act (Beng. Act I of 1916), the Bengal Food Adulteration Act (Beng. Act VI of 1919), s. 19.

The following are held to be statutory public servants.—A Municipal Inspector within the meaning of Madras District Municipal Act[1]; a Sanitary Inspector within the meaning of the Local Boards Act[2]; a Karkun employed to execute revenue processes and receive rent by a manager appointed under Act XV of 1872.[3]

The following are held to be not statutory public servants.—A police-officer under suspension within the meaning of s. 8 of Act V of 1861[4]; a Municipal Corporation within the meaning of s. 39 of Act V of 1877[5]; a person nominated by a Collector under s. 69 of the Bengal Tenancy Act[6]; a Goods Clerk of a railway company for the purpose of Chapter IX of the Penal Code[7]; a person assisting, in virtue of s. 11 of the Burma Village Act, the headman of a village in arresting a person.[8]

Not public servants.—A lessee of a village who has undertaken to keep an account of its forest revenues and pay a certain proportion to the Government, keeping the remainder for himself[9]; a Poddar of the Bank of Bengal[10]; a Mysore Policeman[11]; a peon employed by the manager of an estate under the charge of the Court of Wards[12]; a carter employed by Government[13]; an arbitrator appointed by the parties to a proceeding under s. 145 of the Criminal Procedure Code[14]; a clerk appointed by a Sub-Registrar and paid out of an allowance given to the latter[15]; a Municipal Water-Tax Collector[16]; a villager required to bring an accused person into a police-station in arrest under s. 11 of the Burma Village Act.[17]

The Madras Labour and Emigration Act (Mad. Act V of 1866), s. 3; the Madras Forest Act (Mad. Act V of 1882), s. 60, the City of Madras Municipal Act (Mad. Act I of 1884), s 56; the Madras District Municipal Act (Mad. Act IV of 1884), s 41, the Madras Local Boards Act (Mad Act V of 1884), s. 43; the Madras Rivers Conservancy Act (Mad. Act VI of 1884), s 23, the Madras Canals and Public Ferries Act (Mad. *Act II of 1890*), s 11; the Madras Medical Registration Act (Mad Act IV of 1914), s. 10 (3); the Madras City Municipal Act (Mad. Act IV of 1919), s. 405.

The U. P. Land Revenue Act (U. P. Act III of 1901), s. 27; the Bundelkhand Encumbered Estates Act (U. P. Act I of 1903), s. 33; the U P District Boards Act (U. P. Act III of 1906) s 41, the U. P. Court of Wards Act (U P Act IV of 1912), s. 33; the U P. Towns Areas Act (U. P Act II of 1914), s 13, the U. P. Steam Boilers Act (U. P. Act III of 1915), s. 32 (1), the U P Municipalities Act (U. P Act II of 1916), s 84, the U P Towns Improvement Act (U P Act VIII of 1919), s. 92

The Punjab Steam Boilers and Prime Movers Act (Punj Act II of 1902), s. 12 (3), the Punjab Military Transport, etc., Act (Punj. Act I of 1903), s. 4 (2)

The Burma Municipalities Act (Burma Act III of 1898), ss. 44, 139 (4); the Burma Forest Act (IV of 1902), s. 75, the Burma Canal Act (Burma Act II of 1905), s. 667; the Rangoon Port Act (Burma Act IV of 1905), s. 19; Rangoon Victoria Memorial Act (Burma Act I of 1908), s. 4; the Burma Entablement Act (Burma Act IV of 1909), s. 12, the Burma Medical Act (Burma Act I of 1916), s. 11 (3), the Burma *Oil fields Act (Burma Act I of 1918)*, s. 10, the Burma Rural Self-Government Act (Burma Act IV of 1921), s 74, the City of Rangoon Municipal Act (Burma Act VI of 1922), s. 237.

The Orissa Tenancy Act (Beh. and O. Act II of 1913), s. 79 (4); the Bihar Orissa Medical Act (Beh. and O. Act II of 1916), s. 14 (4); the *Assam Medical Act (Assam Act I of* 1916), s. 14 (4).

The C. P Slaughter of Animals Act (C P. Act IV of 1915), s. 3 (3)

[1] *Ramasami*, (1889) 13 Mad 131.

[2] *Tiruvengada Mudali*, (1898) 21 Mad. 428.

[3] *Irab Musa*, (1876) Unrep Cr. C. 117.

[4] *Dinanath Gangoly*, (1872) 8 Beng. L. R. App 88

[5] *The Municipal Corporation of the Town of Calcutta*, (1878) 3 Cal. 755.

[6] *Chatter Lal v Thakoor Persh.d*, (1891) 18 Cal. 518.

[7] *Zakaria*, (1898) P R No 9 of 1898

[8] *Nga Paw E*, (1916) 10 B L. T. 170, s.c. (1914-1916) 2 U B R. 122.

[9] *Ramjivan Jahajwan*, (1872) 12 B. H C 1

[10] *Modan Mohan*, (1878) 4 Cal. 376

[11] *Venkatapada*, (1879) 1 Weir 342.

[12] *Arayi*, (1883) 7 Mad 17

[13] *Narhari*, (1882) 7 Mad 18

[14] *Sankar Mahi*, (1902) 29 Cal 1084

[15] *Bhagwati Sahai*, (1905) 32 Cal. 674

[16] *Gabi*, (1904) 1 A. L J R 122 (note)

[17] *Nga Paw E*, (1914-1916) 2 U B. R. 122, s.c. 10 B L T 170.

PRACTICE.

Evidence.—Where the offence concerns any 'public serva to show "actual possession of the situation," and this is suf the proof that the duties or functions are actually discharged by to be such servant.

"Moveable property."

22. The words "moveable property" are inten corporeal property[1] of every desci land and things attached to the ea nently fastened to anything which the earth.

COMMENT.

The term 'property' conveys a compound idea composed of subject, and of the right to be exercised over it. It is everywh. Code so as to be applicable exclusively to "that which is its subje

The General Clauses Act of 1868 says that "moveable proper property of every description except "immoveable property." Registration Act says that "moveable property" includes standing crops and grass, fruit upon and juice in trees, and property description, except "immoveable property."[3]

The definition in the Penal Code is restricted to corporeal propert all choses in action. It differs from the definitions given in the two as it excludes incorporeal rights.

1. **'Corporeal property'** is property which may be perceived by in contradistinction to incorporeal rights, which are not so perceivable tions of all kinds. Thus, salt produced on a swamp,[4] and papers fo of the record of a case,[5] are property within the meaning of this sectior

In a recent case the question arose, but was not decided, whethe received by post could be considered "moveable property" of the receiv ter addressed to W was handed by a postman to W, who was at the time i in the occupation of H. W read the letter, and put it on a table in the i left it there. H took the letter, and subsequently attempted to file it as a attached to an affidavit made by him in a suit for judicial separation bet and his wife, for the purpose, as he afterwards stated, "of strengthening H case and of improving his own position." The Court, however, refused to the letter. It was held that in the circumstances H could not be convic dishonest misappropriation of property with respect to his retention of the le

2. **'Land and things attached to the earth.'**—This section does not ex "earth and things attached to the earth," but "land and things attached to earth"; "land" and "earth" are not synonymous terms, and there is a p distinction between "the earth" and "earth." By severance things that immoveable become moveable, and it is perfectly correct to call those things attac which can be severed; and undoubtedly it is possible to sever earth fr the earth, and attach it again thereto. Earth, that is soil and all component parts of the soil, inclusive of stones and minerals, when severed fr the earth or land to which it was attached, is moveable property capable of bei the subject of theft.[7] Any part of "the earth" whether it be stones or sand

[1] 1st Rep., s. 82.
[2] Act I of 1868, s. 2 (6)
[3] Act XVI of 1908, s. 3.
[4] *Tamra Ghantaya*, (1881) 4 Mad. 228.
[5] *Ramaswami Aiyar* v. *Vaithilinga Mud* (1882) 1 Weir 28.
[6] *Harris*, (1917) 40 All. 119.
[7] *Shivram*, (1891) 15 Bom. 702.

the ultimate end, good or bad, which a person hopes to secure; his intention is concerned with the immediate effects of his acts. End cannot justify the means, in other language, the motive does not justify the intention. Take the case of a scoundrel or a man of bad character, whom it might be desirable to destroy on the spot, but if a person takes the law into his own hands and kills him, none the less he is guilty of murder.

"Fraudulently."

25. A person is said to do a thing fraudulently if he does that thing with intent to defraud,[1] but not otherwise.

COMMENT.

"As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist; for it leaves it to be determined,...whether the word 'defraud'...implies the deprivation or intended deprivation of property as a part or result of the fraud."[1]

The word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part.[2]

1. **'Intent to defraud.'**—The word 'intent,' by its etymology, seems to have metaphorical allusion to archery, and implies 'aim' and thus connotes not a casual or merely possible result—foreseen perhaps as a not improbable incident, but not desired—but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive, without which the action would not have been taken.[3] The terms 'fraud' and 'defraud' are not defined in the Penal Code. The word 'defraud' is of double meaning in the sense that it either may or may not imply deprivation, and, as it is not defined, its meaning must be sought by a consideration of the context in which the word 'fraudulently' is found.[4] Sir James Stephen, in his History of the Criminal Law of England,[5] observes: "There has always been a great reluctance amongst lawyers to attempt to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. *I shall not attempt to construct a definition which will meet every* case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intend to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive, or in some cases mere secrecy; and, [illegible] expose some person [illegible] ns of that deceit of secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end, though this, as I have already explained, does not prevent it from being intentional. A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent."

[1] Per Maclean, C. J., in *Abbas Ali*, (1896) 25 Cal. 512, 521, F.B.

[2] *Ibid.*

[3] Per Batty, J., in *Bhagwant* v. *Kedari*, (1900) 25 Bom. 202, 226, s.c. 2 Bom. L. R. 986, 1000.

[4] *Abbas Ali*, sup., 521.

[5] Vol. II., p. 121. *Balkrishna Vaman*, (1913) 15 Bom. L. R. 708, 713, 2 Bom. Cr. C. 115, 120.

loss,'[1] but not the illegal seizure and impounding of cattle, even though it was effected with the malicious intent of subjecting the owners to additional expense, inconvenience, and annoyance.[2] Merely permitting cattle to stray does not establish any intention of causing 'wrongful loss' to the public or any person.[3]

Secreting a document.—Where the plaintiff, in a suit referred to arbitration, with a view to prevent a witness from referring to an endorsement on a bond, snatched up the bond which was lying beside the arbitrator, ran away, and refused to produce it, it was held that it could hardly be inferred from those circumstances that the act of the accused was prompted by any desire to cause 'wrongful loss' or 'wrongful gain.'[4]

Breach of a condition does not amount to 'wrongful loss.'—Where a person who purchased rice from a famine-relief officer at a certain rate, on condition that he should sell it at a pound the rupee less did not sell it at the rate agreed upon, but at four pounds the rupee less, it was held that no wrongful gain or wrongful loss had been caused to anyone within the meaning of this section. The rice having been sold to the accused, and he having paid for it, it was not unlawful for him to sell it again at such prices as he thought fit.[5]

"Dishonestly."

24. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly."

COMMENT.

From this definition it will appear that the term 'dishonestly' is not used in the Code in its popular significance. Unless there is wrongful gain to one person, or wrongful loss to another, an act would not be 'dishonest.' The word 'dishonestly' is used as bearing relation with property. The 'intention' under the section must be to cause wrongful gain or wrongful loss to a person. "The word 'intent,' by its etymology, seems to have metaphorical allusion to archery, and implies 'aim' and thus connotes not a casual or merely possible result—foreseen *perhaps as a not improbable incident, but not desired—but rather connotes* the one object for which the effort is made—and thus has reference to what has been called the dominant motive, without which the action would not have been taken."[6]

The word 'dishonestly' occurs alone in the definition of theft (s. 378), extortion (s. 383), robbery (s. 390), criminal misappropriation (s. 403), criminal breach of trust (s. 405), and receiving stolen property (s. 411). It occurs with the word 'fraudulently,' defined in the next section, in several offences such as cheating (s. 415), forgery (s. 463), and counterfeit coins (ss. 246, 247).

The word 'fraudulently' occurs alone in the definition of many offences, chief of which are offences against public justice (ss. 206-208, 210), weights and measures (ss. 264-266), and counterfeit coins and stamps (ss. 242, 243, 252, 253, 261-263).

The law takes into account the primary or immediate intention and not the secondary or remote. Thus, if A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration, he takes it dishonestly and commits theft.[7] As every man is presumed to intend the natural consequences of his act, it is from the consequences that the Court has often to presume the intention of the accused in doing a particular act. The law does not look to the motive: it looks only to the intention. Motive and intention are two different things. Motive is directed to

[1] *Preonath Banerjee*, (1866) 5 W. R. (Cr.) 68.
[2] *Aradhun Mundul* v. *Myan Khan Takadgeer*, (1875) 24 W. R. (Cr.) 7.
[3] *Toorebajkhan*, (1868) Unrep. Cr. C. 11.
[4] *Subramania Ghanapati*, (1881) 3 Mad. 261.
[5] *Lal Mahomed*, (1874) 22 W. R. (Cr.) 82.
[6] Per Batty, J., in *Bhagwant* v. *Kedari*, (1900) 2 Bom. L. R. 986, 1000, 25 Bom. 202, 226.
[7] Section 378, ill. (i).

the ultimate end, good or bad, which a person hopes to secure; his intention is concerned with the immediate effects of his acts. End cannot justify the means, in other language, the motive does not justify the intention. Take the case of a scoundrel or a man of bad character, whom it might be desirable to destroy on the spot, but if a person takes the law into his own hands and kills him, none the less he is guilty of murder.

"Fraudulently."

25. A person is said to do a thing fraudulently if he does that thing with intent to defraud.[1] but not otherwise.

COMMENT.

"As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist; for it leaves it to be determined,...whether the word 'defraud'...implies the deprivation or intended deprivation of property as a part or result of the fraud."[2]

The word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part.[3]

1. **'Intent to defraud.'**—The word 'intent,' by its etymology, seems to have metaphorical allusion to archery, and implies 'aim' and thus connotes not a casual or merely possible result—foreseen perhaps as a not improbable incident, but not desired—but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive, without which the action would not have been taken.[3] The terms 'fraud' and 'defraud' are not defined in the Penal Code. The word 'defraud' is of double meaning in the sense that it either may or may not imply deprivation, and, as it is not defined, its meaning must be sought by a consideration of the context in which the word 'fraudulently' is found.[4] Sir James Stephen, in his History of the Criminal Law of England,[5] observes: "There has always been a great reluctance amongst lawyers to attempt to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intend to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit of secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is

[illegible]

tion for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent."

[1] Per Maclean, C. J., in *Abbas Ali*, (1896) 25 Cal. 512, 521, F.B.

[2] *Ibid.*

[3] Per Batty, J., in *Bhagwant* v. *Kedari*, (1900) 25 Bom. 202, 226, s c. 2 Bom. L. R. 986, 1009.

[4] *Abbas Ali*, sup., 521.

[5] Vol. II., p. 121; *Balkrishna Yaman*, (1913) 15 Bom. L. R. 708, 713, 2 Bom. Cr. C. 115, 120.

Approving these observations, the Allahabad High Court has laid down that where there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud.[1] A somewhat wider interpretation has been placed on the word 'fraud' in *Haycraft* v. *Creasy*,[2] which is expressly followed by the Bombay High Court.[3] Le Blanc, J., in the judgment, says:—"By *fraud*, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other is immaterial."

The expression 'intent to defraud' implies conduct coupled with intention to deceive and thereby to injure; in other words, 'defraud' involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him but not necessarily deprivation of property.[4] Where the accused, after the execution and registration of a document which was not required by law to be attested, added his name to the document as an attesting witness, but without putting a date or alleging actual presence at the time of its execution, it was held that this act was neither fraudulent nor dishonest and that the accused was therefore not guilty of forgery.[5] Similarly, where the accused attested a document, without the authority of the executant, after its execution, to prevent other people from setting up a claim to the property in the possession of the accused under the document, it was held that he was not guilty of forgery for there was no intention to defraud where no wrongful result was intended or could have arisen from the act of the accused.[6] The accused, in order to obtain recognition from a Settlement Officer that they were entitled to the title of "Loskur," filed a *sannad* before that Officer purporting to grant that title. This document was found not to be genuine and they were convicted under ss. 471 and 464 by the Sessions Judge. It was held that they could not be found guilty as their intention was not to cause wrongful gain or wrongful loss to any one, but to produce a false belief in the mind of the Settlement Officer that they were entitled to the dignity of "Loskur" and that this could not be said to constitute an intention to 'defraud.'[7]

A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would be sufficient to support a conviction.[8] In order to prove an intent to defraud it is not at all necessary that there should have been some person defrauded, or who might possibly have been defrauded. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque either to try his credit, or to imitate his handwriting, there would be no *intent* to defraud, though there would be parties who might be defrauded; but where another person has no account at his bankers, but a man *supposes* that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded.[9] When it is material to prove an intent to defraud, evidence may be given of similar offences by the defendant.[10]

'Fraudulently': 'Dishonestly.'—There is a real distinction between the meaning of the terms 'fraudulently' and 'dishonestly'; the former denotes an intent to deceive. The production of a forged bond by a person in a suit with the intent to make the Court believe that he was entitled to recover money upon the basis of the particular document produced, though may not be dishonest within the meaning of s. 24, may yet be fraudulent within the meaning of s. 471.[11]

[1] *Muhammad Saeed Khan*, (1898) 21 All. 113, 115.

[2] (1801) 2 East 92, 108.

[3] *Vithal Narayan*, (1886) 13 Bom. 515n.; followed in *Lolit Mohan Sarkar*, (1894) 22 Cal. 313, 322, and in *Khandusingh*, (1896) 22 Bom. 768.

[4] *Surendra Nath Ghose*, (1910) 38 Cal. 75, 69, s.c. 14 C. W. N. 1076.

[5] *Surendra Nath Ghose*, (1910) 38 Cal. 75, s.c. 14 C. W. N. 1076.

[6] *Manika Asari*, [1915] M. W. N. 278.

[7] *Jan Mahomed*, (1884) 10 Cal. 584.

[8] *Dhunum Kuze*, (1882) 9 Cal. 53, 60.

[9] Per Maule, J., in *Charles Nash*, (1852) 1 Den. C. C. 493, 499.

[10] *Simmonds*, (1909) 2 Cr. App R. 301.

[11] *Kedar Nath Chatterjee*, (1901) 5 C.W.N. 897.

"Reason to believe."

26. A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing, but not otherwise.

COMMENT.

The expression "reason to believe" occurs in ss. 411 to 414.

See Comment on s. 414 where the word 'believe' is distinguished from 'suspect.'

"Property in possession of wife, clerk or servant."

27. When property is in the possession of a person's wife,[1] clerk or servant on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

COMMENT.

Object.—The object of the framers of the Code in the Explanation is to lay down a few rules, in accordance with the general sense of mankind, for the purpose of preventing any difference of opinion arising in cases likely to occur very often. The possession by a clerk or servant of that which belongs to the master, or of that which, whether it belongs absolutely to his master, or to another person, the clerk or servant holds for his master and on his account, is the master's possession. The possession of the servant must be on account of his master to make the master liable. A pistol was discovered lying on the floor of a shop which could not reasonably be expected to be dealing in such articles. At the time of the discovery the shop was in charge of a servant and there was no proof that he was holding the pistol for his master. It was held that the master could not be convicted.[1]

Principle.—This section abrogates the distinction made by the English law between 'possession' and 'custody.' But it does not express the complete thought of the legislature on the question of possession.[2]

According to English law 'possession' is used as regards the owner, whereas 'custody' is used to mean "such a relation towards the thing as would constitute possession if the person having custody had it on his own account"[3] What would be a mere 'custody' under English law would be 'possession' under the Code.

Corporeal property is in a person's possession when he has such power over it that he can exclude others from it, and intends to exercise, if necessary, that power on behalf of himself or of some person for whom he is a trustee. But a wife, a clerk, or a servant, has not this power or intention to deal with things in their charge as owners. They are, therefore, said to have custody merely according to English law. The word 'custody' means "such a relation towards a thing as would constitute possession if the person having custody had it on his own account."[4]

A man's goods are in his possession, not only while they are in his house or on his premises, but also when they are in a place where he may usually send them (as when horses and cattle feed on common land), or in a place where they may be lawfully deposited by him, as if he buries money or ornaments in his own land, or puts them in any other secret place of deposit.

1. 'Wife.'—A permanent mistress may be regarded as a 'wife.' When a man furnishes a house for his mistress' occupation, he may reasonably be presumed to be in possession of all articles therein which can reasonably be inferred to belong to him or to be in the possession of his mistress on his behalf. But the

[1] *Chhatey*, (1922) 20 A. L. J. R. 855.
[2] *Fateh Chand*, (1916) 44 Cal. 477.
[3] Stephen's Criminal Law, 210, 211.
[4] *Ibid.*

inference must be inapplicable to articles of which the mistress is in possession illegally or contrary to the provisions of law, especially when the article in question is such that he might well remain in ignorance that it was in his mistress' possession.[1]

"Counterfeit."

28. A person is said to "counterfeit" who causes one thing[1] to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.

COMMENT.

The word 'counterfeit' occurs in offences relating to coin provided in Chapter XII.

Under this section it is not necessary to show that deception actually took place. Intention to practise deception by causing one thing to resemble another is quite sufficient.

1. "Thing."—The thing may be a coin or a piece of metal. Its value is immaterial. The counterfeit coin may be more valuable so far as money value is considered than the coin for which it is intended to pass.

When the coins counterfeited are such imitations of the genuine coin as might deceive people on account of the resemblance, the presumption referred to in Explanation 2 arises.[2]

Amendment.—Explanations 1 and 2 were substituted for the original explanation by Act I of 1889, s. 9.

"Document."

29. The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used,[1] or which may be used, as evidence of that matter.

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

ILLUSTRATIONS.

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

[1] *Banwari Lal*, (1914) P. R. No. 20 of 1914. [2] *Qadir Baksh*, (1907) 30 All. 93.

Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

ILLUSTRATION.

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

COMMENT.

The term 'document' seems to include everything done by the pen, by engraving, by printing, or otherwise, whereby is made on paper, parchment, wood, or other substance a representation of words or other equivalents addressed to the eye. This word occurs in ss. 167, 175, 192, 201, 461 and 479.

The definition here given seems to be faulty; because the "matter described" is manifestly not the "document." According to English law the material on which words are written is said to be a 'document.' Under the Code it is the matter written and not the material that is called a 'document.' But the matter should be intended to be used as evidence of that matter. A writing is a document. Words printed, lithographed, or photographed are documents. A map or plan is a document. An inscription on a metal plate or stone is a document. A caricature is a document. Letters or marks imprinted on trees and intended to be used as evidence that the trees had been passed for removal by the Ranger of a forest, are a document [1] A hammer for marking sleepers is a document.[2]

An avouchment, whether written or printed, of the character or quality of a chattel, is not a document which, if false, would be a forgery, *e.g.*, the false signature of an artist's name to a picture,[3] or enclosing spurious goods in a wrapper imitating a trade mark.[4] But an instrument, though not signed by all parties thereto, fulfils the requirements of the definition of "document."[5]

Section 3 of the Indian Evidence Act says that 'document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means intended to be used, or which may be used, for the purpose of recording that matter.

Section 3 (16) of the General Clauses Act says that 'document' shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.

1 **'Intended to be used.'**—A writing which is not legal evidence of the matter expressed, may yet be a document, if the parties framing it *believed* it to be, and intended it to be, evidence of such matter [6]

Amendment.—The present explanations were substituted by Act I of 1889, s. 9.

"Valuable security."

30. The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby

[1] *Krishtappa Khandappa*, (1925) 27 Bom. L. R. 599.
[2] *A. V. Joseph*, (1924) 3 Rang. 11.
[3] *Thomas Closs*, (1858) Dears. & B. 460.
[4] *John Smith*, (1858) 27 L. J. (M. C.) 225.
[5] *Ramaswami Ayyar*, (1917) 41 Mad. 589.
[6] *Sheefait Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. 12.

any person acknowledges that he lies under legal liability, or has not a certain legal right.

ILLUSTRATION.

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security."

COMMENT.

The words "valuable security" denote a particular class of documents, *viz.*, such documents as create or extinguish legal rights. This expression occurs in ss. 329-331, 347, 348, 420, 467 and 477.

Copy.—The term "valuable security" applies to the original document, and not to a copy.

Cancelled instrument.—A cancelled instrument is not a valuable security, "for an instrument available for the purpose for which it was made is clearly what the clause intended; a cancelled instrument, therefore, though by the cancelling of it a legal right may be 'extinguished,' inasmuch as the instrument upon which such right depended is thereby avoided, does not fall within its scope."[1]

Unstamped document.—The fact that a document has not been stamped or not properly stamped, and is not, therefore, receivable in evidence, does not prevent its being a valuable security.[2] This is so because such a document "purports to be" a valuable security. A document whereby a person acknowledges himself to be under a legal liability is a valuable security.[3]

Unregistered document.—An unregistered document, though it may not be a valuable security until the registration is completed still "purports" to be a valuable security.[4]

Valuable securities.—A settlement of accounts in writing, though not signed by any person, and containing no promise to pay[5]; a kabulayat[6]; a deed of divorce[7]; a *hundi*[8]; and a counterfoil of a paying-in slip purporting to be an acknowledgment of receipt of a sum of money by a Bank[9] are valuable securities.

A signature purporting to be that of B was forged on each of two printed forms, one intended to be used as a promissory note and the other as a receipt. The blank spaces left for entering particulars of the amount, the name of the person in whose favour the document was executed, the date and place of execution and the rate of interest, were not filled in; a one-anna stamp was affixed on the top of each paper, but the stamp was neither signed across nor cancelled in any way. It was held that the documents, as they stood, were valuable securities.[10] A document, though not signed by all the parties thereto, is a valuable security if it imposes an obligation on the actual executants and an option on the others and there is no condition precedent to be found in the document that the document is to be inoperative against the executants until all the parties executed it.[11]

Not valuable securities.—The copy of a lease,[12] a sannad purporting to confer a personal title,[13] a postal receipt for an insured parcel,[14] and a copy of a decree passed by a Court,[15] are not valuable securities.

[1] 1st Rep., s. 89.
[2] (1873) 7 M. H. C. App. 26; *Ramasami*, (1888) 12 Mad. 148.
[3] *Ida Jolsha*, (1917) 3 P. L. J. 386.
[4] *Kashi Nath Nath*, (1897) 25 Cal. 207.
[5] *Kapalsrayo Sarayo*, (1864) 2 M. H. C. 247.
[6] (1866) 6 W. R. Cr. L. 2; *Nasiruddin*, 1883) 3 A. W. N. 59.
[7] *Azimoeddeen*, (1869) 11 W. R. (Cr.) 15.
[8] *Lekhraj*, (1910) P. W. R. No. 65 of 1910.
[9] *Turner*, (1924) 29 C. W. N. 868.
[10] *Jaswahir Thakur*, (1916) 38 All. 430.
[11] *Ramaswami Ayyar*, (1917) 41 Mad. 639.
[12] *Khushal Hiraman*, (1867) 4 B. H. C. (Cr. C.) 29; *Naro Gopal*, (1868) 5 B. H. C. (Cr. C.) 56.
[13] *Jan Mahomed*, (1884) 10 Cal. 534.
[14] *Arura*, (1912) P. L. R. No. 209 of 1913; *Sadho Lal*, (1916) 3 P. L. W. 99.
[15] *Charu Chandra Ghose*, (1923) 39 C.L.J. 12.

"A will."

31. The words "a will" denote any testamentary document.

COMMENT:

A "will" is a disposition or declaration by which the person making it provides for the distribution or administration of property after his death. It does not take effect until the testator's death, and is always revocable by him.

The Indian Succession Act[1] defines 'will' as "the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death." The General Clauses Act[2] says that 'will' "shall include a codicil and every writing making a voluntary posthumous disposition of property." This term occurs in ss. 467 and 477 of the Code.

Words referring to acts include illegal omissions.

32. In every part of this Code, except where a contrary intention appears from the context, words which refer to acts[1] done extend also to illegal[2] omissions.[3]

COMMENT:

This section simply says that acts include illegal omissions.

1. 'Acts.'—An 'act' generally means something voluntarily done by a person. 'Act' is a determination of the will, producing an effect in the sensible world. This word includes writing and speaking, or, in short, any external manifestation. In the Code, the term 'act' is not confined to its ordinary meaning of positive conduct of doing something, but includes also illegal omissions.

2. 'Illegal.'—See *post*, s. 43.

3. 'Omission.'—This word is used in the sense of intentional non-doing. Thus, according to this section, 'act' includes intentional doing as well as intentional non-doing. The omission or neglect must no doubt be such as to have an active effect conducing to the result, as a link in the chain of facts from which an intention to bring about the result may be inferred.[3] The Code makes punishable omissions which have caused, which have been intended to cause, or which have been known to be likely to cause, a certain evil effect in the same manner as it punishes acts, provided they were illegal. And when the law imposes a duty to act on a person, his illegal omission to act renders him liable to punishment.[4]

"Act." "Omission."

33. The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.

COMMENT:

The effect of s. 32 and this section taken together is that the term 'act' comprises one or more acts or one or more illegal omissions.

An act may constitute an offence under two or more enactments.[5]

Acts done by several persons in furtherance of common intention.

34. When a criminal act is done by several persons,[1] in furtherance of the common intention of all,[2] each of such persons is liable for that act in the same manner as if it were done by him alone.[3]

[1] X of 1865, s. 3.
[2] X of 1897, s. 3 (57).
[3] *Thornotti Madathil Poker*, (1886) 1 Weir 495.
[4] *Latifkan*, (1895) 20 Bom. 294.
[5] *Seaka Ayyar v. Venkatrabba Chetty*, (1923) 33 M. L. T. 263.

COMMENT.

This section deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself.[1] The section does *not create a distinct offence; it lays down only a principle of liability.*[2]

Object.—This section is framed to meet a case in which it may be difficult [illegible] or to prove exactly [illegible] are deemed guilty [illegible] rangement, support, and protection to the person actually committing the act.

This section has no application in the construction of ss. 397 and 398, though it may be read with ss. 392 and 395 to determine the substantive offence which is created.[4] It cannot be used to make a co-accused liable to the minimum punishment laid down in s. 397 because one accused is so liable.[5]

Principle.—Where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility.[6] It is a well recognized canon of criminal jurisprudence that the Courts cannot distinguish between co-conspirators, nor can it inquire, even if it were possible, as to the part taken by each in the crime.[7] All are guilty of the principal offence, not of abetment.[8] If two or more persons combined in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured [illegible] probable and natural results of the combination of acts in which he joined.[9] But a party not cognizant of the intention of his companion to commit murder is not liable, though in his company, to do an unlawful act.[10] For instance, if three persons go out to commit a felony, and one of them unknown to the others, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out.[11]

Scope.—This section does not require proof that any particular accused was responsible for the commission of the actual offence.[12]

The section provides not only for liability to punishment, but also for subjec- [illegible] foreigner in foreign territory initiates an offence [illegible] territory, he is, if found within British territory, [illegible] Court within whose jurisdiction the offence was completed.[13]

1. **'Criminal act is done by several persons.'**—The section contemplates the case where more persons than one share in the doing of the act, and it is necessary to bear in mind the definition of 'act' given in s. 33 and also the provisions of

[1] *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 158, 52 Cal. 197, P.C.

[2] *Barendra Kumar Ghosh*, (1923) 28 C. W. N. 170, 38 C. L. J. 412.

[3] *Nga Po Sein*, (1902) 1 L. B. R. 233.

[4] *Ali Mirza*, (1923) 51 Cal. 265.

[5] *Po Myaing*, (1920) 10 L. B. R. 269; *Dalli*, (1924) 47 All. 59.

[6] *Ganesh Sing* v. *Ram Raja*, (1869) 3 Beng. L. R. (P. C.) 44, 45.

[7] *Ibid.*

[8] *Pha Laung*, (1906) 3 L. B. R. 264; but see *Po Ya*, (1919) 13 B. L. T. 44.

[9] [illegible] 04. See [illegible] id. [illegible] 41 Cal. 751.

[10] *Chhotalal Babar*, (1912) 14 Bom. L. R. 147, 1 Bom. Cr. C. 83.

ss. 35, 37 and 38.[1] A 'criminal act' means that unity of criminal behaviour which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.[2]

The section only comes into operation when there is a substantive charge of an offence having been committed.[3]

2. **'In furtherance of the common intention of all.'**—Acts done in furtherance of common intention make all equally liable for the results of all the acts of others. Mahmood, J., in *Dharam Rai's case*[4] said: "This section was the subject of consideration impliedly in the case of *The Queen* v. *Gora Chand Gopee.*[5] At p 456, Sir Barnes Peacock clearly laid down the rule of law that mere presence of persons at the scene of an offence is not, *ipso facto*, sufficient to render them liable to any rule such as s. 34 enunciates, and that 'the furtherance of a common design' was an essential condition before such a rule applied to the case of an individual person. It was probably in consequence of this expression of view from such a high authority that the Legislature by s. 1 of Act XXVII of 1870, repealed the original s. 34; and in substituting another section therefor, inserted the important words 'in furtherance of the common intention of all,' as representing the condition precedent to each of such persons being held liable for the crime in the same manner as if it were committed by him alone. This change in the law is very significant, and it indicates to my mind that the original section having been found to be somewhat imperfectly worded, these additional words were introduced to draw a clear distinction that unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate persons who take no part in that particular act. We have the opinion of an American jurist on the point, whom Mr. Mayne, in his Commentary on the Indian Penal Code, quotes (Bishop, s. 439), where that learned author, laying down the rule, goes on to say:—'But if the wrong done was a fresh and independent wrong, springing wholly from the mind of the doer, the other is not criminal therein, merely because when it was done he was intending to be a partaker with the doer in a different wrong.' This seems to me to be the right interpretation of the words in '*furtherance of the common intention of all*,' as they occur in s 34 of the Indian Penal Code. There is another section in that Code which is somewhat similarly worded, and seems to turn upon the same principle, so far as this particular point is concerned. That section is 149, which, instead of using the words quoted above, uses the words 'in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object.' It will be observed that while s. 34 limits itself to the furtherance of the common intention, s. 149 goes further, inasmuch as it renders every member of an unlawful assembly guilty of the offence when it is likely that such an offence might have been committed in prosecution of the common object. I have referred to this section to show that it [illegible] s. 34; and even upon [illegible] v. *Sabed Ali*[6] held [illegible] an unlawful assembly would not render all the other members liable therefor, unless it was shown that the assembly did understand and realize either that such offence would be committed or was likely to be necessary for the common object." Thus to establish guilt under s. 34 it is necessary to prove a common intention as distinguished from a common object as in s. 149 and it must be shown that the criminal act was committed in furtherance of that intention.[7]

[1] *Nga Tun Baw*, (1907) 14 Burma L. R. 264.

[2] *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 162, 52 Cal. 197, P.C., overruling *Nirmal Kanta Roy*, (1914) 41 Cal. 1072 and *Profulla Kumar Mazumdar*, (1922) 50 Cal. 41.

[3] *Reazuddi*, (1912) 16 C. W. N. 1077.

[4] (1887) 7 A. W. N. 236, 237.

[5] (1866) Beng. L. R., Sup. Vol., 443, 5 W. R. (Cr.) 45.

[6] (1873) 11 Beng. L. R. 347, F.B.

[7] *Ritbaran Singh*, (1917) 4 P. L. W. 120.

Recently the Privy Council observed that the words 'in furtherance of the common intention of all' introduced as an essential part of the section the element of a common intention prescribing the condition under which each might be criminally liable when there are several actors.[1]

A furtherance of a common design is a condition precedent for convicting each of the persons who take part in the commission of a crime, and the mere fact that several persons took part in a crime in the absence of a common intention is not sufficient to convict them of that crime. Thus, where several persons joined together in striking another but there was no evidence to show that the common intention of all was to cause grievous hurt, the conviction of all of them for the same offence was held to be bad in law.[2] It is not sufficient for joint responsibility for an offence under this section that the offence actually committed was likely to occur as a result of the several persons acting together; but that the existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention.[3] Where there is no direct evidence of common intention it must be judged and decided by a consideration of all the facts proved and the circumstances surrounding the case.

It is essential to consider, first, the common intention of all, and, secondly, the individual intention of each accused as disclosed by the circumstances.[4] The fact that a criminal act done in furtherance of the common intention of several persons was the act of a single individual does not render the provisions of this section inapplicable.[5]

Cases.—Where each of several persons took part in beating a person so as to break eighteen ribs and cause his death, each of them was convicted of murder.[6] Where several persons join in beating another with *lathis* (sticks), and inflict such injuries on him that he dies shortly after the beating, all are guilty of murder without distinction.[7] But where three persons assaulted the deceased and gave him a beating, in the course of which one struck him a blow on the head, which resulted in death, it was held that, in the absence of proof that the prisoners had the common intention to inflict injury likely to cause death, they could not be convicted of murder but of voluntarily causing grievous hurt.[8] In a fight which ensued over the division of property between three persons, one of them was hit by a *lathi* (stick) and died. It did not appear which of the other two had struck the blow which caused his death. It was held that the accused were not acting in concert and none of them could be convicted of murder[9] A and B conspired to waylay and attack C. At a signal from A, B struck C. The blow happened to fall on D who was close by. A then joined with B in attacking C. D afterwards died as a result of the blow struck by B. It was held that this section did not apply until A actually joined in attacking C. Up to then A could be treated only as an abettor, and he could not be held responsible for the killing of D, as the act done was different from the act abetted and not a probable consequence of the abetment[10] The common intention must cover the act done by all the several persons.[11] During the course of a political trial police were posted in different places in the

[1] *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 162, 52 Cal. 197, P.C.

[2] *Dhian Singh*, (1912) 9 A. J. R. 180; *Kotoora Thevan*, (1923) 26 M. L. J. R. 311. See *Jhakri Chamar*, (1912) 16 C. L. J. 440.

[3] *Maung Gyi*, (1923) 1 Rang. 390, *Nga Po Sein*, (1902) 1 L. B. R. 233, disapproved.

[4] *Shwe On*, (1919) 10 L. B. R. 117; *Foez-ullah*, (1920) 25 C. W. N. 24.

[5] *Ranchhod Sureang*, (1924) 26 Bom. L. R. 354, 49 Bom. 84.

[6] *Gour Chunder Das*, (1875) 24 W. R. (Cr.) 5; *Ralya v. Arjan*, (1886) P. R. No. 2 of 1887. See *Jamiruddi Biswas*, (1912) 16 C.W.N. 909.

[7] *Sipahi Singh*, (1922) 45 All. 130; *Umed*, (1923) 45 All 727; *Allah Ditta*, (1920) 4 L. L. J. 276.

[8] *Duma Baidya*, (1896) 19 Mad. 483; *Mala Singh*, (1922) 5 L. L. J. 121.

[9] *Bhagwana*, (1919) 17 A. L. J. R. 1005.

[10] *Po Ya*, (1919) 13 B. L. T. 44, s.c. 10 L. B. R. 99.

[11] *Nga Tun Baw*, (1907) 1 U. B. R. (P. C.) 5. See *Salmon*, (1880) 6 Q. B. D. 79.

Court to keep order. Large crowds gathered, and some men who were not permitted to go in the Court room, had some sort of *melee* with the police. Several men were seen assaulting individual policemen in different parts of the premises. It was held that each assault was independent of other similar assaults and this section had no application as the assaults on individual policemen were not the [illegible] accused were thereupon tried for the offence of murder. It was held that the accused were not guilty of murder, for the separation of the two accused from the gang having been prior to the murder, there could be no common object.[2] Four men joined in committing a robbery. Two of them went from house to house bullying and ill-treating the inmates and making them give up their valuables while the other two kept guard on the house tops. Of the latter pair one was armed with a gun, which he fired off several times. When the villagers began to make it unpleasant for the robbers by throwing stones, he shot and killed one of them who took a prominent part in the stone throwing. It was held that those who went on bullying were not liable for the act of the one who shot the villager as the act which caused the death was not done by several persons but only by one.[3] One D was killed by one blow on his head with some sharp weapon. The accused B and M with others armed with *gandasas* had invaded the compound where D was sleeping, and had immediately assaulted D and that one of their number struck him on the head and killed him. The accused's intention was to insult and disgrace one K. The accused M, who gave the fatal blow, was convicted under s. 302 and B was convicted of abetment of grievous hurt under s. 325 read with s. 109. As both the accused had armed themselves with deadly weapons B must have known that in case of opposition the weapons would be used and in all probability grievous hurt would be caused.[4]

The appellant was charged under s. 302 with the murder of a Post-master. At the trial the evidence showed that while the Post-master [illegible] money, three men, of whom the appellant was [illegible] called upon him to hand over the money; he [illegible] trial Judge directed the jury that if they were satisfied that the Post-master was killed in furtherance of common intention of all three men, then the appellant was guilty of murder, whether he fired the fatal shot or not. It was held that upon the true construction of this section especially having regard to ss 33, 37 and 38, the direction was correct.[5] Where five persons armed with big sticks or clubs joined together to forcibly carry off a girl and grievous hurt was caused to persons attempting to prevent the girl being carried off by any one of them it was held that all must be regarded as being responsible for the hurt caused.[6]

Where both master and servant were present at the sale of *ganja* in contravention of the terms of his licence and the servant received the money paid for the *ganja*, it was held that the servant was guilty of the offence of selling *ganja* without a licence by the operation of this section.[7]

English cases.—Where Lord Dacre agreed with several persons to hunt in another's park for deer, and to kill all who might resist, one of the party having killed the keeper, all were held to be guilty of the murder, though Lord Dacre was a quarter of a mile distant, and knew nothing of the individual blow.[8]

[1] *Fateh Chand*, (1922) 20 A. L. J. R. 706.
[2] *Hari Bijal*, (1915) 17 Bom. L. R. 906, 3 Bom. Cr. C. 118.
[3] *Harnam Singh*, (1919) P. R. No. 21 of 1919.
[4] *Bahal Singh*, (1918) P. R. No. 24 of 1919.
[5] *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 162, 52 Cal. 197, P.C.; *Said Nur*, (1925) 1 L. C. 531, 536.
[6] *Allah Rakha*, (1925) 2 L. C. 34.
[7] *Keshwar Lal Shaha* v. *Girish Chunder Dutt*, (1902) 29 Cal. 496.
[8] *Dacre's case*, Palm. 35, 1 Hale P. C. 439.

Three soldiers went together to rob an orchard, two got upon a pear tree and the third stood at the gate with a drawn sword in his hand. The owner's son coming by collared the man at the gate and asked him what business he had there, and thereupon the soldier stabbed him. It was held that he had committed murder, but not those on the tree. It would have been otherwise if they had all come thither with a general resolution against all opposers.[1] Two soldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refused, alleging the unreasonableness of the hour; whereupon they went away uttering imprecations. Some time after one of them rushed in, the other remaining out, and renewed his demand for beer. On his refusing to depart the landlord pushed him towards the outer door where the other soldier gave the landlord a violent blow with a sharp instrument on the head. The landlord died after a few days. It was held that both the soldiers had committed murder, notwithstanding the previous struggle between the landlord and one of them.[2]

3. 'Each of such persons is liable for that act in the same manner as if it were done by him alone.'—All who participate in the commission of an offence are severally responsible as though the offence had been committed by each of them acting alone; consequently each must be separately punished.[3]

Mere presence does not raise a presumption of complicity.—Although a man is present when a felony is committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it, or to apprehend the felon. All who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.[4] The mere circumstance of a person being present on a lawful occasion does not, therefore, raise a presumption of that person's complicity in an offence then committed.[5]

Amendment.—The words "in furtherance of the common intention of all" were introduced by Act XXVII of 1870, s. 1.

PRACTICE.

Calcutta Rule.—When several persons are accused of the commission of the same offence, it would be obviously inconvenient if a Magistrate were to punish some and commit others to the Court of Session; and, as the Code does not seem to contemplate such procedure, the Magistrate should, if he considers the case to be one for the Sessions, commit all those concerned for trial before that tribunal.[6]

When such an act is criminal by reason of its being done with a criminal knowledge or intention.

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

COMMENT.

This section follows as a corollary from s. 32. The legal consequences of an 'act' and of an 'omission' being the same, if an act is committed partly by an act and partly by an omission the consequences will be the same as if the offence was committed by an 'act' or by an 'omission' alone.

[1] Foster, 353.
[2] *Willoughby*, (1791) 1 East P. C. 288.
[3] *Amrita Lal Bose* v. *Corporation of Calcutta*, (1917) 44 Cal. 1025.
[4] *Gora Chand Gopee*, (1866) 5 W. R. (Cr.) 45, Beng. L. R., Sup. Vol., 443. See *Coney*, (1882) 8 Q. B. D. 534.
[5] *Maganlal* and *Motilal*, (1889) 14 Bom. 115; *Ganapatha Sarma*, (1922) 17 L. W. 197; [1923] M. W. N. 104.
[6] C. H. R. and O., Vol. I, Ch. I, s. 40, p. 14.

The preceding section provided for a case in which a criminal act was done by several persons in furtherance of the common intention of all. Under this section a person assisting the accused, who actually performs the act, must be shown to have the particular intent or knowledge if the act is criminal only by reason of its being done with a criminal knowledge or intention.

If several persons, having one and the same criminal intention or knowledge, jointly commit murder or an assault, each is liable for the offence as if he had acted alone; but if several persons join in an act, each having a different intention or knowledge from the others, each is liable according to his own criminal intention or knowledge, and he is not liable further.

If an act which is an offence in itself and without reference to any criminal knowledge or intention on the part of the doers is done by several persons, each of such persons is liable for the offence.

Effect caused partly by act and partly by omission.

36. Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

ILLUSTRATION.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

Co-operation by doing one of several acts constituting an offence.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

ILLUSTRATIONS.

(*a*) A and B agree to murder Z by severally and at different times giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder, and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(*b*) A and B are joint jailors, and, as such, have the charge of Z, a prisoner, alternately for six hours at a time. A and B, intending to cause Z's death, know- [illegible] the time [illegible] Z dies [illegible] of hunger. Both A and B are guilty of the murder of Z.

(*c*) A, a jailor, has the charge of Z, a prisoner. A, intending to cause Z's death, illegally omits to supply Z with food; in consequence of which Z is much [illegible] not sufficient to cause his death. A is [illegible] B, without collusion or co-operation [illegible], knowing that he is likely thereby to [illegible] guilty of murder; but as A did not co-operate with B, A is guilty only of an attempt to commit murder.

COMMENT.

This section provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence.[1]

[1] *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 158, 52 Cal. 197, P.C.

This section follows as a corollary from s. 35 as will appear from the illustrations.

We have seen that if several persons combine both in intent and act, each is answerable for the joint criminal act just as if he alone had done it; and so it is if each person has his several part to do, the whole contributing to one result. It is immaterial what particular share is allotted to each, or whether the object be accomplished jointly by all present at the same time and place, or each performs his own part separately. Where all concur in effecting the criminal result, each does the act so far as his own part extends, and, as to the residue, may be regarded as causing it to be done by means of a guilty agent. All the persons concerned stand in the mutual relation of principals and agents to each other. If, for instance, several persons combine to forge an instrument and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.[1] Where two persons are acting in concert in the sense that their attack on the deceased (with a heavy stick by the one, and with a heavy stone by the other) is a single indivisible thing, both of them are liable for the resultant murder.[2] Three persons, brothers, attacked with heavy sticks a fourth, against whom they bore a grudge, and beat him with great severity, so that he died shortly afterwards. His skull was badly fractured, and numerous other injuries were inflicted upon him. It did not appear which injuries were caused by which of the assailants, but the evidence showed that they were acting in concert and intended to cause such bodily injury as was likely to cause death. It was held that all the three assailants were guilty of murder.[3]

Persons concerned in criminal act may be guilty of different offences.

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

ILLUSTRATION.

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

COMMENT.

This section provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other.[4]

Sections 34, 35 and 38 deal with the same subject and should be read together. Section 34 treats of acts done with a 'common intention,' s 38 of acts done with different intentions. Thus it is the converse of s. 34. Under this section the act is not supposed to be done with a 'common intention.' A quarrel arose between C on the one side and A and B on the other. C abused A, whereupon A struck him with a stick, and B struck him down with an axe on the head. He also received two other wounds with the axe on other parts of the body. Any one of the three axe-wounds was sufficient to cause death, more especially that on the head. It was held that B was guilty of culpable homicide, while A was guilty of voluntarily causing hurt.[5]

[1] *John Bingley*, (1821) R. & R. 446.
[2] *Subbappa Channappa*, (1912) 15 Bom. L. R. 303, 2 Bom. Cr. C. 84.
[3] *Ram Newaz*, (1913) 35 All. 506.
[4] *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 158, 52 Cal. 197, P.C.
[5] *Indar*, (1882) 2 A. W. N. 23.

Sections 34 to 38 lay down principles similar to the English law of "principals in the first and second degrees" See Comment on s. 107, *infra*.

"Voluntarily."

39. A person is said to cause an effect "voluntarily" when he causes it by means[1] whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

ILLUSTRATION.

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating robbery, and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

COMMENT.

The word 'voluntarily' is defined in relation to the causation of effects and not to the doing of acts from which those effects result. It has been given a peculiar meaning, differing widely from its ordinary meaning, in the Code.

In general, the Code makes no distinction between cases in which a man causes an effect designedly and cases in which he causes it knowingly or having reason to believe that he is likely to cause it. If the effect is a probable consequence of the means used by him he causes it 'voluntarily,' whether he really meant to cause it or not He is not allowed to urge that he did not know or was not sure that the consequence would follow; but he must answer for it just as if he had intended to cause it. The English law by means of an artificial presumption, viz., that a man is presumed to intend the natural or probable consequences of his own act, gives to the words which denote intention the meaning here annexed to 'voluntarily'[1] See s 81, *infra*.

The definition of the term 'voluntarily' bears resemblance to the definition of 'wilfully,' current in the English law.

An injury shall be deemed to be 'wilfully' caused whensoever the person from whose act or omission such injury results, either directly intended it to result from his act or omission, or believing that it was in any degree probable that such injury would result from his act or omission, incurred the risk of causing such injury.[2]

"The principle of exemption from criminal responsibility in respect of a hurtful consequence is that of bona fide ignorance of the connexion existing between the mere mechanical act and its consequence. That principle ceases to operate where the connexion is known to be either certain or probable. If the doer of an act know or believe that a noxious consequence will result from that act, he is just as culpable both in law and morals as if he had acted with the most direct intention to hurt. Let it however be supposed that the consequence is not certain, but that it is a likely or probable consequence, and that the likelihood or probability is known to the doer of the act. Here again it is clear that the principle of exemption above mentioned is unavailable to exempt the offender from liability in respect of the consequence. All he can urge is, that he was not sure that the hurtful consequence would follow; but he had no right to incur the risk [illegible] nsible for it; [illegible] the penalty [illegible] may justly, after due notification, doom such an offender to the penalties inflicted on those who accomplished their purposes by more certain or direct means; the safety of society is inconsistent with any distinction in this respect, and the offender in truth acted wilfully, in wilfully incurring the risk and danger of causing the injurious result."[3]

[1] M. & M. 21.

[2] 10th P. R. 16

[3] English Law Commissioners' 7th Rep. p. 23, cited in First Rep., s. 106.

1. "Means.'—*This* word *signifies* acts as well as omissions.

"Offence."

40. Except in the chapter and sections mentioned in clauses two and three of this section the word "offence"[1] denotes a thing made punishable[2] by this Code.

In Chapter IV, Chapter V-A and in the following sections, namely:—sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445 the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined:

And in sections 141, 176, 177, 201, 202, 212, 216 and 441 the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

COMMENT.

The word 'offence' as defined in this section has three sets of meaning, as explained in the three clauses of this section.

1. **'Offence.'**—This word does not extend to acts punishable under the law of England. Stokes says that the Code is defective in not declaring that in certain sections (*e.g.*, 216, 221, 224, 225), 'offence' shall include acts and omissions punishable by the law of England.

2. **'A thing made punishable.'**—In *Moorga Chetty's case*,[1] West, J, remarked: "If verbal criticism is to have a preponderating influence, I may observe that there is an inaccuracy in section 40 'A thing,' meaning an act or omission, is not susceptible of punishment. What is meant is 'a thing for which he who is guilty of it is punishable.'" The term 'a thing' is a rather unhappy substitute for what it seems to mean—"an aggregate of acts and omissions."[2] A 'thing' must be *an act*, or a *series* of *illegal acts*, or an illegal *omission*, or a series of *illegal omissions*; or, to use the words of Mr. Bentham "we give the name of *offence* to every act which we think ought to be prohibited by reason of some evil which it produces or tends to produce."

'Punishable' must mean that the commission or omission of the act, the commission or omission of which is prohibited, renders the person who commits or omits it liable to the sanction of the law, *i.e.*, to punishment.[3] This word is here used according to a common idiom for "rendering a person liable to punishment"; for it is obvious that in the strict and primary usage of the word nothing is punishable; and no person since Xerxes, except a child with his doll, has ever supposed otherwise. The expression, therefore, is incomplete.[4] The words 'made punishable' must be interpreted as meaning recognized as or "declared punishable."[5] 'A thing made punishable' is no doubt an inaccurate expression; but 'punishable' is here used in a sense which is popularly familiar in the expression "a punishable offence," that is, "an offence to which a punishment is attached"; and the words 'a thing made punishable' mean an act or omission; which by this Code is constituted one to which a punishment is attached.[6]

[1] (1881) 5 Bom. 338, 353.
[2] Per Collett, J., (1866) 3 M. H. C. App. 11, 17.
[3] Per Dutholt, J., in *Kandhaia*, (1884) 7 All. 67, 71.
[4] Per Holloway, J., (1866) 3 M. H. C. App. 11, 12.
[5] Per Collett, J., *in ibid*, 15
[6] Per Innes, J., *in ibid*, 20, 21.

Order under s 55 of the Criminal Procedure Code—Such an order does not come within the definition of an offence.[1]

Maintenance order.—An order for payment of maintenance is not a conviction for an offence.[2]

Proceeding under s 28 of the Public Conveyances Act.—A proceeding to recover legal fare under s 28 of the Bombay Public Conveyances Act 1867, is not a complaint for an offence.[3]

Attempt.—An attempt to commit an offence is itself an offence within the definition of 'offence' as given in this section.[4]

Abetment.—The abetment of an offence is in itself an offence within the meaning of this section.[5]

Amendment.—This section was substituted for the original s. 40 by Act XXVII of 1870, s 2. The figures 64, 65, 66 and 71 were inserted by Act VIII of 1882, s. 1; and the figure 67 by Act X of 1886, s. 21. The term 'offence' is thus, [illegible] nder any special or local law. [illegible] f 1870 is to be taken to affect [illegible] The word, figure and letter [illegible]

"Special law."

41. A "special law" is a law applicable to a particular subject.

COMMENT.

Whenever there is an intention to apply the provisions of the criminal law to acts authorized or required by particular statutes, that intention is always made clear by express words to that effect, *e g*, the Income-tax Act,[6] the Land Acquisition Act,[7] etc.[8]

The special laws contemplated in s. 40 and this section are only laws, such as the Excise, Opium, and Cattle Trespass Acts, creating fresh offences, that is, laws making punishable certain things which are not already punishable under the Penal Code. The Whipping Act is not a special law in this sense; it creates no fresh offences, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code.[9]

"Local law."

42. A "local law" is a law applicable only *to a particular part of British India.*

COMMENT.

Laws applicable to particular localities are termed local laws. *e.g.*, Port Trust Acts. A local law does not necessarily include all rules made under the provisions of a local law.[10]

"Illegal."
"Legally bound to do."

43. The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action[1]; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

[1] *Kandhaia*, (1884) 7 All. 67, 69; *Shasti Churn Napit*, (1882) 8 Cal. 331.
[2] *Ponnammal*, (1892) 16 Mad. 234; *Golam Hossain Chowdhry*, (1867) 7 W. R. (Cr) 10; *Thaku bin Ira*, (1868) 5 B. H. C. (Cr. C.) 81.
[3] *Valli Mitha*, (1919) 22 Bom. L. R. 195.
[4] *Ajudhia*, (1895) 17 All 120.
[5] *Spier*, (1897) P. R. No. 49 of 1887.
[6] II of 1887, ss. 35, 37.
[7] I of 1894, s. 10
[8] *Chandi Pershad* v. *Abdur Rahman*, (1894) 22 Cal. 131, 139
[9] *Po Han*, (1913) 7 L. B. R. 63.
[10] *Ganda Shah*, (1894) P. R. No. 23 of 1894.

COMMENT.

The word "illegal" has been given a very wide meaning as it includes (1) everything which is an offence; (2) everything which is prohibited by law; and (3) everything which furnishes ground for a civil action. The prohibition in the second case must be *legal*. The accused submitted to his official superior a false 'nil' return of lands in his enjoyment, and also made a false statement to the same effect in a revenue inquiry. It was held that no offence had been committed as the act of the accused was not 'illegal'[1] He was doubtless guilty of a breach of a departmental order, but he was not legally bound to furnish such information within the meaning of this section. Suppose an official is bound by the rules of his superior to be at his office at 10 A.M., and to enter his name in a book kept for that purpose: he falsely enters his arrival at 10 when he in fact arrived at 11 o'clock; can it be said that he has committed an offence? Certainly not. A breach of a departmental order is not a criminal offence.

The words 'illegal' and 'unlawful' have the same meaning under the Code.[2]

1. **'Which furnishes ground for a civil action.'**—"These appear wide words, but we think it would be difficult to restrict them without the risk of excluding something that ought to be included. Generally we apprehend it will be found unobjectionable to designate as illegal any thing done or omitted to be done by a man for which he is liable to a civil action."[3]

"Injury."

44. The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.[1]

COMMENT.

"Injury" is an act contrary to law.[4] Thus an unlawful detention of a cart at a toll-gate caused by an illegal demand for payment of toll amounts to injury.[5] Threat of a decree which can never be given effect to is a threat of harm to an individual in his person, reputation, or property.[6] The word 'injury' has been given a wide meaning in this section. It will include every tortious act.

1. **'Property.'**—This word here means something in existence and it cannot, with any propriety, be applied to the reasonable expectation of pecuniary benefit for the loss of which an action is maintainable by the representatives of a deceased person.[7] Where the accused took away the complainant's cattle and declined to release them until he was paid a certain sum and on the receipt of that sum he released them, it was held that he caused 'injury' to the complainant.[8]

Death of husband is not an 'injury' to wife.—A Magistrate imposed a fine in addition to a sentence of imprisonment on a conviction for the offence of causing death by a rash and negligent act and gave compensation to the widow of the deceased out of the fine imposed. It was held that compensation could not be given to her for she did not suffer any injury as here defined.[9] The Court said: "If the claim of the widow in such a case as the present is maintainable, it must follow that the master of a servant, who has been disabled or put in wrongful confinement, may equally apply for compensation to be paid out of the fine inflicted on the offender." It may, however, be argued that nothing could be more harmful to the mind of a woman than the death of her husband and the section speaks of

[1] *Appayya*, (1891) 14 Mad. 484. *Virasami Mudali*, (1881) 4 Mad. 144, dissented from.

[2] See 1st Rep., s. 658.

[3] *Ibid*, s. 91.

[4] *Sami Nayudu* v. *Subramania Mudali*, (1864) 2 M. H. C. 158.

[5] *Appalasami*, (1892) 1 Weir 441.

[6] *Priyanath Gupta*, (1923) 27 C. W. N. 479.

[7] *Yalla Gangulu* v. *Mamidi Dali*, (1897) 21 Mad. 74, 76, F B.

[8] *Habibul Razzak*, (1923) 21 A.L.J.R. 850.

[9] *Yalla Gangulu* v. *Mamidi Dali*, sup.; *Lutchmaka*, (1889) 12 Mad. 352; *Abdul Rahiman*, (1895) Cr. R. No. 26 of 1895, Unrep. Cr. C. 763.

harm to the mind as 'injury.' And it has been held by the Chief Court of the Punjab that loss of her husband's support affects a widow prejudicially in a legal right, and is therefore an injury as defined in the Penal Code.[1]

'False charge is an injury.'—A false charge laid before the Police, and never intended to be prosecuted in a Court, may subject the accused to very substantial injury, as here defined.[2]

"Life."

45. The word "life" denotes the life of a human being, unless the contrary appears from the context.

"Death."

46. The word "death" denotes the death of a human being, unless the contrary appears from the context.

"Animal."

47. The word "animal" denotes any living creature, other than a human being.

COMMENT.

This definition is, according to Sir James Stephen, not only superfluous but of doubtful correctness. It will include an angel, frog-spawn, and probably a tree.

"Vessel."

48. The word "vessel" denotes anything made for the conveyance by water of human beings or of property.

"Year." "Month."

49. Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British Calendar.

COMMENT.

A year is the time wherein the sun goes around his compass through the twelve signs, or the period in which the revolution of the earth round the sun is completed, viz, 365 days, 5 hours, 48 minutes, and 51·6 seconds. For ordinary purposes the average length of a year is taken to be 365 days. But every fourth year the extra hours are taken into account and the statute 24 Geo. II., c. 25, enacts that the year shall consist of 366 days. The fourth year is called the leap year. By statute 21 Hen. III., the increasing day in the leap year, as well as the preceding day, are counted for one day only The 1st January is the first day of the year by statute 24 Geo. II., c. 23; before that enactment the 25th March was the first day of the year.

The day on which a sentence is passed on a prisoner is calculated as a whole day. A person sentenced to imprisonment for the space of one calendar month is entitled to be discharged on the day in the succeeding month immediately preceding the day corresponding to that from which his sentence takes effect.[3] On the 31st October the prisoner was sentenced to be imprisoned for one offence for one calendar month, and for a second offence for a period of fourteen days, commencing after the expiration of the calendar month. Pursuant to his sentence, he was detained in custody until the 14th of December. It was held that the detention was lawful, for as the calendar month did not expire until the 30th of November, he was not entitled to be discharged from the second term of imprisonment until

[1] *Saif Ali*, (1898) P. R. No. 17 of 1898, F.B.
[2] *Ashrof Ali*, (1879) 5 Cal. 281, 282
[3] *Micotti* v. *Colvill*, (1879) 4 C. P. D. 233.

the full period of fourteen days computed from the 1st of December had expired. Denman, J., said: "I am of opinion that a sentence of imprisonment for one calendar month, passed on any given day of any given month, is to be held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as the preceding month, then by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day, but as long as there is a day in the calendar numerically corresponding from which the sentence begins to run, so that it is unnecessary to trench upon the succeeding month, I see no ground for anticipating the expiration of the sentence."[1]

"Section."

50. The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

"Oath."

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.

COMMENT.

An 'oath' is a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of Heaven if he do not speak the truth.[2]

The Indian Oaths Act substitutes affirmation for an oath in the case of Hindus and Mahomedans. If oath is objected to then affirmation is admissible in other cases.[3]

"Good faith."

52. Nothing is said to be done or believed in good faith which is done or believed without due care and attention.

COMMENT.

The definition of good faith given here is merely a negative one. It does not define 'good faith.' It says that an act is only done in good faith if it is done with due care and attention.

According to the General Clauses Act,[4] "A thing shall be deemed to be done in 'good faith' where it is in fact done honestly whether it is done negligently or not." This definition is borrowed from an English statute,[5] and it differs materially from that contained in the Penal Code. Under the Code definition the question of honesty is immaterial.

Good faith requires not logical infallibility, but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circum-

[1] *Migotti* v. *Colvill*, (1879) 4 C. P. D. 233, 236.

[2] *White*, (1786) 1 Leach 430.

[3] Act X of 1873, s. 6.

[4] X of 1897, s. 3 (20).

[5] The definition corresponds exactly with s. 90 of the Bills of Exchange Act, 1882, 45 & 46 Vic., c. 61, which is founded on the distinction pointed out in *Jones* v. *Gordon*, (1877) 47 L. J. Bank. 1, 2 App. Cas. 616, by Lord Blackburn, between the case of a person who was honestly blundering and careless, and the case of a person who has acted not honestly, that is, not necessarily with the intention to defraud, but not with an honest belief that the transaction was a valid one, and that he was dealing with a good Bill. The Sale of Goods Act, 1893 (56 & 57 Vic., c. 71), s. 62, gives a similar definition.

stances and the capacity and intelligence of the person, whose conduct is in question.[1]

The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. The law does not exact the same care and attention from all persons regardless of the position they occupy.[2]

Where a Police constable after questioning a person, who was carrying three bundles of cloth under his arms, and receiving unsatisfactory replies, arrested him, [illegible] stolen the horse, or had purchased it from the thief. He found that B had bought the animal from one S; so he sent for S and charged him with the theft without taking the trouble of getting any credible information as to whether it was his father's horse or not. It was held that he had acted without exercising due care and attention.[3] The accused who was an educated man living in a town where medical assistance was available chained up his brother, who was subject to fits of violent insanity with lucid intervals, for over three months in an unnecessarily cruel way, it was held that he did not act with due care and attention.[4]

Mere good faith in the sense of simple belief, actual belief, with any grounds for believing, is not sufficient: the belief must be a reasonable, not an absurd, belief, that is, there must be some reasonable ground for it. Good faith in act or belief requires due care and attention to the matter in hand. The law cannot mark, except in this vague way, the amount of care and attention requisite; but if a man takes upon himself an office or duty requiring skill or care, and a question arises whether he has acted therein in good faith, he must show not merely a good intention, but such care and skill as the duty reasonably demands for its due discharge. The degree of care requisite will vary with the degree of danger which may result from the want of care. Where the peril is the greatest the greatest caution is necessary.[5]

Where a person, uneducated in matters of surgery, operated on a man for internal piles by cutting them out with an ordinary knife, and the man died from the hæmorrhage, it was held that he had not acted in good faith although he had performed similar operations on previous occasions.[6]

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that is, [illegible]

[1] *Abdool Wadood Ahmed*, (1907) 9 Bom. L. R. 230, 31 Bom 293.

[2] *Bhawoo Juvaja* v. *Mulji Dayal*, (1888) 12 Bom. 377, 393.

[3] *Sheo Surun Sahai* v. *Mohomed Fazil Khan*, (1868) 10 W. R. 20.

[4] *Shimbhu Narain*, (1923) 21 A. L. J. R. 391.

[5] M. & M.

[6] *Sukaroo Kobiraj*, (1887) 14 Cal. 566.

[7] *Hayat*, (1887) P. R. No. 11 of 1888.

CHAPTER III.

OF PUNISHMENTS.

Punishments.

53. The punishments to which offenders are liable under the provisions of this Code are,—

First,—Death;

Secondly,—Transportation;

Thirdly,—Penal servitude;

Fourthly,—Imprisonment, which is of two descriptions, namely:—

(1) Rigorous, that is, with hard labour.

(2) Simple.

Fifthly,—Forfeiture of property;

Sixthly,—Fine.

COMMENT.

"The determination of the right measure of punishment is often a point of great difficulty. Hard-and-fast rules cannot be laid down, but the decision must be left to discretion, and discretion has to be guided by a variety of considerations.

There is the element of vindictiveness, which cannot be left out of sight, notwithstanding what has been said by Plato on the subject. Both personal and public sentiment demand that the person who has made others suffer unjustly, should himself be made to suffer in return. This is quite distinct from the moral side of an act with which properly the Courts have nothing to do. Their concern is solely with the nature of the act viewed as a crime or breach of the law. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, by how much.

The principal object of punishment, however, is the prevention of offences, and the measure of punishment must, consequently, vary from time to time according to the prevalence of a particular form of crime and other circumstances. An amount of severity may be very appropriate at one time which would be quite uncalled for at another.

It may generally be taken as a safe principle to follow, that punishments should be made as moderate as is consistent with the object aimed at. Punishment in excess is apt to defeat its own object, and to produce a reaction of popular feeling, as experience shows. To shut a man up in prison longer than is really necessary is not only bad for the man himself, but is a useless piece of cruelty, and economically wasteful and a source of loss to the community."[1]

To the six kinds of punishments mentioned in the section two more are added by subsequent enactments, *viz.*, whipping and detention in reformatories. In the Madras Presidency the punishment of stocks is inflicted on offenders of lower castes.[2]

1. **Death.**—The authors of the Code say: "We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed...To the great majority of mankind nothing is so dear as life. And we are of opinion

[1] Per Burgess, J. C., in *Noa Ku*, (1897) 1 U. B. R. (1897-1901) 330, 335.

[2] Mad. Reg. XI of 1816, s. 10.

that to put robbers, ravishers and mutilators on the same footing with murderers is an arrangement which diminishes the security of life...Those offences are almost always committed under such circumstances that the offender has it in his power to add murder to his guilt...As he has almost always the power to murder, he will often have a strong motive to murder, inasmuch as by murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment of murder, he will have no restraining motive. A law which imprisons for rape and robbery, and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which only hangs for murder, holds [illegible]

Death is the punishment that must be awarded for murder by a person under sentence of transportation (s. 303). It may be awarded as punishment for the following offences only :—(1) Waging war against the King (s. 121). (2) Abetting mutiny actually committed (s. 132). (3) Giving or fabricating false evidence upon which an innocent person suffers death (s. 194). (4) Murder (s 302). (5) Abetment of suicide of a minor or insane, or intoxicated person (s. 305) (6) Dacoity accompanied with murder (s. 396). (7) Attempt to murder by a person under sentence of transportation, if hurt is caused (s. 307).

2. **Transportation.**—The authors of the Code observe: "The consideration which has chiefly determined us to retain that mode of punishment is our persuasion that it is regarded by the Natives of India, particularly by those who live at a distance from the sea, with peculiar fear. The pain which is caused by punishment is unmixed evil. It is by the terror which it inspires that it produces good; and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance; but it is not so much dreaded beforehand; nor does a sentence of imprisonment strike either the offender or the bystanders with so much horror as a sentence of exile beyond what they call the Black Water. This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict. The separation resembles that which takes place at the moment of death. The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the Natives have but an indistinct notion over an element which they regard with extreme awe, to a distant country of which they know nothing, and from which he is never to return. It is natural that his fate should impress them with a deep feeling of terror. It is on this feeling that the efficacy of the punishment depends, and this feeling would be greatly weakened if transported convicts should frequently return, after an exile of seven or fourteen years, to the scene of their offences, and to the society of their former friends."[2]

I [illegible]

T[illegible]

ation [illegible]

any term under ss. 121-A (conspiracy to wage war) and 124-A (sedition). Except in the case of these two offences transportation prescribed is for life.

Age, sex and infirmities, combined with various other circumstances and considerations may frequently render the exercise of a discretion in substituting a moderate sentence of imprisonment for one of transportation[3]

The Government of Bombay in virtue of a resolution of the Government of India have issued a resolution saying "Instructions should be issued to the

[1] Note A, p. 93.
[2] *Ibid*, p. 94.
[3] 7 Parl. Rep. p. 93.

prison authorities and the Court should be informed that as far as possible deportation to the Andamans will cease."[1]

3. **Penal servitude.**—The punishment of penal servitude, which is a substitute for transportation, is applicable only to Europeans and Americans[2] under Act XXIV of 1855 which is based on 16 & 17 Vic., c. 99. The word 'European,' as used in this Act, shall be understood to include any person usually designated a European British subject.[3] "By reason of the difficulty of providing a place to which Europeans or Americans can, with safety to their health, be sent for the purpose of undergoing sentences of transportation or of imprisonment for long terms, it has become expedient to substitute other punishment for that of transportation."[4]

Penal servitude is a punishment which consists in keeping an offender in confinement and compelling him to labour. Persons sentenced to penal servitude are, during the term of the sentence, confined in such prison within British India as the Government of India directs, and kept to hard labour.[5]

See the Penal Servitude Act (XXIV of 1855) set out in the Appendix.

4. **Imprisonment.**—Imprisonment is of two kinds: rigorous and simple. In the case of rigorous imprisonment the offender is put to hard labour, such as grinding corn, digging earth, drawing water, cutting fire-wood, bowing wool, etc. In the case of simple imprisonment the offender is confined to jail and is not put to any kind of work. Where the Code provides that an offender shall be punished with imprisonment "*and shall also be liable to fine*," the sentence should include some period of imprisonment, whatever it may be.[6] The definition of 'imprisonment' applies in the case of all Acts of the Governor-General in Council made after the 3rd January 1868, and of all Regulations under the Government of India Act, 1870,[7] made after the 14th January 1887.[8]

The authors of the Code had, in many cases not heinous, fixed a minimum as well as a maximum punishment. The Committee were of opinion that, considering the general terms in which offences were defined, it would be inexpedient, in most cases, to fix a minimum punishment; and they had accordingly so altered the Code as to leave the minimum punishment for all offences, except those of the gravest nature, to the discretion of the Judge who would have the means in each case of forming an opinion as to the character of the offender, and the circumstances whether aggravating or mitigating, under which the offence had been committed. But with respect to some heinous offences—such as offences against the State, murder, attempt to commit murder, and the like—they had thought it right to fix a minimum punishment.[9] Circumstances which are properly and expressly recognized by the law as aggravations calling for increased severity of punishment are principally such as consist in the manner in which the offence is perpetrated; whether it be by forcible or fraudulent means, or by aid of accomplices, or in the malicious motive by which the offender was actuated, or the consequences to the public or to individual sufferers, or the special necessity which exists in particular cases for counteracting the temptation to offend, arising from the degree of expected gratification, or the facility of perpetration peculiar to the case. These considerations naturally include a number of particulars, as of time, place, persons and things, varying according to the nature of the case.[10]

[1] Government of Bombay Resolution H.D. No. 4568, dated May 7, 1921. Government of India Resolution, Home Department (Jails), No. 101, dated March 30, 1921.

[2] *Duma Baidya*, (1896) 19 Mad. 483, 485.

[3] Act XXIV of 1855, s. 15

[4] *Ibid*, Preamble.

[5] The Prisoners Act (V of 1871), s. 21.

[6] *Chanviova Shidram*, (1863) 1 B. H. C. 4; *Rama bin Rabhaji*, (1863) 1 B. H. C. 34; *Bahirji bin Krishnaji*, (1863) 1 B. H. C 39; *Menazoodin*, (1864) 2 W. R. (Cr.) 33; *Sheikh Dulloo v. Zainab Bebee*, (1871) 16 W. R. (Cr.) 17; *Bayne*, (1906) 8 Bom. L. R. 414, 416.

[7] 33 Vic., c. 3, s. 1

[8] See the General Clauses Act, X of 1897, ss. 3 (26) and 4 (1) and (2).

[9] P. L. C. (1856), p 718.

[10] 7 Parl. Rep. p. 93.

Circumstances which are to be considered in alleviation of punishment are: (1) the minority of the offender; (2) the old age of the offender; (3) the condition of the offender, *e.g.*, wife, apprentice; (4) the order of a superior military officer; (5) provocation; (6) when offence committed under a combination of circumstances and the influence of motives which are not likely to recur either with respect to the offender or to any other; (7) the state of health and the sex of the delinquent.[1] Bentham mentions the following circumstances in mitigation of punishment which should be inflicted: (1) absence of bad intention; (2) provocation; (3) self-preservation; (4) preservation of some near friend; (5) transgression of the limit of self-defence; (6) submission to menaces; (7) submission to authority; (8) drunkenness; (9) childhood.

The maximum imprisonment that can be awarded for an offence is fourteen years (s. 55). The lowest term actually named for a given offence is twenty-four hours (s. 510), but the minimum is unlimited.

The minimum term of imprisonment, however, is fixed in the following two cases:—

(1) If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, he shall be punished with imprisonment of not less than seven years (s. 397).

(2) If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, he shall be punished with imprisonment of not less than seven years (s. 398).

An offender shall be punished with rigorous imprisonment in the cases of—

(1) Giving or fabricating false evidence with intent to procure conviction of an offence which is capital by this Code, or by the law of England (s. 194).

(2) Unlawful return from transportation (s. 226).

(3) House-trespass in order to the commission of an offence punishable with death (s 449)

The following offences are punishable with simple imprisonment only:—

(1) Public servant unlawfully engaged in trade; or unlawfully buying or bidding for property (ss. 168, 169).

(2) A person absconding to avoid service of summons or other proceeding, from a public servant, or preventing service of summons or other proceeding, or preventing publication thereof, or not attending in obedience to an order from a public servant (ss. 172, 173, 174).

(3) Intentional omission to produce a document to a public servant by a person legally bound to produce such document; or intentional omission to give notice or information to a public servant by a person legally bound to give, or intentional omission to assist public servant when bound by law to give assistance (ss. 175, 176, 187).

(4) Refusing oath when duly required to take by a public servant; or refusing to answer a public servant authorized to question; or refusing to sign any statement made by a person himself before a public servant (ss. 178, 179, 180).

[illegible] servant (s 188).

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[illegible] pe, on the part of

[illegible] -A).

(7) Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding (s. 228).

(8) Continuance of nuisance after injunction to discontinue (s. 291)

(9) Wrongful restraint (s. 341).

(10) Defamation; printing or selling defamatory matter known to be so (ss. 500, 501, 502

[1] Louisiana Penal Code, Arts. 431, 435.

(11) Uttering any word, or making any sound or gesture, with an intention to insult the modesty of a woman (s. 509).

(12) Misconduct in a public place by a drunken person (s. 510).

5. **Forfeiture.**—Absolute forfeiture of property was a punishment inflicted on persons guilty of high political offences. It could also be inflicted on persons guilty of offences punishable with death. It has now been abolished by Act XVI of 1921.

In England this punishment was abolished by 33 & 34 Vic., c. 23, s. 1. In America too it was done away with.

Forfeiture of specific property is still retained as a punishment in the following cases:—

(1) Whoever commits, or prepares to commit, depredation on the territories of any power at peace with the King, shall be liable, in addition to other punishments, to forfeiture of any property used, or intended to be used, in depredation, or acquired thereby (s. 126).

(2) Whoever knowingly receives property taken as above mentioned or in waging war against any Asiatic power at peace with the King, shall be liable to forfeit such property (s. 127).

(3) A public servant, who improperly purchases property, which, by virtue of his office, he is legally prohibited from purchasing, forfeits such property (s. 169).

6. **Fine.**—"Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. The mulct which is ruinous to a labourer is easily borne by a tradesman, and is absolutely unfelt by a rich zemindar...Punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of...forging a bill of exchange, for example, of keeping a receptacle for stolen goods, or of extensive embezzlement, ought...to be so fined as to reduce him to poverty."[1]

Fine is the only punishment in the following cases:—

(1) Unlimited—

(a) The person for whose benefit a riot has been committed, not having duly endeavoured to prevent it (s. 155).

(b) The agent or manager of such person under the like circumstances (s. 156).

(c) False statement in connection with an election (s. 171-G).

(2) Limited to Rs. 1,000—

(a) The owner or occupier of land on which a riot or unlawful assembly is held, and any person having or claiming any interest in such land, and not using all lawful means to prevent such riot or unlawful assembly, is punishable with fine not exceeding Rs. 1,000 (s. 154).

(b) Whoever publishes any proposal to pay any sum or to deliver any [illegible] and doing anything for the benefit of any [illegible] to [illegible] any such lottery, shall be punished with fine not exceeding Rs. 1,000 (s. 294-A).

[1] Note A., pp. 97, 98.

(3) Limited to Rs. 500—

(*a*) A person in charge of a merchant vessel, negligently allowing a deserter from the Army or Navy to obtain concealment in such [illegible]

(*b*) [illegible]

(*c*) Illegal payments in connection with an election (s. 171-H).

(*d*) Failure to keep election accounts (s 171-I).

(4) Limited to Rs. 200—

(*a*) Offences relating to fictitious stamps (s. 263 A) [illegible]

(*b*) [illegible]

(*c*) Committing of a public nuisance, not otherwise punishable, is punishable with fine not exceeding Rs. 200 (s. 290).

When payment of a fine or fee is ordered to be made jointly by several persons convicted together, it may be recovered from all or any of them, and, if payment made by one is nullified by the reversal of the order as to him, the liability of all and each of the others revives, as what was done subject to appeal was but provisional or subject to a condition subsequent.[1]

7. **Whipping.**—This form of punishment is added by the Whipping Act[2] under which offenders are liable to whipping—

(*a*) As an alternative punishment when offences under ss. 378, 380, 382, 443, 444, 445 and 446 of the Penal Code are committed.

(*b*) As an alternative or additional punishment when offences under ss. 375, 377, 390 and 391 of the Penal Code are committed.

(*c*) When they are juvenile offenders and commit certain offences specified in s. 5 of the Whipping Act.

It should be employed at the discretion of the Judge in all cases in which the offence involves cruelty in the way of inflicting pain, or in which the offender's motive is lust The man who cruelly inflicts pain on another should be made to feel what it is like. The man who gratifies his own passions at the expense of a cruel and humiliating insult inflicted on another should be himself shamefully and painfully humiliated.

Whipping should be inflicted in cases where there is a certain amount of aggravation in the commission of the offence.[3]

Concurrent sentences of whipping are illegal.[4]

In France, Germany, and the United States corporal punishment has been abolished.

8. **Detention in Reformatories.**—Juvenile offenders sentenced to transportation or imprisonment may be sentenced to, and detained in, a Reformatory School for a period of three to seven years.[5]

PRACTICE.

Procedure.—Death.—When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.[6] When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.[7] If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the

[1] *Ratnagiri Magistrate's Letter*, (1875) Unrep. Cr. C. 90.

[2] Act IV of 1909. See the Appendix where it is set out in full. In Upper Burma, see the Burma Laws Act (XIII of 1898), s. 3 (*b*) and the second Schedule; in the Punjab Frontier Districts, in the North-West Frontier Province and Baluchistan, see the Punjab Frontier Crimes Regulation (III of 1901), ss. 6 and 12 (2).

[3] [illegible] 10.

[4]

[5]

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[7] [illegible], s 381.

sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.[1]

Transportation.—No sentence of transportation shall specify the place to which the person sentenced is to be transported.[2] The Governor-General in Council is empowered to fix places in British India to which persons sentenced to transportation may be sent. It is the duty of the local Government to make arrangements for the removal of such person.[3]

Imprisonment.—A sentence of imprisonment cannot be suspended to take effect at a future period, but must commence from the time that the sentence is passed. Where a Deputy Magistrate postponed the execution of a sentence of imprisonment for a stated period at the request of the accused, to allow him to appeal, it was held that the sentence was bad in law and could not be carried into execution.[4]

Bombay Circular.—When any person serving in the Military Department is convicted in a criminal Court, such Court shall inform the Officer Commanding the Regiment or Corps to which the convict belongs.[5]

When a Military pensioner is convicted and sentenced to imprisonment in a criminal Court, the facts of the case should be reported, without delay, to the Controller of Military Accounts of the Circle to which the pensioner belongs.[6]

When a reservist of the Native Army is sentenced by a criminal Court to transportation or imprisonment for any term exceeding three months, the facts of the case should be reported, without delay, by such Court to the Adjutant-General in India (*vide* Bom. Gov. Gaz. for 1895, Part I, p. 853).[7]

Patna Circular.—(*a*) Sessions Judges and Magistrates will forward to the Military Department of the Government of India a copy of the conviction and sentence in all cases in which persons serving under the Government of India in that Department are convicted in a criminal Court.

(*b*) In the case of a reservist of the Native Army who may be sentenced by a criminal Court to transportation or imprisonment for any term exceeding three months, a report should be made to the Adjutant-General, India (Home Department letter No. 220, Judicial, dated 18th—25th February 1910).[8]

Burma Rule.—Imprisonment for a fraction of a day should not be awarded unless it is the only period that can legally be imposed. There is, however, no objection to a sentence of imprisonment until the rising of the Court, where only a nominal sentence is called for. Whilst it is recognized that in a certain number of cases no other method of punishment than a short term of imprisonment can be imposed and although it is not desired to infringe in any way upon the discretionary powers possessed by Magistrates in sentencing offenders, upon Magistrates are impressed the evils arising from sentencing offenders to short terms of imprisonment. As the moral effect of prison life is generally bad while the associations are degrading and the loss of character and self-respect involved in even the shortest term of incarceration is difficult to recover and often tends to create a criminal, other orders, such as the imposing of a fine or whipping, the taking of security under s. 562, Code of Criminal Procedure, or the allowing of offenders under s. 388 to collect the amount of the fines imposed upon them, may suitably be passed. Second and Third Class Magistrates should make use of the provisions of s. 349 by sending the accused before the District Magistrate or the Sub-Divisional Magistrate to receive a punishment different in kind from or more severe than that which can be imposed by them.[9]

[1] Criminal Procedure Code, s. 382.
[2] *Ibid*, s. 368 (2).
[3] Section 33 of the Prisoners Act V of 1871, as substituted by s. 2 of Act IX of 1882.
[4] *Kishen Soonder Bhattacharjee*, (1869) 12 W. R. (Cr.) 47.
[5] B. H. C. Cr. C., Ch. V, s. 97, p. 69.
[6] B. H. C. Cr. C., Ch. V, s. 98, p. 69.
[7] B. H. C. Cr. C., Ch. V, s. 99, p. 69.
[8] Pat. H. C. Cr. C., para 59, p. 22.
[9] L. B. C. M. Vol. I, s. 283, p. 89.

To assist the Courts in deciding when sentences of simple imprisonment may fitly be passed, the following orders of the Government of India are reproduced :—

"It has been brought to notice that in one province at least it is a common practice for the Courts to pass a sentence of simple imprisonment, not because a minor degree of moral turpitude is involved in the crime committed, but in view of the prisoner's presumed unfitness for labour. The Government of India believe that it is not the practice for the Courts to take into consideration any question of the physical fitness of a convict to labour. It is for the jail authorities to ascertain what labour is appropriate to a prisoner's strength and to put him to that only; the Courts have merely to consider the amount and nature of the imprisonment appropriate to the offence, and the character and status of the offender, and they should realize that by selecting simple instead of rigorous imprisonment they make a very essential difference in the way in which a prisoner will be treated on his admission to jail."[1]

Fine.—A sentence of fine where more prisoners than one prisoner are punished by fine must define by a specific sum the individual liability of each prisoner.[2]

Whipping.—As to the mode of executing this sentence, see ss. 390-396 of the Code of Criminal Procedure.

Commutation of sentence of death.

54. In every case in which sentence of death shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

COMMENT.

See the observations of the authors of the Code set out under the next section. This section empowers the Government to commute the sentence of death "for any other punishment provided by this Code," but s. 402 of the Criminal Procedure Code limits this power as it says that the Governor-General in Council or the Local Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it :—death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

Postponement of capital sentence on a pregnant woman.—Section 382 of the Criminal Procedure Code says : "If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life."

Commutation of sentence of transportation for life.

55. In every case in which sentence of transportation for life shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

COMMENT.

The authors of the Code say : "It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code. It seems to us also very desirable that the Government should have

[1] Home Department Resolution No. 4 (Jails), 183-194, dated 4th April 1839 ; L. R. C. M., Vol. I, s. 285, p. 80.

[2] 5 M. H. C. App. 5, 1 Weir 30.

the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances of which the executive authorities ought to be accurately informed, but which must often be unknown to the ablest judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect. The state of those remote provinces of the Empire in which convict settlements are established, and the way in which the interest of those provinces may be affected by any addition to the convict population, are matters which lie altogether out of the cognizance of the tribunals by which those sentences are passed, and which the Government only is competent to decide."[1]

PRACTICE.

Procedure.—See ss. 401 and 402 of the Criminal Procedure Code which provide for suspensions, remissions, and commutations of sentences.

Sentence of Europeans and Americans to penal servitude.

56. Whenever any person being an European[1] or American is convicted of an offence punishable under this Code with transportation, the Court shall sentence the offender to penal servitude instead of transportation according to the provisions of Act XXIV of 1855:

Proviso as to sentence for term exceeding ten years, but not for life.

Provided that, where an European or American offender would, but for such Act, be liable to be sentenced or ordered to be transported for a term exceeding ten years, but not for life, he shall be liable to be sentenced or ordered to be kept in penal servitude for such term exceeding six years as to the Court seems fit, but not for life.

COMMENT.

The punishment of penal servitude is only applicable to Europeans and Americans.[2]

1. 'European.'—This word, as used in Act XXIV of 1855, shall be understood to include any person usually designated an European British subject (s. 15). 'European British subject' means (i) any subject of His Majesty of European descent in the male line born, naturalized or domiciled in the British islands or any colony, or (ii) any subject of His Majesty who is the child or grand-child of any such person by legitimate descent.[3]

Proviso.—This was added by Act XXVII of 1870, s. 3.

PRACTICE.

Procedure.—For the special procedure for the trial of European British subjects, Europeans or Americans, see the Code of Criminal Procedure, Ch. XXXIII, s. 443 *et seq.*

Fractions of terms of punishment.

57. In calculating fractions of terms of punishment transportation for life shall be reckoned as equivalent to transportation for twenty years.

COMMENT.

For calculating fractions of terms of punishment this section provides that transportation for life shall be reckoned as equivalent to transportation for twenty

[1] Note A., p. 95.

[2] *Dama Bardyn*, (1896) 19 Mad. 483.

[3] Criminal Procedure Code, s. 4 (1) (i).

years. But transportation for life has come to mean for the purpose of duration of the sentence as transportation for twenty years. After the period of twenty years is over the convict may come back if he likes.

Offenders sentenced to transportation how dealt with until transported.

58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment.

Transportation instead of imprisonment.

59. In every case in which an offender is punishable with imprisonment for a term of seven years or upwards,[1] it shall be competent to the Court which sentences[2] such offender, instead of awarding sentence of imprisonment,[3] to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment.[4]

COMMENT.

Object.—Under the Penal Code as originally prepared, the power of passing sentence of transportation instead of imprisonment was vested in the Government, and not in the Courts. "At the time when the Penal Code was prepared by the Indian Law Commissioners, it was a rule of the Court of Directors of the East India Company that no native should be sentenced to transportation for a period less than for life, it being the opinion at that time that a native of India, if once transported, should never be allowed to return to this country The Indian Penal Code, as prepared by the Law Commissioners, did not provide transportation as a punishment for any period short of life, and it did not give power to the Government to commute a sentence of imprisonment for seven years into transportation, except in cases where the prisoner was not of Asiatic blood and of Asiatic birth. But, when the Penal Code came to be altered, a different rule was thought necessary. It was thought reasonable that natives of India as well as Europeans and others should be sentenced to transportation for periods less than for life, and that the [illegible] 'n transported, to return to India, [illegible] Code as prepared by the Indian [illegible] on as a punishment for any less period than for life, it was thought advisable, when the Code was altered, to enact this section" as a general clause.[1]

Though this section was introduced when the Bill was before the Council, yet no alteration appears to have been made in the language of the several sections which prescribed transportation as a punishment. Thus, in the majority of instances, the words used are:—"shall be punished with transportation for life or with imprisonment which *may* extend, etc." While the Court has an option in determining the duration of the term of imprisonment it has no option in determining the duration of the term of transportation.[2] In no section of the Code which prescribes transportation as a punishment, with the exception of this section and ss. 121-A and 124-A is the language used such as to leave the Court any option regarding the duration of the term

Principle.—This section only enacts a general rule to the effect that in the case of offences for which no transportation is specially mentioned as a punishment.

[1] Per Peacock, C. J., in *Boodhooa*, (1868) 9 W. R. (Cr.) 6 Beng. L. R., Sup. Vol., 869.

[2] *Naiada*, (1875) 1 All. 43, 45, F.B.

and which are punishable with imprisonment for a term of seven years or upwards, it is competent to the Judge to substitute a sentence of transportation as a substantive sentence for that of imprisonment.[1] The term of transportation under it cannot exceed the term of imprisonment provided by the section under which a conviction is had.[2] It cannot be less than seven years.

Scope.—This section applies exclusively to cases in which the offender may legally be sentenced by the Court trying him to imprisonment for seven years.[3] It necessarily gives powers to a Court which could sentence a prisoner to seven years' imprisonment to sentence him to seven years' transportation in lieu of it: but it does not intend to give this power to a Court, which could not sentence to imprisonment for that period. The section, no doubt, goes out of the ordinary course adopted in other parts of the Code, and instead of defining the punishment, gives a certain power to the Court, which passes the sentence, to award a different kind of punishment from that specified in the Code.[4]

1. **'In every case in which an offender is punishable with imprisonment for a term of seven years or upwards.'**—The punishment awarded for one offence alone must be imprisonment for seven years or upwards. It cannot be made up by adding two sentences together and then commuting the amalgamated period to transportation.[5] A general sentence of transportation for two or more offences, when only one of the punishments awarded is seven years' imprisonment, is illegal.[6]

2. **'It shall be competent to the Court which sentences.'**—That is, it shall be competent to the Court, which has power to sentence the prisoner to imprisonment for a term of seven years or upwards, to sentence him to transportation instead of imprisonment. If the Court passing sentence has jurisdiction to sentence to imprisonment for seven years, then it has also jurisdiction, under this section, to pass a sentence of transportation for seven years.[7]

3. **'Instead of awarding sentence of imprisonment.'**—The proper procedure is to pass a sentence of imprisonment for the term fixed by law for the particular offence and then, under this section, direct that the prisoner be transported for that period.[8] The Court may, in passing sentence for the offence, commute the imprisonment to transportation; but it cannot commute the sentence after the sentence of imprisonment has been passed.[9]

4. **'Transportation for a term not less than seven years, and not exceeding ...imprisonment.'**—A transportation awarded under this section cannot exceed the imprisonment for which the prisoner might have been sentenced, even though it would have been open to the Court to award a longer period of transportation under the section appropriate to the crime. Thus, where the law gives the alternative punishments of death, transportation for life, and rigorous imprisonment extending to ten years, and the Court does not inflict the extreme penalty, it cannot award more than ten years' transportation.[10] No sentence of transportation for a

[1] *Kunhussa*, (1882) 5 Mad. 28.
[2] Per Reid, J, in *Arura*, (1903) P. R. No. 31 of 1903.
[3] Per Macpherson, J., in *Boodhooa*, (1868) 9 W. R. (Cr.) 6.
[4] Per Peacock, C J., in *ibid*, p. 10.
[5] *Prem Chund Ousowal*, (1864) W. R. (Gap. No.) Cr. 35; *Mootker Koea*, (1865) 2 W. R. (Cr.) 1; *Tonooram Malee*, (1865) 3 W. R. (Cr.) 44; *Sabir Bakhsh*, (1901) P. R. No. 27 of 1901; *Sunda*, (1886) P. R. No. 68 of 1886; *Bahadar*, (1886) P. R. No 14 of 1886; *Musammat Mathro*, (1885) P. R. No. 4 of 1885; *Nga Meik*, (1903) U. B. R. (P. C.) 11.
[6] *Shonullah*, (1866) 5 W. R. (Cr.) 44.
[7] *Boodhooa*, (1868) 9 W. R. (Cr) 6, 8, 11; *Nuran*, (1880) P. R. No. 17 of 1880.
[8] *Rughoo*, (1864) W. R. (Gap. No.) Cr. 30.
[9] *Prem Chund Ousowal*, sup.
[10] *Rughoo*, sup.; *Keifa Singh*, (1865) 3 W. R. (Cr.) 16; *Mohunundo Bhundary*, (1866) 5 W. R (Cr.) 16; *Joseph Meriam*, (1868) 1 Beng. L. R. (A. Cr. J.) 5, 10 W. R. (Cr.) 10; *Naiada*, (1875) 1 All. 43, F.B.; *Arura*, (1903) P. R. No. 31 of 1903; *Muhammad Sharif*, (1915) P. R. No. 14 of 1915; *Sayyapureddi Chinnayya Dhora*, (1920) 23 Bom. L. R. 705, 6 Bom. Cr. C. 58, P.C.

shorter period than seven years can be passed on any charge.[1] Where a prisoner was convi[illegible] icial proceeding under s. 1[illegible] ears' transportation for [illegible] three years for the second offence, the second conviction was quashed as illegal.[2]

Where a person was convicted of an attempt to rape and sentenced, under this section, to seven years' transportation, the sentence was set aside on the ground that as rape was only punishable with ten years' imprisonment under s. 511 only five years' imprisonment could be awarded for an attempt to commit such an offence. At the same time it was held that as rape was punishable with transportation for life—transportation for twenty years (s. 57)—the sentence of seven years' transportation being less than one half of twenty years would have been legal if passed independently of this section.[3]

Sentence under a special or local law.—The section does not apply to sentences under a special or local law and transportation cannot, therefore, be ordered in the case of offences punishable under such law.[4]

Transportation cannot be substituted for imprisonment in default of fine.—This section does not authorise the substitution of transportation for the imprisonment to which a Court can sentence an offender in default of payment of fine.[5]

PRACTICE.

[illegible]

s. 35 Code

The Punjab Rule—Section 59 of the Indian Penal Code empowers Courts to award transportation instead of imprisonment in cases in which offenders are punishable with imprisonment for a term of seven years or upwards, and Sessions Judges and Magistrates of Districts, exercising enhanced powers, are informed that, in order to bring this section into operation, the punishment awarded for one offence alone must be seven years or upwards. The term of seven years cannot be made up by adding two sentences together and then commuting the amalgamated period of imprisonment to one of transportation. The correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time that, under s. 59 of the Indian Penal Code, such transportation is awarded instead of imprisonment, simple or rigorous, as the case may be.[7]

Bengal Rule.—The correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time that, under s. 59 of the Indian Penal Code, such transportation is awarded instead of imprisonment, simple or rigorous, as the case may be.[8]

The Central Provinces Circular.—When term-transportation is allowed, Sessions Judges and Magistrates with special powers should pass term-sentences of transportation in cases in which such sentence may legally and suitably be passed. The correct procedure is to sentence the offender to transportation under the section under which the offence is punishable read with s. 59 of the Indian Penal Code.[9]

[1] *Gour Chunder Roy*, (1867) 8 W. R. (Cr.) 2; *San Da*, (1906) 4 L. B. R. 65.

[2] *Gour Chunder Roy*, sup. See to the same effect; *San Da*, sup., where a sentence of three years' transportation was passed under s. 440 of the Penal Code but was held to be illegal.

[3] *Joseph Meriam*, (1868) 1 Beng. L. R. (A. Cr. J.) 5, 10 W. R. (Cr.) 10.

[4] *Muthuramalingam*, (1901) 11 M. L. J. R. 127, 1 Weir 99.

[5] *Kunhussa*, (1882) 5 Mad. 28; *Nuran*, (1880) P. R. No. 17 of 1880; *Yusuf*, (1882) 2 A. W. N. 116; *Nga Tha Zan*, (1902) 1 L. B. R. 292, overruling *Nga Shwe Lan*, (1898) P. J. L. B 482.

[6] [illegible]

[7] [illegible]

[8] C. P. Cr. C. No. 23 (4), p. 37.

Burma Rule.—When a sentence of seven years or more is necessary, it is usually desirable that the sentence should be one of transportation, not of imprisonment, in which case s. 59 of the Penal Code should be quoted in the finding unless the sentence be for life.[1]

A certain number of term-convicts are annually transported from Burma. It is, therefore, expedient in most cases to leave it to the jail authorities to decide whether a particular convict shall be transported or not, and this can best be done by making use of s. 59 of the Penal Code.[2]

Mode of sentencing.—The sentence should run thus:—"The Court directs, under the provisions of section——and s. 59 of the Indian Penal Code, that the said——be" (sentence).

Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.

60. In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

COMMENT.

As to the application of ss. 60 and 63-74 to sentences passed in the Punjab Frontier District, in the North-West Frontier Province, or in Baluchistan, see the Frontier Crimes Regulation.[3]

As to the application of ss. 60, 63, 64, 65, 68 and 74 to the Sindh Frontier, see the Sindh Frontier Regulation.[4]

61. [*Repealed by Act XVI of 1921.*]

62. [*Repealed by Act XVI of 1921.*]

Amount of fine.

63. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

COMMENT.

The authors of the Code observe: "It is impossible to fix any limit to the amount of a fine which will not either be so high as to be ruinous to the poor, or so low as to be no object of terror to the rich. There are many millions in India who would be utterly unable to pay a fine of fifty rupees; there are hundreds of thousands from whom such a fine might be levied, but whom it would reduce to extreme distress; there are thousands to whom it would give very little uneasiness; there are hundreds to whom it would be a matter of perfect indifference, a [illegible] poor criminal it is a matter of absolute indifference whether the fine to which he is liable be limited or not, unless it be so limited as to render it quite inefficient as a mode of punishing the rich. To a man who has no capital, who has laid by nothing, whose monthly wages are just sufficient to provide himself and his family with their monthly rice, it matters not whether the fine for assault be left to be settled by the discretion of the Courts, or whether a hundred rupees be fixed as the maximum. There are no degrees in impossibility. He is no more able to pay a hundred rupees than to pay a lac. A just and wise judge, even if intrusted with a boundless discretion, will not, under ordinary circumstances,

[1] L. R. C. M., Vol. I, s. 289, p. 81.
[2] L. R. C. M., Vol. I, s. 290, p. 81.
[3] III of 1901, ss. 13 (2), 61.
[4] III of 1892, s. 28 (1).

sentence such an offender to a fine of a hundred rupees. And the limit of a hundred rupees would leave it quite in the power of an unjust or inconsiderate judge to inflict on such an offender all the evil which can be inflicted on him by means of fine.

"It appears to us that the punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of great offences arising from cupidity, of forging a bill of exchange, for example, of keeping a receptacle for stolen goods, or of extensive embezzlement, ought, we conceive, to be so fined as to reduce him to poverty. That such a man should, when his imprisonment is over, return to the enjoyment of three-fourths of his property, a property which may be very large and which may have been accumulated by his offences, appears to us highly objectionable. Those persons who are most likely to commit such offences would often be less deterred by knowing that the offender had passed several years in imprisonment, than encouraged by seeing him, after his liberation, enjoying the far larger part of his wealth."[1]

The description of fine which it was the object of this section to prohibit, was a fine which it would be impossible or very difficult for the accused person to pay, or wholly disproportioned to the character of the offence.[2] The maximum fine to be imposed upon any individual should depend in every case upon his position in life.[3]

Magisterial fines.—In a Calcutta case it has been doubted whether this section applies to fines inflicted by a Magistrate, as the power of a Magistrate to fine is, in all cases, under the Penal Code and the Criminal Procedure Code, limited to Rs 1,000, and it is only the Court of Session and the High Court that can inflict fines to an unlimited extent.[4]

Statutory application of ss. 63-70.—The provisions of ss. 63 to 70 apply to all fines imposed under the authority of any Act, Regulation, rule or bye-law, unless the Act, Regulation, rule or bye-law contains an express provision to the contrary.[5]

PRACTICE.

Procedure.—Whenever a fine is imposed, the Court may issue a warrant for levy of fine as provided in the Code of Criminal Procedure.[6] The whole or any part of the fine recovered is to be applied—(*a*) in defraying expenses properly incurred in the prosecution; (*b*) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court; and (*c*) in compensating any bona fide purchaser of property acquired in the commission of certain offences for the loss if such property is restored to its owner.[7]

[1] Note A, pp 97, 98.

[2] *Abdoor Ruhman*, (1867) 7 W. R. (Cr.) 37; [illegible]

[illegible] 397, s. 25. Under s. 26 of the Bombay General Clauses Act, I of 1904, the provisions of ss. 63-70 "apply to every fine imposable under any enactment of the Governor of Bombay in Council." (See *Pana Laxman Bhil*, (1904) 6 Bom. L. R. 357.) The Bengal General [illegible] General Clauses Act (I of 1904), s. 25 and the Punjab General Clauses Act (I of 1898), s. 23, make ss. 63-70 applicable to all fines under any local Acts. The Burma General Clauses Act (I of 1898) s. 25 and the Assam General Clauses Act (Assam Act II of 1915), [illegible] to all fines imposed under the authority of any Madras Act. The United Provinces [illegible] 1898, s. 340.

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[1] Note A, pp. 97, 98.

[2] *Abdoor Rukman*, (1867) 7 W. R. (Cr.) 37; *Mohna*, (1895) P. R. No. 20 of 1895.

[3] *Abdullah*, (1922) 5 L. L. J. 271.

[4] *Abdoor Rukman*, sup.

[5] General Clauses Act, X of 1897, s. 25. Under s. 26 of the Bombay General Clauses Act, I of 1904, the provisions of ss. 63-70 "apply to every fine imposable under any enactment of the Governor of Bombay in Council." (See *Puna Laxman Bhil*, (1904) 6 Bom. L. R. 357.) The Bengal General [illegible] and the [illegible] of 1898), [illegible] all fines under any local Acts. The Burma General Clauses Act (I of 1898) s. 25 and the Assam General Clauses Act (Assam Act II of 1915), s. 23, the Bihar and Orissa General Clauses Act, 1897; and the Central Provinces General Clauses Act (C.P. Act I of 1914), s. 24, contain similar provisions. These sections are also [illegible] to all fines imposed under the authority of any Madras Act. The United Provinces [illegible]

[7] *Ibid*, s. 545.

imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.

"But we do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in his person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to those very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment would be most likely to restrain. We therefore propose that the imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine; but his property will for a time continue to be so. What we recommend is, that at any time during a certain limited period the fine may be levied on his effects by distress. If the fine is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate, and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place.

"It may perhaps appear to some persons harsh to imprison a man for non-[illegible]

desirable that the fine should be levied, and he is the very convict who has least claim to indulgence. The confinement which he has undergone may be regarded as no more than a reasonable punishment for his obstinate resistance to the due execution of his sentence. If the offender has not the means of paying the fine while he continues liable to it, he will be quit for his imprisonment There remains another case; that of an offender who, being really unable to pay his fine, lies in [illegible]

both laws imprisonment is inflicted, under both a fine is exacted But the one law liberates the offender on payment of the fine, and also fixes a limit beyond which he cannot be detained in gaol, whether the fine be paid or no The other law keeps him in confinement till the money is actually paid It is therefore, at least as severe as ours on his property, and is immeasurably more severe on his person."[1]

Scope.—This section does not include punishment inflicted under s 75 of the Code.[2] Similarly it does not affect several sections of certain local Acts.[3]

1. **'The term...shall not exceed one-fourth of the term of imprisonment... fixed for the offence.'**—Where the accused was convicted under s 510 of the Penal Code and sentenced to pay a fine of two annas or in default to suffer imprisonment for a day, it was held that the maximum sentence of imprisonment legally awardable was six hours.[4] Accused having been found guilty of an offence under s 3, cl. 10, of the Towns Nuisance Act (Madras Act III of 1889) punishable with a "fine not exceeding Rs. 50" or "imprisonment of either description not exceeding eight

[1] Note A, pp. 98, 99, 100. These views were generally approved of by the Law Commissioners in their 2nd Rep., ss. 489-494.

[2] *Klawa*, O. S. C. 175.

[3] See Burma Act IV of 1907, s. 43 D; Burma Vaccination Act (Burma Act I of 1909), s. 15

[4] *Tirumalai*, (1894) 1 Weir 31.

...nd Class, imprisonment for six months, ...prisonment for one month.[1] Where a ...l fine, the period of imprisonment awarded ...exceed one-fourth of the period which the ...ntively. Thus, in this case, a Magistrate ...han six months a Magistrate of the Second ...f, and a Magistrate of the Third Class, more

...e imprisonment which the Court im- ...ult of payment of a fine may be of any ... to which the offender might have been ...for the offence.[1]

...OMMENT

...default of payment of a fine may be of any kind ...ffence.

...e with rigorous imprisonment then the additional ...ment of fine, must be rigorous.[3]

...d denotes here anything punishable under the Penal ...local law (s. 40).

...be punishable with fine only, the impri- ...which the Court imposes in default of ...of the fine shall be simple, and the term ...the Court directs the offender to be ...in default of payment of fine shall not ...that is to say, for any term not exceeding ...nount of the fine shall not exceed fifty ...n not exceeding four months when the ...one hundred rupees, and for any term not ...any other case.

COMMENT.

...e offender ...provides for the maximum term of imprisonment which ...ot be detained ...ult of payment of fine where fine is the only punishment ...n in confinement. It has no application to offences punishable either ...were as ou...with fine. Such sentences are governed by s. 65.[4]

...t affected by Ch. XXII of the Criminal Procedure Code ...le, limiting the period of imprisonment ... the Magistrate acts under this section. ... three months cannot be inflicted but if ...ternative punishment it can exceed three months.[5]

...offence.[6]—This word denotes here anything punishable under the Penal ...ntenced ...was held ...y special or local law (s. 40).

...s.[4] A—The words "the imprisonment which the Court imposes in ...s Nuient of the fine shall be simple and" were inserted by Act VIII of ...s. 5 in the case of hill-tribes to which the Kachin Hill Tribes Regulation

...overruling Muhammad ... 277. See Phoolman Tewy... (1866) 6 W. R. (Cr.) 51; ... 461, F.B.

[6] Pat. H. C. Cr. C. ...

[7] U. B. C. M. s. 122.

... M. s. 123.

... M. s. 124.

...ato Kotal, (1867) 7 W. R. (Cr.) 31.

... Sahib, (1898) 22 Mad. 238. See Chunder Pershad Singh, (1866) 10 W. R. (Cr.) 30.

[4] Asghar Ali, (1883) 6 All. 61.

[5] See Santa bin Lakhappa Kore, (1886) 5 B. H. C. (Cr. C.) 62.

may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.[1] Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.[2]

The successor in office of a Judge or Magistrate may levy a fine imposed by his predecessor. But the Court which levies the fine must be the same as the Court which imposed it.[3]

Termination of imprisonment on payment of proportional part of fine.

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

ILLUSTRATION.

A is sentenced to a fine of one hundred rupees and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

COMMENT.

If the fine imposed on an accused is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate; and if a proportion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place.

PRACTICE.

Court has no power to refund fine.—Where a prisoner paid a portion of his fine, but that fact not having been communicated to the jailor, he underwent the full term of imprisonment, it was held that, under those circumstances, the Court had no power to order the fine to be refunded.[4] The accused must apply in such a case to the Government.

Calcutta Rule.—Magistrates and sub-divisional officers should be very careful, in all cases in which a person is sentenced to imprisonment in default of fine, to see that if the fine or a proportional part of it be paid or levied, immediate information be given to the officer in charge of the jail so that the prisoner may not be kept in illegal confinement.[5]

When a fine is imposed in addition to transportation, and the whole or part of the fine is levied, it is the duty of the sentencing Judge to inform the authorities at Port Blair of the fact.[6]

[1] *Vide* Criminal Procedure Code, s. 388.
[2] *Ibid*, s. 389.
[3] *Chunder Coomar Miller* v. *Modhoosoodun Dey*, (1868) 9 W. R. (Cr.) 50, F.B.
[4] *Bengal Govt. Letter*, No. 1060 T. 1864.
[5] 5 M. H. C. App. 44.
[6] *Nathu Mulu*, (1867) 4 B. H. C. (Cr. C.) 37.

Fine leviable within six years, or during imprisonment.

70. The fine, or any part thereof which remains unpaid, may be levied at any time within six years[1] after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.[2]

Death not to discharge property from liability.

COMMENT.

Imprisonment in default of payment of fine does not liberate the offender from his liability to pay the full amount of fine imposed on him. Such imprisonment is not a discharge or satisfaction of the fine, but is imposed as a punishment for non-payment[1] or contempt or resistance to the due execution of the sentence. The authors of the Code observe: "We do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in his person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to those very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment would be most likely to restrain. We therefore propose that the imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine; but his property will for a time continue to be so. What we recommend is, that at any time during a certain limited period the fine may be levied on his effects by distress. If the fine is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate, and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place. It may perhaps appear to some persons harsh to imprison a man for non-payment of a fine, and, after he has endured his imprisonment, to take his property by distress in order to realize the fine. But this harshness is rather apparent than real; if the offender, having the means of paying the fine, chooses rather to lie in prison than to part with his money, his case is the very case in [illegible] and he is the very convict [illegible] ich he has undergone may [illegible] for his obstinate resistance to the due execution of his sentence. If the offender has not the means of paying the fine while he continues liable to it, he will be quit for his imprisonment. There remains another case; that of an offender who, being really unable to pay his fine, lies in prison for a term, and within six years after his sentence acquires property. This case is the only case in which it can, with any plausibility, be maintained that the law, as we have framed it, would operate harshly. Even in this case, it is evident that our law will operate far less harshly than a law which should provide that an offender sentenced to a fine should be imprisoned till the fine should be paid. Under both laws imprisonment is inflicted, under both a fine is exacted. But the one law liberates the offender on payment of the fine, and also fixes a limit beyond which he cannot be detained in gaol, whether the fine be paid or no. The other law keeps him in confinement till the money is actually paid. It is, therefore, at least as severe as ours on his property, and is immeasurably more severe on his person...The offender who has been sentenced to fine must be considered as a debtor, and, as a debtor, not entitled

[1] *Gayya*, (1901) 23 All. 497.

to any peculiar lenity. It will be difficult to show on what principles a creditor ought to be allowed to employ, for the purpose of recovering a debt from a person who is perhaps only unfortunate, a more stringent mode of procedure than that which the State employs for the purpose of realizing a fine from the property of a criminal. If a temporary imprisonment for debt ought not to cancel the claim of the private creditor, neither ought a temporary imprisonment in default of payment of a fine to cancel the claims of public justice."[1]

1. 'Within six years.'—The bar of six years may save the property of the accused but not his personal arrest. The liability for any sentence of imprisonment awarded in default of payment of fine continues after the expiration of six years.[2]

2. 'Death of the offender does not discharge from the liability any property which...would be liable for his debts.'—Under the new provisions of s. 386, Criminal Procedure Code, moveable as well as immoveable property of the offender can be sold for realising the fine The cases of *Lallu Karwar*[3] and *Sita Nath Mitra*[4] are no longer of any authority

Fine once irrecoverable may be recovered if the offender obtains property subsequently.—The mere fact that a Magistrate having written off a fine as irrecoverable, is no bar to his taking action to levy the fine within the time allowed by law, if it subsequently appears that the person from whom it was due has acquired the means of paying it.[5]

PRACTICE.

Procedure.—An offender, who has undergone the full term of imprisonment to which he was sentenced in default of the payment of a fine, is still liable to have the amount levied by distress and sale of his property if the Court for special reasons to be recorded in writing considers it necessary to do so. The Court must act in accordance with the provisions of s 386 of the Code of Criminal Procedure.

Bombay Circular.—The attention of Sessions Judges and Magistrates is called to s. 70 of the Indian Penal Code, and ss. 386, 387 and 388 of the Code of Criminal Procedure, and to the fact that the proviso to s. 386 (1) directs that after the whole of the imprisonment awarded in default of payment of fine has been undergone, no further steps should be taken for the recovery of the fine unless the Court for special reasons to be recorded considers it necessary to do so In cases where further steps are required, if at any time subsequent to the return of the original warrant and within a period of six years from the passing of the sentence, the fine or any part of it, remains unpaid, and the Court, from information gained, has reason to think that there is any moveable property belonging to the offender, it should issue a fresh warrant for the attachment and sale of that property within a specified period, returnable within a certain time.[6] When any Court recovers a fine, or any portion thereof, inflicted upon a prisoner who is already in jail, or who is liable to be further detained in gaol, in default of payment of that fine, such Court shall be held responsible for the immediate communication to the jailor of the amount of the fine so recovered.[7]

Calcutta Rule.—A warrant issued under s. 386, Criminal Procedure Code, for the levy of a fine should ordinarily be directed to a Police Officer (see Form No. XXXVII, Schedule V, Criminal Procedure Code); and the authority issuing it should set a time for the sale and for the return of the warrant. If no one claims the property distrained, the Police have the power of selling it within the time

[1] Note A, pp. 99, 100.
[2] *Ganu Sakharam*, (1884) Unrep. Cr. C. 207.
[3] (1868) 5 B H. C. (Cr. C.) 63.
[4] (1892) 20 Cal. 478.
[5] *Latif-ul-Hasan* v. *Mumtaz Ali Khan*, (1906) 28 A. W. N. 275, 3 A. L. J. R. 818.
[6] B. H. C. Cr. C. Ch. IX, s. 136, p. 94.
[7] B. H C. Cr. C. Ch. IX, s. 137, p. 94.

specified in the warrant, without any previous reference to the claimant come forward, then the ownership of the property dist determined by the Magistrate, and not by the Police. If at any ti to the return of the warrant, and within the period of six years from the sentence, the fine, or any part thereof, remains unpaid (s. 70 of the and the Magistrate has, from information gained in any way, reason t any moveable property belonging to the offender is within his jurisdiction, issue a fresh warrant for the attachment and sale of such property. Such should be made returnable within a time to be definitely fixed therein.[1]

When a Court of Session realizes a fine imposed by it on an accused p it shall prepare the usual warrant for the realization of the fine, and shall for it to the Magistrate of the district concerned with an endorsement thereon to effect that the fine has been realized.[2]

Patna Circular.—In any case when, under any special or local law, imprisonment in lieu of fine is to be taken as a full satisfaction of the penalty, if the convicted person is sentenced to undergo the imprisonment, the clerk in charge of the Fine Register shall at once obtain a certificate from the Court imposing the sentence that the fine is not to be realised, and the amount of the fine shall, if entered, be struck out of the Register of criminal fines. Nothing here laid down shall interfere with any special directions of law for the attempted realization of fine by distress or otherwise before carrying out any sentence of imprisonment upon the offender.[3]

Oudh Circular.—If at any time subsequent to the return of the warrant and within the period of six years from the passing of the sentence, or within the period of imprisonment to which the offender is liable under the sentence when such period exceeds six years, the fine or any part thereof remains unpaid, the Magistrate, if he has reason to think that there is any moveable property belonging to the offender liable to attachment and sale, may, even though the offender has completed the term of imprisonment awarded in default of payment of the fine (s. 70, Indian Penal Code), issue a fresh warrant, returnable within a certain time, for levy of the unpaid amount by distress and sale of such property.[4]

Limit of punishment of offence made up of several offences.

71. Where anything which is an offence[1] is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where[2] anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where[3] several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

[1] C. H. C. R. & O., Ch. I, r. 117, p. 41. This rule will have to be modified in the light of the new s. 386 of the Code of Criminal Procedure.

[2] *Ibid*, r. 118, p. 42.

[3] Pat. H. C. Cr. C., para 11, p. 115.

[4] O. C. D. 127. This circular will have to be modified in the light of the new s. 386 of the Code of Criminal Procedure.

The combined effect of this clause and clause (1) of s. 235, Criminal Procedure
le, is exemplified in *Nilmony Poddar's case*,[1] discussed hereafter.

The word 'offence' denotes a thing punishable under the Code or under special or local law (s. 40).

. Second clause.—First provision.—This clause has two provisions. The first
to cases mentioned in cl. (2) of s. 235, Criminal Procedure Code, and the
to cases covered by cl. (3) of that section. The first provision provides for
which presents different aspects according to the view which may be taken
and which therefore fall within

there are two provisions, one specific and the other general, the specific
ought to be applied in preference to the general one. The applicant was
having abetted the personation of a voter at a municipal election in
eing himself acquainted with the person who came forward to vote,
he advice of others, put his name to a "signature sheet" in token that
ark made by the voter was that of the person entitled to vote under a
on the electoral roll. It was held that, inasmuch as the acts done
nt constituted the specific offence provided for by s. 171-F he could
or that offence and could not be tried for abetment of the general
d for by s. 465.[2]

rovision.—The second provision refers to cases falling under cl. (3) of
iminal Procedure Code. Illustration (*m*) is an example of such

ence.'—This phrase must be understood to refer to the
nces as enunciated in the Code itself, irrespective of the iden-
of the evidence whereby the several acts are proved.[3]

Penal Code and s. 235 of the Criminal Procedure Code.—
hese sections and gives the result, which nearly corresponds
Criminal Procedure Code (Act X of 1872):—
tition of several offences constitutes one offence of exactly
he instances taken together can only be treated as making
he greater or lesser number of instances may add to or
of the offence [*e.g.*, s. 71, ill. (*a*)].

w belonging to two persons.—Where the accused stole pro-
rto two different persons from the same room of a
ould not be sentenced separately as for two offences of
ts at the same time belonging to two different owners,
rt, was held to constitute only one offence of
charge of a goods train, stole articles
parate bags in a truck, it was held that
enced separately for two distinct offences of

perty belonging to two persons.—Where a gang of dacoits,
object, viz., robbery, attacked at the same time two
lifferent owners in the same village, it was held that
d separately on separate charges of dacoiting each
nished for one offence of dacoity.[7]

nsaction or connected series of events gives rise to
character, or to several offences of the same character

of 1897, Unrep. Cr. C. 927; *Nga Po*, (1882) S. J. L. B. 168; *San Hla*, (1889) S. J. L. B. 475.

Jan, (1887)

[4] *Har Dial*, (1905) P. R. No. 58 of 1905.

[7] *Nga San Dun*, (1889) S. J. L. B 444.

(Cr.) 38.
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affecting different persons, each such offence is separately indictable and punishable [*e.g.*, s. 71, ill. (*b*), and Criminal Procedure Code, s. 235, ills. (*a*), (*f*) and (*g*)].

Where different persons are injured, grievous hurt being caused in one case and simple hurt in others, it is competent for the Court to impose separate and accumulative sentences.[1]

Cases.—**House-breaking to commit mischief and assault, and mischief and assault.**—An accused person was convicted under s. 457 of the Penal Code of house-breaking by night in order to commit an offence (mischief and assault) and also under ss. 426 and 352 for the offences of mischief and assault, and punished separately for each offence. These offences formed part of one transaction. It was held that the sentences were legal.[2]

House breaking after making preparation for causing hurt or assault and committing of rape—Where the accused committed house-breaking by night after making preparation to cause hurt or assault (s. 458) and then committed rape (s. 376), it was held that separate sentences for both the offences were legal.[3]

Criminal intimidation to three persons at one time—An accused person, who threatened three witnesses, was convicted and sentenced to four months' imprisonment for the threat to each witness. It was held that if a person at one *time criminally intimidates three different persons, and each of those persons* brings a separate charge against him, he may be convicted for an offence as against each person, and be punished separately for each offence.[4]

Resistance to the taking of property by a public servant, and assaulting him.—Where the accused objected to accompany a constable who had been directed to produce him before the Court, seized the constable by the arm, and resisted his carrying away a pony which the accused was charged with having misappropriated, it was held that he was guilty of separate offences under ss. 353 and 183, and the infliction of separate sentences for each offence was not prevented by this section.[5]

Rioting and hurt, and rescuing from custody.—The accused were charged with, and convicted of, rioting and causing hurt, the common object of the unlawful assembly being the rescue of the first acc[illegible] and the first accused was further convicte[illegible]

[illegible] to those for rioting and hurt were proper, [illegible] escape and rescue were distinct offences, [illegible] the meaning of this [illegible] hurt also, it was held [illegible] ing hurt (s. 323) and separate sentences could be passed.[7]

Theft and receiving gilt to recover stolen property—Where a person was proved to have committed a theft and also the offence under s. 215, it was held that he might be convicted and sentenced for each of such offences, for the offences were distinct transactions capable of being proved independently of each other. But where the theft is proved not by direct evidence but by inference drawn from the facts which prove the commission of the offence under s. 215, separate convictions and sentences should not be passed.[8]

Wrongful confinement and assault—The accused were convicted under ss 352 and 342 and sentenced separately for each of the offences, the acts found

[1] *Bakshar*, (1915) 38 All. 628.

[2] *Nirichan*, (1888) 12 Mad. 36. In this case. *Noujan*, (1874) 7 M. H. C. 375, was not followed. But so far as the question of punishment goes these two cases can be [illegible] 25 of the [illegible] .1; *Malu Arjun*, (1899) 1 Bom. L. R. 142, 23 Bom. 706, F.B., distinguished.

[4] *Goolzar Khan*, (1868) 9 W R (Cr.) 30.

[5] *Joyah Mohun Chunder*, (1870) 14 W R. (Cr.) 19.

[6] *Anon.*, (1894) 1 Weir 34.

[7] *Kawaru Rai*, (1917) 39 All. 623.

[8] *Nga Shein*, (1902) 1 L. B. R. 203, F.B.

against them being that they seized, dragged, and pushed the complainant to a certain place in order to punish him. It was held that what the accused had been punished for was the whole series of acts, and that series of acts came within the definition both of wrongful confinement and of using criminal force, and, accordingly, the case fell within the second paragraph of this section.[1] Separate sentences may be passed for making a false charge under s. 211 and for giving false evidence under s. 193[2]; or for kidnapping (s. 363) and for selling for purposes of prostitution (s. 372).[3]

Rioting and grievous hurt—The question as to whether a member of an unlawful assembly, some members of which have caused grievous hurt, can be [illegible] hurt, separate sentences may be passed for each of the two offences without regard to the limit of the combined sentences. In such a case the total punishment can [illegible] ny one of the offences.[4] [illegible] hich he has not himself [illegible] difference of opinion.

A Full Bench of the Calcutta High Court has ruled that separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code.[5] [illegible] tion that some persons wer [illegible] thither unaccompanied by [illegible] arrested some persons, and [illegible] assistance of the Panchayet who, instead of giving assistance, collected men and rescued them from custody and assaulted the Excise Sub-Inspector, it was held that separate sentences should not be passed for rioting and assaulting a public servant in execution of his duty when practically the offence of assaulting the public servant was the common object of the unlawful assembly, the members of which committed such rioting.[6] In this case their lordships solved the difficulty by considering the separate sentences passed under ss. 147, 353 and 225 as one consolidated sentence so as to meet the offence of which the accused were convicted. Recently, in a case in which the accused was sentenced to two years' rigorous imprisonment under s. 147 and a further sentence of three years' imprisonment under s.325 read with s.149, both sentences being directed to run concurrently, Sanderson, C. J., held that the infliction of separate punishments for the two offences was illegal under para 1 of this section and it did not make any difference that the sentences were directed to run concurrently. Cuming, J., expressed the opinion

[1] *Fakira Khan*, (1905) 4 C. L. J. 90.

[2] [illegible]

[3] [illegible]

[4] *Bana Punja*, (1892) 17 Bom. 260, F.B.; *Chandra Kant Bhattacharjee*, (1885) 12 Cal. 495; *Mohur Mir*, (1889) 16 Cal. 725; *Ferasat*, (1891) 19 Cal. 105; *Dungar Singh*, (1884) 7 All. 29; *Pershad*, (1884) 7 All. 414, F.B.; *Roy*, (1871) 16 W. R. (Cr.) 60; *Sobrai Cowellah*, (1873) 20 W. R. (Cr.) 70.

judgments of Oldfield and Duthoit, JJ., in *Ram Sarup*, (1885) 7 All. 757, F.B.

[5] *Nulmony Poddar*, (1889) 16 Cal. 442, F.B., overruling *Lole Nath Sarkar*, (1885) 11 Cal. 349, and approving *Ram Parlab*, (1883) 6 All. 121. See *Hansa Pathak* v. *Bansi Lal Das*, (1901) 8 C. W. N. 510, where an effort is made to distinguish *Nulmony's case*, and an opinion is expressed that the latter decision does not apply to the case of separate sentences for unlawful assembly and theft. This is opposed to the ruling in *Mithoo Singh* v. *Gopal Lal*, (1899) 3 C. W. N. 761.

[6] *Hridoy Mondal* v. *Jogananda Das*, (1899) 4 C. W. N. 245.

that the prohibition in this section against punishing an accused with the punishment of more than one of the offences was obviously met by making all the sentences which had been imposed run concurrently and that where two separate sentences had been passed the illegality did not necessarily attach to the sentence which was passed second in point of time.[1]

The Patna High Court has adopted the same view. It has laid down that it is illegal to record separate convictions for offences under ss. 147 and 325 read with s. 149 and that separate sentences in respect of the two offences are illegal.[2] It has also held that separate sentences under ss. 147 and 325 are not *per se* illegal, but the sentences imposed ought not to be heavier than are justifiable upon the particular facts and circumstances of the case.[3] If the common object of the accused is to commit an assault, but, in prosecution of that object, grievous hurt or death is caused by the members thereof, this section will not apply and separate sentences under s. 147 or s. 148 and s. 324 or s. 325 read with s. 149 will not be illegal.[4]

The Madras High Court has taken a similar view. When the object of an unlawful assembly is to cause hurt, then a member of that unlawful assembly, if he is convicted under s. 147, cannot be convicted also under s. 323 or s. 325 read with s. 149, unless he is himself proved to have caused hurt in the course of the riot.[5]

A Full Bench of the Bombay High Court has decided that where a prisoner is convicted of rioting and of hurt, and the conviction for hurt depends upon the application of s. 149, it is not illegal to pass two sentences, one for riot, and another for hurt; provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences.[6] Under the amended s. 35 of the Criminal Procedure Code it is competent to a Court to pass separate sentences for offences punishable under ss. 148 and 326, provided the sentences so passed could be passed under any of the two sections, and provided they are not in excess of the powers of the Court passing them.[7] In this case the application of s. 149 did not arise.

The several decisions of the Allahabad High Court are not unanimous on this question In an early case Straight, J., decided that a member of an unlawful assembly, some members of which had caused grievous hurt, could not lawfully be punished for the offence of rioting as well as for the offence of causing grievous hurt.[8] This point was not decided in the Full Bench case of *Ram Sarup*,[9] but the judgment of Broadhurst, J., in this case expresses a contrary opinion. In two subsequent cases, however, the ruling in *Ram Partab's case* was not approved of. In the first case, the facts were that one M, in prosecution of the common object of an unlawful assembly, caused grievous hurt with his own hand. M and other members of the assembly, as to whom it did not appear whether or not any of them [illegible] ment did not exceed the maximum punishment which could have been awarded under s. 325. Edge, C. J., said: "The object of s. 149, as I think, in such a case as the present, is to make it clear that an accused who comes within that section, cannot put forward as a defence that it was not his hand which inflicted the grievous hurt."[10] In the second case, Mahmood, J., said: "It seems to me that where certain acts constitute more than one offence, whether such offences do or do not fall under the purview of s. 71 of the Indian Penal Code, and the accused is charged

[1] *Kiamuddi Karikar*, (1923) 51 Cal. 79.
[2] *Paltu Singh*, (1918) 3 P. L. J. 641; *Nemdhari Singh*, (1920) 2 P. L. T. 91.
[3] *Ramnath Rai*, (1921) 2 P. L. T. 549.
[4] *Mathura Rai*, (1921) 2 P. L. T. 316
[5] *Krishna Ayyar*, (1918) 24 M. L. T. 96, (1918) M. W. N. 522.
[6] *Bana Punja*, (1892) 17 Bom. 260, F.B.; *Tokha*, (1895) P. R. No. 8 of 1895.
[7] *Piru Rama*, (1925) 27 Bom. L. R. 1373, 8 Bom. Cr. C. 137.
[8] *Ram Partab*, (1883) 6 All. 121.
[9] (1885) 7 All. 757, F.B.
[10] *Bisheshar*, (1887) 9 All. 645, 650.

and tried for more than one offence and the evidence establishes those offences, the Court is bound to convict him of those offences, though in awarding punishment the provisions of s. 71 of the Indian Penal Code and of s. 35 of the Code of Criminal Procedure would of course have to be duly kept in view."[1] Recently, in a case, Walsh, J., observed: "Whether there are different definitions of the same offence, or whether the same offence is provided for in different sections or by separate and different provisions in the Code, care should be taken that under no circumstances should the accused be sentenced to a greater punishment than the highest penalty contained in one of the provisions under which he may be convicted. He may be convicted of rioting and also of causing grievous hurt by mere membership of an unlawful assembly, provided the sentence ultimately passed on him does not exceed that provided in s. 325."[2]

The former Chief Court of the Punjab distinguished the Calcutta Full Bench case of *Nilmony Poddar* in *Nur Khan*,[3] in which it held that *separate* sentences under ss. 147 and 325 were legal inasmuch as each of the offenders might have been convicted individually under s. 325, and further under ss. 149 and 325. It also held that this section was inapplicable to the case of conviction and separate sentences under s. 147 and ss. 149 and 325.[4] On the question going before a Full Bench, the following two propositions were laid down: (1) Separate sentences for the offence of rioting and grievous hurt cannot be legally imposed upon a member of an unlawful assembly where the offence of rioting was not itself complete until the grievous hurt was actually inflicted, that is to say, where the causing of the hurt was itself the form of force or violence which constituted the offence of rioting (2) Separate sentences cannot be awarded where the first clause of this section applies, and the offence committed is made up of parts, any of which part is itself an offence, but they can be legally awarded where distinct offences not made up of parts are proved to have been committed by one member of an unlawful assembly in prosecution of the common object of that assembly, or where the members of it knew that such offences were likely to be committed in prosecution of that object.[5]

The Rangoon High Court adopting the Bombay view has held that in cases of rioting under s. 147, resulting in grievous hurt, convictions and separate sentences under s 325 are legal against all the accused who actually joined in the assault. Some of these assaults may have resulted in simple hurt, others in grievous hurt, but all the actual assailants are, under s. 149, liable for all the results.[6]

III. Where the same facts will constitute different offences, the indictment may, and ought to, charge each such offence so as to meet every possible view of the case. But only one offence has been committed, and the punishment must not exceed that applicable to the graver offence (s 71, cl. 2).

"It is a general rule that when, in the same penal statute, there are two clauses applicable to the same act of an accused, the punishments are not to be regarded as cumulative, unless it be so expressly provided"[7]

Cases.—An accused cannot be punished at the same time for committing an offence by fire with intent to destroy a warehouse (s. 436) and for the offence of mischief by fire (s. 435).[8] Where a mother abandoned her child, with the intention of wholly abandoning it, and knowing that such abandonment was likely to cause its death, and the child died in consequence of the abandonment, it was held

[1] *Wazir Jan*, (1887) 10 All. 58.

[2] *Dharamdeo Singh*, (1916) 14 A. L. J. R. 738, 740

[3] (1893) P. R. No. 31 of 1894.

[4] *Tokha*, (1895) P. R. No 8 of 1895.

[5] *Bhagwan Singh*, (1900) P. R. No. 4 of 1901, F.B.; *Mangal Singh*, (1916) P. R. No. 31 of 1916.

[6] *Nga Son Min*, (1923) 3 B L. J 49.

[7] Per West, J., in *Dod Basaya*, (1874) 11 B H C 13, 15; *Francis Xavier*, (1890) Unrep. Cr C 506

[8] *Dod Basaya*, sup.

that she could not be convicted and punished under s. 304 and also under s. 317, but under s. 304 only.[1]

A person cannot be punished for rioting and also for being a member of an unlawful assembly[2]; for rioting and for wrongful confinement, when the common object of the unlawful assembly is the wrongful confinement[3]; for rioting and assaulting a public servant in execution of his duty when the offence of assaulting was the common object of the unlawful assembly[4]; for rioting with the common object of causing hurt and also for causing hurt[5]; for rioting with the common object of committing theft and also for theft[6]; for causing grievous hurt by a dangerous weapon (s. 326) and for committing robbery or dacoity with attempt to cause grievous hurt (s. 397)[7]; for wrongful confinement (s. 342) and for robbery (s. 392) when but for wrongful confinement a conviction for robbery could not be made[8]; for stealing an animal (s. 379) and for subsequently killing it (s. 429)[9]; for adultery (s. 497) and for enticing for the purpose of illicit intercourse (s. 498)[10]; for culpable homicide and for being a member of an unlawful assembly armed with deadly weapons[11]; for abetment of abduction of a woman (ss. 109 and 498) and for her wrongful confinement (s. 343)[12]; for dishonestly receiving stolen property (s. 411) and for assisting in concealment of stolen property (s. 414)[13]; for abducting a child with intent dishonestly to take moveable property (s. 369) and also for the theft of a part of the moveable property (s. 379) which he intended dishonestly to take by means of the abduction[14]; for kidnapping with intent secretly and wrongfully to confine a person (s. 365) and also for putting a person in fear of death or of grievous hurt in order to commit extortion[15]; for distilling spirit and possessing the spirit obtained by such distillation[16]; and for performing a part in the process of counterfeiting King's coin (s. 232) and for having in his possession implements and materials for the purpose of using the same for counterfeiting King's coin.[17]

IV. Sometimes an act, which is itself an offence, becomes either a different offence, or an aggravated form of the same offence when combined with other facts, either in themselves innocent or criminal. Here also it may be proper not only to charge the offender with the compound offence, but with the minor offences of which it is made up. But if the compound offence is made out, no punishment can be awarded beyond that which can be given in respect of it. For instance, upon the same facts A may be charged for using criminal force under s. 352 and under s. 152 for the same force against a public servant. But though convicted on both charges, he could not receive a higher punishment than that which is provided by the latter section.

[1] *Banni*, (1879) 2 All 349.

[2] *Meelan Khalifa* v. *Dwarkanath Goopto*, (1864) 1 W R (Cr.) 7.

[3] *Alim Sheikh* v *Shahazada Singh Burkundaz*, (1904) 8 C. W N. 483; *Ameeruddi Pramanick*, (1924) 40 C L. J. 306.

[4] *Hridoy Mondal* v *Jagananda Das*, (1899) 4 C. W. N 245.

[5] [illegible] (1911) P L R No 161 of [illegible] T. 91; [illegible]

[illegible] 45.

[illegible] *Hussain* [illegible]

[illegible] r.) 35.

[illegible] 13

[illegible] W. R. (Gap. No.) (Cr.) 21.

[13] (1868) 4 M. H. C. App. 13.

[14] *Noujan*, (1874) 7 M. H. C. 375.

[15] *Po Lan*, (1912) 6 L. B. R. 160.

[16] *Nga San Dun*, (1904) U. B R. (P.C.) 1.

[17] *Hayat*, (1904) 5 P L. R 404. See also *Ganu Ladu*, (1864) 2 B. H. C. (Cr. C) 126; *Zora Karubeg*, (1867) 4 B. H. C. (Cr. C.) 12; *Bhyrub Seal*, (1864) W. R. (Gap. No) (Cr.; 27 [illegible]

27 [illegible]

Sr [illegible]

Bi [illegible]

W [illegible]

8 [illegible]

(C [illegible]

Ra [illegible]

[illegible] (1869) 11 W R (Cr.) 12; [illegible]

In *Queen Empress* v. *Malu Arjun*[1] a Full Bench of the Bombay High Court held: (1) that a person, who has committed house-breaking in order to commit theft (s. 457) and theft (s. 380), can be charged with, and convicted of, each of these offences; (2) that a Court, in awarding punishment (under this section), should pass one sentence for either of the offences in question, and not a separate one for each offence; (3) that if two sentences are nevertheless passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an *irregularity* only and not an *illeg* [illegible] the [illegible] it is [illegible] the provisions of s. 71, Indian Penal Code, should pass one sentence for either of the offences in question, and not a separate one for each offence." The illustration [illegible] 5 by Act V of 1898 are now omitted by Act XVIII of [illegible] in s. 35 is also deleted. The Statement of Objects [illegible] existing Explanation and Illustration to s. 35 have occasioned considerable misunderstanding. It is therefore proposed to omit them and state definitely that s. 35 must be read subject to s. 71." The decision in *Malu Arjun* is therefore considerably modified in view of the amended section. The Court may award separate sentences for offences under s. 457 and s. 380.[2]

The Calcutta High Court has held that house-breaking by night and theft form a single and an entire offence and cannot be punished separately.[3] In one case, however, it has held that a person may be convicted of theft in a building and of house-breaking by night with intent to commit theft, though, if the Judge considers the punishment for the first sufficient, he need not award any additional sentence for the second.[4] But it has held that the infliction of separate punishment does not violate the law, provided that the aggregate punishment awarded is not in excess of what the Court could inflict for either of the offences.[5] These decisions are no longer of any authority in view of the amended s. 35 of the Code of Criminal Procedure

The Madras High Court has held that a prisoner convicted under s. 369 for abducting a child with intent dishonestly to take moveable property, cannot also be punished for the theft of a part of the moveable property which he intended dishonestly to take through means of the abduction.[6] Under the present law he can be punished separately.

The Allahabad High Court has held that where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass, and at the same time committed mischief, that such person could not receive a punishment more severe than what might have been awarded for either of such offences. But Turner, J., in this case, said: "The . law does not,...prohibit the Court from passing sentence in respect of each offence established, but it declares that the offender must not receive for such offence collectively a punishment more severe than might have been awarded for any one of them, or for the offence formed by their combination."[7] This view was approved of by the same High Court in a later case in which it laid down that where more offences than one are proved in respect of which the accused has been charged and tried,

[1] (1899) 1 Bom. L. R. 142, 23 Bom 706, F.B., followed in *Wadhawa*, (1917) P. R. No 46 of 1917 See *Anwarkhan*, (1872) 9 B H. C 172, F B, *Gulam Abas*, (1875) 12 B H C. 147; *Tukaya bin Tamana*, (1875) 1 Bom. 214; *Sakharam Bhau*, (1880) 10 Bom. 493

[2] *Dhondu Bapu Bhapkar*, (1906) 8 Bom. L. R. 850, is no longer of any authority

[3] *Tonaokoch*, (1865) 2 W. R (Cr.) 63; *Chytun Bowra*, (1866) 5 W. R. (Cr.) 49; *Jogeen Pullee* v. *Nobo Pullee*, (1865) 6 W R (Cr) 49; *Mussahur Daoudh*, (1866) 6 W R. (Cr.) 92; *Sahrae*, (1867) 8 W. R (Cr) 31.

[4] *Tincouree*, (1864) W. R. (Gap No) (Cr.) 31

[5] *Fakira Khan*, (1905) 4 C. L. J. 90.

[6] *Noujan*, (1874) 7 M H. C. 375

[7] *Budh Singh*, (1879) 2 All. 101.

a conviction for each offence must follow, whether this section applies to the case or not; and, subject to the provisions of this section, a separate sentence must be passed in respect of each such conviction. In this case the accused were tried for offences under ss. 170 and 383, committed in the same transaction, and it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion. It was held that the former offence was completed before the latter h[illegible] each offence were not illegal.[1] The view [illegible] *se*[2] was not *approved of in this case.* [illegible] Where in the course of one and the same transaction an accused person appears to have perpetrated several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence proved." In this case a person who broke into a house by night and committed theft therein was charged and tried for offences under ss. 380 and 457, and was convicted of both those offences, and punished for each with rigorous imprisonment for eighteen months. The High Court convicted him of the offence under s. 457 and sentenced him to rigorous imprisonment for three years, and acquitted him of the offence under s. 380. This case was decided when Act X of 1872 was the Code of Criminal Procedure. In a case decided under the Criminal Procedure Code of 1882 (Act X of 1882) by Straight and Broadhurst, JJ., it was held that, under ss. 35 and 235 of the Criminal Procedure Code, a Magistrate might legally pass a sentence of two years' rigorous imprisonment and fine under each of the sections 379 or 380 and 454 of the Penal Code, for house-breaking in order to the commission of theft, and theft, the two offences forming part of the same transaction, and being tried together. But a Sessions Judge trying such a case would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454, and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit but had actually committed theft.[3] These decisions will also undergo modification in view of the amended s. 35 of the Code of Criminal Procedure.

Amendment.—The last three clauses of this section were added by Act VIII of 1882, s. 4.

Attempt and abetment.—A person cannot be separately punished for attempting as well as for abetting the same offence.[4]

PRACTICE.

[illegible] convicted the accused under several sections amounting to nine months. It was held that Magistrate was empowered to pass separate sentences for different offences.[5]

Upper Burma Rule.—When a person is convicted at one trial of two or more offences, it is not necessary for the Court to pass a sentence for each offence, the first sentence of paragraph 1 of s. 35 of the Code of Criminal Procedure being permissive, not mandatory.[6]

[1] *Wazir Jan*, (1887) 10 All. 58.

[2] (1880) 2 All. 644, 646.

[3] *Zor Singh*, (1887) 10 All. 146.

[4] *Fatehkhan Bahadurkhan*, (1906) 8 Bom. L. R. 855.

[5] *Dharam Das*, (1910) 7 A. L. J. R. 910.

[6] U. B. C. M., s. 128.

Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful[1] of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

COMMENT.

The authors of the Code observe: "This provision is intended to prevent an offender whose guilt is fully established from eluding punishment, on the ground that the evidence does not enable the tribunals to pronounce with certainty under what penal provision his case falls.

Where the doubt is merely between an aggravated and mitigated form of the same offence, the difficulty will not be great. In such cases the offender ought always to be convicted of the minor offence. But the doubt may be between two offences, neither of which is a mitigated form of the other. The doubt, for example, may lie between murder and the aiding of murder. It may be certain, for example, that either A or B murdered Z, and that whichever was the murderer was aided by the other in the commission of the murder; but which committed the murder, and which aided the commission, it may be impossible to ascertain. To suffer both to go unpunished, though it is certain that both are guilty of capital crimes, merely because it is doubtful under what clause each of them is punishable, would be most unreasonable. It appears to us that a conviction in the alternative has this recommendation, that it is altogether free from fiction, that it is exactly consonant to the truth of the facts. If the Court find both A and B guilty of murder, or of aiding murder, the Court affirms that which is not literally true; and on all occasions, but especially in judicial proceedings, there is a strong presumption in favour of literal truth. If the Court finds that A has either murdered Z or aided B to murder Z, and that B has either murdered Z or aided A to murder Z, the Court finds that which is the literal truth; nor will there, under the rule which we have laid down, be the smallest difficulty in prescribing the punishment.

It is chiefly [illegible] the necessity fo[illegible]
It will often be c[illegible]
and the only doubt will be, whether this fraudulent appropriation was a theft or a criminal breach of trust. To allow the offender to escape unpunished on account of such a doubt would be absurd. To subject him to the punishment of theft, which is the higher of the two crimes, between which the doubt lies, would be grossly unjust. The punishment to which he ought to be liable is evidently that of criminal breach of trust; but that a Court should convict an offender of a criminal [illegible] trust, when the opinion of the Court perhaps is, that it is an even chance, [illegible]
[illegible]
which, though literally false, are conventionally true. Yet [illegible]
that the presumption is always strongly in favour of that form [illegible]
accurately sets forth the real state of the facts. In the [illegible]
supposed, the real state of the facts is, that the offender [illegible]
either theft or criminal breach of trust, and that theft [illegible]
This ought, therefore, in our opinion, to be [illegible]

1. 'Doubtful.'—This section does not [illegible]
only as to the existence of particular facts [illegible]

[illegible]

applicable to a certain set of facts is doubtful, by reason of the nature of the single act or series of acts done, and in which it is charged, or found proved, that the act or series of acts constitutes one or more or some one of several offences, the doubt being on a matter of law only.[1] To authorize a conviction under this section the doubt must, therefore, be as to which of the offences the accused has committed, not whether he has committed either.

PRACTICE.

Procedure.—The Criminal Procedure Code[2] says: "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." The illustrations clearly bring out the purport of this section. A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating. A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

When the conviction is under the Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same and pass judgments in the alternative.[3]

Punishment—When an accused person is convicted in the alternative, one of the offences of which he might be guilty being murder, punishable under s. 302, this section so far overrides s. 302 as to admit in such a case of a less punishment than transportation for life being inflicted.[4]

Solitary confinement.

73. Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion [1] or portions of the imprisonment to which he is sentenced, not exceeding three months [2] in the whole, according to the following scale, that is to say—

a time not exceeding one month [3] if the term of imprisonment shall not exceed six months:

a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year:

a time not exceeding three months if the term of imprisonment shall exceed one year.

COMMENT.

Solitary confinement means such confinement with or without labour as entirely secludes the prisoner both from sight of, and communication with, other prisoners.

[1] *Khan Muhammad*, (1887) P. R. No. 11 of 1887; *Jamurha*, (1875) 7 N. W. P. 137.
[2] Section 236.
[3] Section 367 (3), Criminal Procedure Code.
[4] *Sahel Singh*, (1906) 28 A. W. N. 93.

This section gives the scale according to which solitary confinement may be inflicted. In England the power to impose solitary punishment, though it was very rarely exercised by a criminal Court as part of its sentence, has been done away with by 56 & 57 Vic, c. 51. Under the section solitary confinement can only be inflicted where the Court has power to sentence an offender to rigorous imprisonment.

1. 'Any portion.'—These words imply that the solitary confinement if inflicted for the whole term of imprisonment is illegal.[1] A prisoner was convicted of hurt and sentenced to fourteen days' rigorous imprisonment, the whole of which was ordered to be passed in solitary confinement. The High Court quashed the order as illegal.[2]

2. 'Not exceeding three months.'—In the case of simultaneous convictions, the award of separate terms of solitary confinement, which in the aggregate exceed three months, is legal[3]; but, as a matter of practice, a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more than one offence. And, in a later case,[4] in which none of these cases was referred to, it was held that such a sentence should not be passed.[5] The Rangoon High Court has laid down that cumulative sentences of solitary confinement are contrary to the intention of this section.[6]

3. 'One month.'—One month signifies thirty days.[7]

Summary trial.—It is not illegal to impose solitary confinement as a part of the sentence in a case tried summarily.[8]

Solitary confinement not to be awarded for offences under special or local Acts.—It is only for offences under the Penal Code that solitary confinement can be awarded.[9]

Solitary confinement for imprisonment in lieu of fine.—Where imprisonment does not form part of the substantive sentence, solitary confinement cannot be awarded[10]; so also, it cannot be awarded as part of the imprisonment in lieu of fine.[11]

Solitary confinement as part of imprisonment in default of furnishing security for good behaviour.—The imprisonment which a person may be ordered to undergo in default of furnishing security for good behaviour cannot be made to include solitary confinement.[12]

Amendment.—The words "shall not exceed one year" were substituted for "be less than a" by Act VIII of 1882, s. 5.

PRACTICE.

Though it is not illegal, yet, as a matter of practice, a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more than one offence.[13]

A Magistrate has no power to direct that solitary confinement should be executed in the first week of every month.[14]

[1] *Nayan Suk Mether*, (1869) 3 Beng. L. R (A. Cr J) 49.

[2] *Ibid.*

[3] *Nihala*, (1877) P. R. No. 11 of 1877; *Khushal*, (1877) P. R No 13 of 1877.

[4] *Ibrahim*, (1897) P R. No 7 of 1897; *Dangar Khan*, (1922) 5 L. L. J. 224

[5] [illegible]

[6] [illegible]

1866; *Hurnarain*, (1870) P. R. No. 20 of 1870; *Munawar*, (1874) P. R. No. 4 of 1875; *Mulk Ram*, (1879) P. R. No. 24 of 1879; *Gurdit Singh*, (1880) P. R. No. 17 of 1880; *Nga Kun Ba*, (1899) P J L B 554; *Baldeo Brahmin*, (1901) 14 C. P. L. R. 39; *Bidha*, (1923) 46 All. 114.

[10] *Umr Singh*, (1869) P R. No. 20 of 1869; *Bunsi*, (1882) P. R. No 9 of 1882.

[11] *Jita*, (1873) P. R. No 26 of 1873; *Jamdad*, (1887) P. R. No. 53 of 1887.

[12] *Kundan*, (1914) 36 All. 495.

[13] *Ibrahim*, sup.

[14] *Jiman*, (1882) 5 C. P. L. R. (Cr.) 17.

Scope.—This section is not to be employed to enhance enormously the heinousness of petty offences.[1] A person found guilty of theft having one previous conviction of theft of old date is not a habitual offender.[2]

The previous offence must have been committed since the Penal Code came into operation.[3]

Principle.—This section does not constitute a separate offence, but only imposes a liability to enhanced punishment. The meaning of the section is that when an offender, being punished,

(*a*) *by a Court in British India*, or

(*b*) by a Court in the territory of a Native State acting under the authority of Government

for an offence under Chapter XII (offences relating to coin and Government stamp) or Chapter XVII (offences against property) of the Code, punishable with three years' imprisonment, commits a similar description of offence after his release from prison, he is liable to increased punishment, on the ground that the punishment undergone has had no effect in preventing a repetition of the crime.

To bring an offence within the terms of this section—

(1) the offence must be one under either Chapter XII or XVII of the Code;

(2) the previous conviction must have been for an offence therein punishable with imprisonment for not less than three years: and

(3) the subsequent offence must also be punishable with imprisonment for not less than three years.

1. **'Having been convicted.'**—*The section declares that if any person*, having been convicted of any offence punishable under certain chapters, shall be guilty of any offence punishable under those chapters, he shall for every such subsequent offence be liable to the penalties therein declared. Where, therefore, a person committed an offence punishable under Chapter XII or XVII with imprisonment of three years, and, previously to his being convicted of such offence, committed another such offence, it was held that he was not subject, on being convicted of the second offence, to the enhanced punishment provided by this section.[4] Similarly, the section is held not to apply to offences committed at one and the same time[5], because it postulates the commission of the offence which forms the *subject of the subsequent charge at a period subsequent to the date of the offence* of which the accused was before convicted The accused cannot be charged with a conviction for an offence committed subsequent to the date of the offence for which he is on his trial.[6]

In one case the Calcutta High Court gave a very liberal construction to the expression 'having been convicted.' *It said: "The meaning of the law appears* to us to be that, when an offender, after having been punished with imprisonment for a crime under Ch. XVII, again, after his release from prison, commits a similar description of crime or a crime punishable under the same chapter, he is liable under s. 75 to enhanced punishment, on the ground that the sentence already borne has had no effect in preventing a repetition of his crime, and has been, therefore, insufficient as a warning. But where the prisoner's conviction has taken place a very short time before, and where no imprisonment under it has yet been undergone, and no time has been given for reformation, it cannot be said that a prisoner has had any opportunity of shewing what the effect of the first sentence

[1] *Shamjee Nashyo*, (1878) 1 C. L. R. 481; *Guhi Jena*, (1908) 12 C. W. N. lxxxiii; *Jowahir Singh*, (1913) P. L. R. No. 4 of 1914, P. W. R. (Cr.) No. 3 of 1914.

[2] *Nga Lu Gyi*, (1884) S. J. L. B. 291.

[3] *Kuskya bin Yesu*, (1867) 4 B. H. C. (Cr. C.) 11; *Moluck Chand Khalifa*, (1865) 3 W. R. (Cr.) 17; *Hurpaul*, (1865) 4 W. R. (Cr.) 9; *Pubon*, (1866) 5 W. R. (Cr.) 66.

[4] *Megha*, (1878) 1 All. 637; *Sakya valad Kavji*, (1868) 5 B. H. C. (Cr. C.) 36; *Beni Chamar*, (1894) 8 C. P. L. R. 17

[5] *Jhoomuck Chamar*, (1866) 6 W. R. (Cr.) 90.

[6] *Anon.*, (1875) 1 Weir 39.

would have been upon him, and it would not be just to punish him as though he were an incorrigible offender whom no comparatively light punishment could wean from evil courses."[1] It is submitted that this interpretation is too wide and is hardly in consonance with the spirit and letter of the section.

2. **Clause (a).**—The offence should not only be an offence under Chapter XII or Chapter XVII but it should also be punishable with imprisonment for a term of three years or upwards.[2] It is not necessary that the punishment actually awarded for the first offence should have been imprisonment for three years. But both the previous and subsequent offences shall be offences of the class punishable with imprisonment for a term of three years or upwards.[3]

3. **Clause (b).**—Under this clause the Court or tribunal in the territory of a Native Prince or State in India must be acting under the general or special authority of the Local or Supreme Government. Conviction by a Court in a Native State which is not under such authority cannot, therefore, be taken into consideration in enhancing punishment under this section.[4]

4. **'Subsequent offence.'**—These words mean an offence committed subsequently to the previous conviction. A person is not liable to enhanced punishment under this section unless the subsequent conviction is for an offence committed after the previous conviction.[5]

5. **'Transportation for life.'**—Under this section if a sentence of transportation is awarded it must be for life. The Court can, however, under this section, sentence the offender, in the alternative, to imprisonment for a term which may extend to ten years and thereafter under the provisions of s. 59 the Court can, instead of awarding sentence of imprisonment, sentence the offender to transportation for a term not less than seven years and not exceeding the term for which under the Code such offender is liable to imprisonment.[6]

Value of property stolen is no test.—"Too much importance is very generally attached to the value of the property stolen in awarding sentences The value of the property stolen is very often a mere accident, and the important question is the intention of the man, and his character and attitude towards society."[7]

Attempt.—This section does not apply to cases of attempts not specially made offences in Chapters XII and XVII of the Code.[8] Penal statutes are construed strictly; so Chapter XXIII relating to attempts cannot be included within the purview of this section when it specially mentions Chapters XII and XVII. This section does not, therefore, apply to cases which are confined to s 511 of the Code. The offences which fall under s. 511 must be punished entirely irrespective of this section.[9]

Abetment.—The previous conviction of an accused for an offence under Chapters XII and XVII cannot be taken into consideration at a subsequent

[1] *Pubon*, (1866) 5 W R. (Cr) 66

[2] *Chandaria*, (1911) P L R. No 235 of 1911, (1911) P W R. (Cr) No 36 of 1911; *Thakur Prasad Singh*, (1924) 2 Pat. L R. 205, *Fattu*, (1922) 6 L. L J 110

[3] *Anon.*, (1874) 1 Weir 38.

[4] See *Bahawal*, (1913) P R. No. 17 of 1913, in which a conviction by a Court in the Bikaner State was not taken into account in imposing enhanced sentence under this section as it was not shewn that the Court was acting under the general or special authority of the Governor-General in Council or of any local Government Followed in *Bhanwar*, (1919) 42 All 136

[5] *Po So*, (1917) 9 L. B R 77.

[6] *Muhammad Sharif*, (1915) P R. No. 14 of 1915

[7] Per Clark, C J, in *Nur Din*, (1903) P R No. 28 of 1903.

[8] *Damu Haree*, (1874) 21 W R. (Cr) 35, *Nana Rahim*, (1880) 5 Bom. 140, *Ram Dayal*, (1881) 3 All 773, *Sricharan Biswas*, (1887) 14 Cal 257, (1868) 1 Weir 36; *Motawel Pahwan*, (1888) 1 Weir 37, *Dara Singh*, (1872) P R. No. 27 of 1872; *Nihal Singh*, (1882) P R. No 37 of 1882, *Fattu*, (1884) P R. No 31 of 1884, *Harram*, (1907) P R. No. 17 of 1907, *Ramnath Bhoi*, (1901) 14 C. P L. R. 72

[9] *Bhamea*, (1895) 17 All 123, *Ajodhia*, (1895) 17 All 129; *Motawel Pahwan*, *supra*, *Jhamman Lal*, (1906) P R. No 14 of 1906; *Gharia*, (1918) P. R. No. 13 of 1919.

offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(*b*) by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor-General in Council, or of any Local Government, of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term,

is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class, such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts.

(4) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.

(5) Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of s. 176 of the Indian Penal Code to have omitted to give a notice required for the purpose of preventing the commission of an offence.

(6) Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.[1]

Jurisdiction.—A Magistrate cannot award punishment beyond his powers (as specified in s. 32, Criminal Procedure Code) because the offender has been previously convicted.[2] If he considers that a more severe sentence than he is empowered to pass is necessary, he should commit the prisoner to the Court of Session.[3]

The Punjab Rule.—2. Under s. 75 of the Indian Penal Code, a person convicted a second time of an offence punishable under Chapter XII or Chapter XVII of the Code, with three years' imprisonment and upwards, is liable to a greatly enhanced sentence.

3. This, of course, does not increase the competence of the Court trying the offender; but s. 348 of the Code of Criminal Procedure gives the Magistrate a discretion to try the case himself, if, in his opinion, an adequate sentence can be passed by him. If the Magistrate is unable to adequately punish the accused person, he should commit such person to the Court of Session, or Chief Court; or transfer the case for trial to the Magistrate of the District invested with powers under s 30. A provision is also contained in s. 347 that, if it appears to any Magistrate at any stage of the proceedings that the case ought to be tried by a Court of Session (or a District Magistrate empowered under s 30) he should make over the case for trial to the Court of Session or to the District Magistrate.

[1] Criminal Procedure Code, s. 565.

[2] *Vithya*, (1871) Unrep. Cr C. 49; *David Naren*, (1904) 6 Bom. L. R. 548; (1870) 6 M. H C. App. 2; (1865) 1 Weir 36; *Gulab Hamir*, (1894) Unrep. Cr C. 688; *Bahadur Khan*, (1872) P. R. No. 31 of 1872; *Nga Tun Tha*, (1894) P. J. L. B. 78

[3] *Ganu Ladu*, (1864) 2 B. H. C. 126; *Khalak*, (1889) 11 All. 393.

Action may be taken under these two sections of the Code of Criminal Procedure by Magistrates of all classes.

4. Every case in which the accused person is liable to enhanced punishment should be seen, in the first instance, by the Magistrate of the District, and, in the event of his not considering it necessary to try it himself, he should send it to a specially selected Magistrate for trial, if possible to one with powers under s. 565, Criminal Procedure Code, and should direct the Magistrate's attention to s. 348 of the Code of Criminal Procedure and s 75 of the Indian Penal Code.

5. Where a Magistrate of the first class finds he is unable to punish any offender adequately, he should submit the case to the District Magistrate with a view to its transfer for trial by a Magistrate with powers under s. 30 of the Criminal Procedure Code. Cases in which a Magistrate with powers under s. 30 of the Criminal Procedure Code cannot pass an adequate sentence should be committed to the Court of Session.

6. Ordinarily, every case in which there are two previous convictions should be tried by a Magistrate with powers under s. 30, and also those cases of single previous convictions where the previous conviction was of a serious offence such as burglary, or where in the previous case there was a sentence of more than one year's rigorous imprisonment.

Where there have been four or five previous convictions of offences against property, or where the aggregate of previous sentences amounts to four or five years' imprisonment, the case should ordinarily be committed to the Court of Session. Sessions Judges should keep in view the necessity of transporting for life incorrigible offenders, men whose previous convictions show that they are preying on society, and of whose reform there is no reasonable expectation.

In determining what sentences should be passed on previous convicts, Courts should freely refer to the judgments in their previous convictions, the facts in which will often help to ascertain the characters of the convicts and whether there is any reasonable probability of their reform.

7. In continuation of the remarks contained in Order No. 36 of this volume, it is pointed out that cases are rare in which whipping alone is sufficient on a second conviction, while a sentence of whipping only is never suitable in cases in which the Court is satisfied that an offender is leading a life of crime.

8. In awarding sentences of transportation in lieu of imprisonment under s. 75 of the Indian Penal Code, Magistrates should bear in mind that the provisions of this section are subject to those of s. 59, and sentences of transportation in lieu of imprisonment may be passed on conviction under s 75, but the sentence of transportation can never exceed the maximum term of imprisonment, which under s. 75 is 10 years. If a longer period of imprisonment is provided for the substantive offence (*e.g.*, 14 years under s. 457, Indian Penal Code), it would not be illegal to sentence to transportation for 14 years, whether the conviction was under s. 457, Indian Penal Code, alone, or under s. 457, Indian Penal Code, combined with s. 75.

9. Section 349 gives a Magistrate of the second or third class the means of securing the proper punishment of an accused when he finds, in the course of the trial, that the maximum sentence which he is empowered to inflict would be insufficient. At the same time, in resorting to this section, it must be remembered that, when the accused appears to be an habitual offender he must ordinarily be dealt with under the provisions of s. 348, and be sent to the District Magistrate for trial under s. 30, or be committed to the Court of Session.

10. It is the duty of the Police, in conducting the investigation, to take proper steps to establish the identity of an accused person and to obtain and produce evidence of previous convictions against him. The attention of Criminal Courts is directed to the decision of the Chief Court in the case of *Empress* v. *Sham Singh*[1]

[1] (1884) P. R. No. 36 of 1884.

and especially to the remarks of Mr. Justice Plowden at page 70 of the Record, with regard to the duties of the Magistrate and of the Police in this matter. It will be seen that the discovery, subsequent to sentence, that the prisoner has been previously convicted, but that this has escaped notice on account of a change of name, is not in itself a good ground for interference on revision.

11. In Punjab Government Circular No. 43-1077, dated the 29th July 1870, the criminal Courts of the Province were instructed to enter any previous conviction or convictions of a prisoner upon the warrant committing him to jail, and the attention of all Magistrates is directed to these instructions. In the form of warrant of commitment prescribed for use under the Code of Criminal Procedure, provision has been made for mention of the fact that the convict has been previously convicted, when one or more previous convictions have been proved against him at his trial, and for the entry of the particulars of the previous convictions in a separate statement, which should be attached to the warrant of commitment in such cases.[1]

Upper Burma Rule.—Apart from the question whether a previous conviction affects the punishment which a Court is competent to award, it is the duty of a Court, whenever a previous conviction is brought to its notice, to consider the nature of the conviction and, if it is of opinion that it constitutes a proper ground for passing a severer sentence than the Court would otherwise pass for the offence for which the accused is being tried, it should take evidence as to the previous conviction, and it may enter the previous conviction in the charge in order that the accused may understand that it will be taken into consideration in passing sentence, but the charge should not refer to the special provisions under which enhanced punishment can be awarded unless the Court trying the accused is competent to award such punishment.[2]

Accused persons who have been previously convicted of offences punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for three years or more, and who are again prosecuted for any such offence, should not be tried by a Magistrate of the second or third class without the permission of the District or the Sub-divisional Magistrate.[3]

Lower Burma Rule.—Accused persons who have been previously convicted of offences punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for three years or more, and who are again prosecuted for any such offence, should not be tried by a Magistrate of the second or third class without the permission of the District or the Sub-divisional Magistrate.[4]

In considering whether such permission should be given or not, District and Sub-divisional Magistrates should remember that these cases must, under s. 348, be either committed to the Court of Session or tried throughout by the Magistrate who is [illegible] to dispose of them; and that they cannot be referred for [illegible] 9[5]

[illegible] has been previously convicted twice or oftener of such an offence, the case should ordinarily be tried by a Magistrate invested with special powers under s. 30, or committed to the Court of Session.[6]

If an habitual criminal who is convicted of an offence punishable under Chapters XII and XVII of the Penal Code with three years' imprisonment and upwards after three previous convictions of similar offences is not sentenced to transportation, the reason should be stated.[7]

Oudh Rule.—The Government of India has noticed the comparatively small extent to which the provisions of s. 75 of the Indian Penal Code are used in the case of habitual convicts. It has been remarked that the sentence of transportation for life is peculiarly appropriate in the case of persons habitually guilty

[1] P. C. C. R. & O., Vol. II, No. 39, p. 223.
[2] U. B. C. M., s. 310.
[3] *Ibid*, s. 238.
[4] L. B. C. M., Vol. I, s. 234.
[5] *Ibid*, s. 235.
[6] *Ibid*, s. 236.
[7] *Ibid*, s. 237.

of offences against property, for whom jail-life in India appears to have no terrors, but who might possibly be reformed if removed from the scene of their crimes. The Judicial Commissioner therefore suggests a more extensive use of the power conferred by s. 75 of the Penal Code.[1]

In order to render s. 75 of the Indian Penal Code effective, it has been provided (s. 348, Code of Criminal Procedure) that persons coming within its provisions shall, if the Magistrate considers them habitual offenders, ordinarily be committed to the Court of Session or High Court, or placed on their trial before the District Magistrate who is invested with powers under s. 30, Criminal Procedure Code. It is obvious that the sentence to be passed on such an offender ought in some measure to depend upon the nature of his previous convictions and sentences. Magistrates, therefore, will be expected to use a discretion in making commitments of such offenders.[2]

Bengal Rule.—*Date of previous conviction and sentence to be stated in the judgment.*—Whenever an enhanced sentence is passed on conviction on a charge within the terms of s. 75 of the Indian Penal Code, the Sessions Judge or Magistrate shall state in his judgment the date of each previous conviction and the sentence passed, as well as the particular offence charged.[3]

Allahabad Rule.—In a case to which the provisions of s. 75 of the Indian Penal Code apply, the Court, if it convicts the accused, shall set forth in its judgment each previous conviction proved against or admitted by the accused, specifying the date of the conviction, the section under which it was had, and the sentence imposed.[4]

Patna Circular.—Whenever an enhanced sentence is passed upon an accused on conviction on a charge within the terms of s. 75 of the Indian Penal Code, the Sessions Judge should enter in the column for remarks the date of each previous conviction, the offence charged, and the sentence passed on each occasion.[5]

Punishment.—No distinct sentence of imprisonment is awardable on account of a previous conviction as it is not in itself an offence. It is merely a circumstance rendering the offender, convicted of a subsequent offence, liable to a larger measure of punishment.[6] The appellant, after four previous convictions for theft, was sentenced for a fifth theft of property of no great value to seven years' transportation. It was held that the sentence was not excessive.[7] A sentence should never be heavier than is necessary to deter the criminal from committing the offence again. In the case of men with previous convictions, regard should be had to their career and to the time that has elapsed between the convictions had against them. This section and s. 221 of the Code of Criminal Procedure are not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction.[8] This section gives no authority for passing a sentence of whipping in addition to any other punishment.[9]

A Sessions Judge cannot (under this section, or otherwise), by amalgamating a sentence which he is competent to pass upon a prisoner with a sentence under which such prisoner is already undergoing imprisonment, and commuting the latter sentence, condemn such prisoner to a longer period of transportation than he is liable to suffer for the crime of which he has last been convicted.[10]

Where a previous conviction is proved, the prisoner cannot be dealt with under s. 35, Criminal Procedure Code, as if he had been convicted of two offences.[11]

[1] O. C. D., s. 68.
[2] *Ibid*, s. 62.
[3] C. H. C. R. & O., Vol. I, Ch. 1, s. 99.
[4] A. H. C. C. R. (Cr.) Ch. 8, r. 3.
[5] Pat. H. C. Cr. C., para 40, p. 16.
[6] (1868) 1 Weir 36; (1878) 1 Weir 37; *Gulab Hamir*, (1894) Unrep. Cr. C. 688; (1870) 6 M. H. C. App. 2.
[7] *Nga Kan Tha*, (1895) 1 U. B. R. (1892-1896) 147.
[8] *Po Nyein*, (1917) 9 L. B. R. 167.
[9] *Nga Tun Tha*, (1894) P. J. L. B. 78.
[10] *Satya valad Kanji*, (1868) 5 B. H. C. (Cr. C.) 36.
[11] *Khalak*, (1889) 11 All. 393.

Record of previous conviction—Records of previous conviction should not be put in until the close of the trial as they can only be used after conviction in determining the measure of punishment.[1] In the case of a trial by a jury or with the aid of assessors when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure shall be as follows, namely :—

(*a*) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until,

(i) he has been convicted of the subsequent offence, or

(ii) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence.

(*b*) In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.[2]

But evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.[3]

Charge—If the accused having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it at any time before sentence is passed[4] But it cannot do so after it is passed[5] The fact, date and place, of the previous conviction must be stated severally, otherwise the accused is not amenable to the terms of this section.[6] A charge of having committed the offence after a previous conviction, therefore, should contain an allegation that the offence has been committed after a previous conviction. A statement in account that, at the time when the prisoner committed the offence (no offence having been mentioned specifically in the count), he had been previously convicted of offences punishable under Chapter XVII of the Penal Code, is not sufficient.[7] A separate charge under s. 75 of the Penal Code must be framed and recorded if the prisoner is to be tried fo an offence punishable under it.[8]

Charge after a previous conviction should run thus :—

I (*name and office of the Magistrate, etc.*) hereby charge you——as follows :

That you, on or about the——day of——, at——, committed——and thereby committed an offence punishable under section——of the Indian Penal Code and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And you, the said——, stand further charged that you, before the committing of the said offence, had been convicted on the——day of——in Calendar No.—of ——on the file of——of an offence punishable under Chapter XII (*or* XVII) of the Indian Penal Code with imprisonment for a term of three years, to wit, the offence of——, which conviction is still in full force and effect, and that you are thereby liable to enhanced punishment under s. 75 of the Indian Penal Code.

[1] *Shiboo Mundle*, (1865) 3 W. R. (Cr.) 38 ; *Jehan Mullick*, (1865) 5 W. R. (Cr.) 67.
[2] Section 310, Criminal Procedure Code.
[3] Section 311, *ibid.*
[4] Section 221 (7), *ibid.*
[5] *Rajcoomar Bose*, (1873) 19 W. R. (Cr.) 41.
[6] *Haidar*, (1883) 3 A. W. N 110 ; *Abbulu*, (1909) 7 M. L. T 77.
[7] *Sheik Jakir*, (1874) 22 W. R. (Cr.) 39
[8] *Dorasami*, (1886) 9 Mad. 284 ; *Dungri*, (1911) P. W. R (Cr.) No 40 of 1911.

And I hereby direct that you be tried by the said High Court (or the Court of Session) on the said charge.

In all cases in which a previous conviction of any offence would render an accused person liable, if convicted on the charges for which he is under trial, to the penalty of whipping as an additional punishment, and it is intended to prove such previous conviction for the purpose of affecting the punishment to be awarded, the Court trying the accused person shall draw up a distinct charge specifying the liability to whipping as an additional punishment and how it arises.

The charge should be to the following effect :—

That at a date previous to the date of the offence of——now charged against you——*viz.* on the——you——were convicted by the Court of——of the offence of——specified in s 3 or 4 of the Whipping Act (IV of 1909) and that this conviction of——is still in full force and effect and being a conviction for the same specific offence as that now charged against you, renders you liable in case you should now be again convicted of——to the punishment of whipping in addition to the punishment provided for the said offence by the Indian Penal Code.

Madras Rule.—If it is proposed to prove several previous convictions against an accused person for the purpose of affecting his punishment, they should not be lumped in one head of charge, but should be set forth separately, each under a distinct head of charge.[1]

The Central Provinces Circular.—It seems necessary to point out that all convictions on record at the date of the charge are not always to be reckoned as previous convictions for the purposes of s. 75 of the Indian Penal Code or ss. 3 and 4 of Act VI of 1864. A previous conviction for the purpose of affecting the punishment which a Court is competent to award is a conviction the penalty following which had been undergone by the accused (in whole or in part) at the time when he committed the offence for which he is being tried.

When a person has been committed at or about the same time of more offences than one and after undergoing the accumulated penalties for those offences commits another offence and is again convicted, each of the previous convictions is a separate conviction in relation to the present conviction.

It is not necessary to state previous convictions in the charge unless it is intended to prove them for the purpose of affecting the punishment which the Court is *competent* to award, that is, in order to render the accused liable to a sentence which could not otherwise have been passed under the law, such as an enhanced sentence under the provisions of s. 75 of the Indian Penal Code, or a sentence of whipping, in addition to other punishment under Act VI of 1864.

Where previous convictions are used, not for the purpose of affecting the punishment to which the accused is *legally liable*, but merely to influence the Court in determining the amount of punishment which it shall award, though they need not be stated in the charge, they should be formally proved if they are not admitted. In using them for this limited purpose the Magistrate should be guided by the analogy of s. 310, Criminal Procedure Code. The judgment should be temporarily closed as soon as the conclusion that the accused is guilty has been arrived at therein. The order sheet should then show that the accused is questioned as to certain previous convictions alleged but not up to that stage admissible in evidence, the actual questions and answers being recorded as a postscript to the examination made under s. 342, Criminal Procedure Code. Whether these convictions are admitted or denied, the documents constituting legal proof of them will of course be filed with the record. Finally, the judgment will be completed and the printed sheet for finding and sentence will then be filled up.[2]

[1] M. H. C. R. P., s. 166.

[2] C. P. (Cr. C.) No. 17, ss. 4, 5, 6 and 7.

CHAPTER IV.

GENERAL EXCEPTIONS.

"THIS chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations. Some limitations relate only to a single provision, or to a very small class of provisions. . .Every such exception evidently ought to be appended to the rule which it is intended to modify. But there are other exceptions which are common to all the penal clauses of the Code, or to a great variety of clauses dispersed over many chapters .. It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore, placed them in a separate chapter, and we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that chapter."[1]

The word 'offence' in this Chapter denotes a thing punishable under the Code, or under any special or local law (s. 40).

This Chapter applies to offences punishable under ss. 121-A, 124-A, 225-A, 225-B, 294-A. and 304-A.[2]

Onus of proving an exception lies on the accused.—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.[3]

Where an accused person has raised pleas inconsistent with a defence which would bring his case within [illegible] up a case, upon the evidence [illegible] exception, the circumstance [illegible] within any of the general exceptions can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record. In the absence of such evidence the Court is not competent to assume the existence of those circumstances, more particularly when the pleas taken are inconsistent with the assumption that such circumstances might have existed or that doubt may arise in consequence of such assumption and the accused ought to be given the benefit of the doubt.[4]

Act done by a person bound, or by mistake of fact believing himself bound by law

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact[1] and not by reason of a mistake of law[2] in good faith believes himself to be, bound by law[3] to do it.

ILLUSTRATIONS.

(*a*) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

[1] Note B, p. 104.

[2] Act XXVII of 1870, s. 13, as amended by Act XII of 1891.

[3] The Indian Evidence Act, I of 1872, s. 105; *Shibo Prosad Pandah*, (1878) 4 Cal. 124; *Dwijendra Chandra*, (1915) 19 C. W. N. 1013.

[4] *Wajid Hussain*, (1910) 7 A. L. J. R. 438.

(b) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

COMMENT.

No more is meant by this section than to excuse a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good faith that he was commanded by law to do it. It is based on the maxim *ignorantia facti excusat*. See Comment on s. 79, *infra*.

Scope.—This and the following three sections leave untouched the liability in a civil suit of the persons who claim their benefit.

1. '**Mistake of fact.**'—See Comment under s. 79, *infra*.

2. '**Mistake of law.**'—See Comment under s. 79, *infra*.

3. '**In good faith believes himself to be, bound by law.**'—In reference to this section, Rattigan, J., has observed: "To entitle a person to claim the benefit of that section (s. 76) it is necessary to show the existence of a state of facts which would justify the belief in good faith, interpreting the latter expression with reference to s. 52,... that the person to whom the order was given was bound by law to obey it. Thus in the case of a soldier, the Penal Code does not recognize the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act. Difficult as the position may appear to be, the law requires that the soldier should exercise his own judgment, and unless the actual circumstances are of such a character that he may have reasonably entertained the belief that the order was one which he was bound to obey, he will be responsible like any other sane person for his act although he may have committed it under the erroneous supposition that his superior was by law authorized to issue the order. His mistake in short must be a mistake entertained in good faith on a question of fact. Such a construction of the law, may indeed subject the soldier to military penalties, and, in certain cases place him in the serious dilemma of either refusing to obey an order which he believed to be unjustifiable in fact, thereby rendering himself liable to military law, or, by obeying it, to subject himself to [illegible] But on a balance of considerations the Legislature of the community that no special exemption [illegible] commits what would ordinarily be a penal offence from that enjoyed by any other person, who does the same act believing in good faith that he is bound by law to do it. A mistake of law in either case would afford no protection, though it might go in mitigation of punishment, and thus military discipline, while it regulates the conduct of the soldier in military matters, is made subject to a higher law in favour of public safety, when the act which the military discipline attempts to enforce or to justify is one which affects the person or property of another. In such a case the civil law looks to the surrounding circumstances to see whether they are of such a character as would lead a man of ordinary intelligence to entertain a reasonable belief that he is bound by law to obey the command of his superior."[1] Alison, in his Principles of the Criminal Law of Scotland,[2] says: "The express command of a Magistrate or officer will exonerate an inferior officer or soldier, unless the command be to do something plainly illegal, or beyond his known duty. If through gross ignorance, or neglect, or design, a Judge or Magistrate pronounce an unlawful sentence, what shall be said of the officers or others who carry it into execution?... If the order or warrant was plainly illegal, as, for example, to strangle a prisoner in jail, or to poison him, or the like, certainly the mere possession of such a warrant will not prevent the officer who wickedly yields it obedience from being held as art and part in the legal murder, and suffering for its commission. But, on the other

[1] *Naimat Khan*, (1883) P. R. No. 17 of 1883. [2] First edition, p. 673.

hand, if the error was in such a part of the proceedings, as the officer entrusted with its execution has no opportunity of seeing, and is not called upon in duty to examine, and if the warrant put into his hands be fair and in ordinary form, certainly he will not be answerable for any illegality or vice in the previous and to him inscrutable proceedings.

"The same distinction is applicable to the case of a soldier acting in obedience to the orders of his superior officer, with this additional circumstance in his favour, that he is not only in a much humbler station, and trained to more implicit obedience than a legal functionary, but subject to a peculiar and peremptory Code of laws, armed with powers of extraordinary severity, for the express purpose of enforcing on his part the most implicit obedience to command. It will require, therefore, the very strongest case to subject a soldier to punishment for what he does in obedience to the distinct commands of his commanding officer. But still this privilege must have its limits; it is confined to what is commanded in the course of official duty, and which plainly and evidently does not transgress its limits. For what if an officer command a private soldier to commit murder or to steal, or to aid him in a rape, or if he order a file of soldiers to fire on an inoffensive multitude, certainly in none of these cases will the privates be exempt from punishment if they yield obedience to such criminal mandates."

For illegal acts, however, neither the orders of a parent nor those of a master will furnish any defence.

Liability of private persons to assist the Police.—Private persons bound to assist the Police under s. 42 of the Code of Criminal Procedure would be protected under this section.

CASES.

Lawful arrest of a wrong person.—A police-officer came to Bombay from Kanara with a warrant to arrest a person. After reasonable inquries he arrested the complainant believing in good faith that he was the person to be arrested. The complainant prosecuted the police-officer for wrongful confinement. It was held that the police-officer was protected by this section and was guilty of no offence.[1]

Act done under a superior's order.—Nothing but fear of instant death is the defence for a policeman who tortures any one by the order of a superior. The maxim *respondeat superior* has no application in such a case.[2] Where a Naik and three sepoys of a Regiment were found on the facts to be guilty of culpable homicide not amounting to murder, in that they fired upon a mob which was threatening them under circumstances which did not render the act excusable under s. 96, and two men were shot dead, it was held that the sepoys, who had fired in obedience to the Naik's order, were not protected by this section, as they were cognizant of all the circumstances of the quarrel, and, there being no room for a mistake of fact, they must be taken to have known that the Naik was wrong in law in firing upon the mob, and that they were not bound to obey his illegal order.[3] A constable verbally ordered two other police constables to arrest bad characters on a road and to fire if resisted. The accused challenged two men and then fired as one of them did not stop and killed one man. It was held that the accused acted unlawfully and should not have been acquitted on a charge of culpable homicide not amounting to murder. A police-officer who commits a wrongful act under the order of his superior officer is liable to punishment as his mistake of law in supposing himself authorized cannot be accepted as a good defence though it may be a ground for mitigation of punishment.[4]

[1] *Gopala Kallaiya*, (1923) 26 Bom. L. R. 138, 7 Bom. Cr. C. 128.

[2] *Latifkhan*, (1895) 20 Bom. 394.

[3] *Gurdit Singh*, (1883) P. R. No. 16 of 1883.

[4] *Nga Myat Tha*, (1882) S. J. L. B 164. The detention by a Monigar of certain persons under the order of a District Magistrate was held to be illegal: *Kampai Gowda*, (1911) 5 Cr. L. Rep 34.

English cases.—A gun discharged in the ordinary and regular course of ball practice by an artillery man in a garrison town missed the mark, and killed a man who was lawfully passing near the spot in a boat, the place being a public one and open to all people. The artillery man who fired the gun was acting under the command of a superior officer, who was acting in obedience to the general orders of the Major-General. It was held that the Major-General was not guilty of manslaughter.[1] A sailor was ordered by his superior officer on board a man-of-war to prevent boats from approaching the ship, and had ammunition given him for that purpose. Boats having persisted, after repeated warnings, in approaching the ship, he fired at one and killed a person. It was held that this was murder although he fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship.[2] A soldier, who commanded the Guards at the trial and execution of Charles I., pleaded at his trial that all he did was as a soldier by the command of his superior officer whom he must obey or die. It was resolved that that was no excuse, for his superior was a traitor, and all who joined with him in that act were traitors and where the command is traitorous the obedience to that command is also traitorous.[3]

Bound by law.—Where a defamatory statement was made by a person as a witness in a case, but the person was not bound by law to go into the witness box and make it, it was held that this section did not apply.[4] On an indictment against the engine driver and fireman of a railway train for the manslaughter of persons killed while travelling in a preceding train running into it, it appeared that on the day in question special instructions had been issued to them, which altered the signal for danger so as to make it mean not 'stop' but proceed with caution. It was held that if the prisoners honestly believed that they were observing them, and they were not obviously illegal, they were not criminally responsible.[5]

PRACTICE.

Procedure.—Punishment.—Though ignorance of law is not a defence in law, yet it is a matter to be considered in mitigation of punishment.[6]

Act of Judge when acting judicially.

77. Nothing is an offence which is done by a Judge[1] when *acting judicially*[2] *in the exercise of any power* which is, or which in good faith[3] he believes to be, given to him by law.

COMMENT.

This section protects Judges from criminal process just as the Judicial Officers' Protection Act[7] saves them from civil suits Section 1 of that Act says: "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duties, whether or not within the limits of his jurisdiction. Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of."

[illegible] a Judge only; whereas the Judicial [illegible] e, Magistrate, Justice of the Peace, [illegible]

Under this section a Judge is exempted not only in those cases in which he proceeds irregularly in the exercise of a power which the law gives him, but also in cases where he in good faith exceeds his jurisdiction and has no lawful powers.

[1] *Hutchinson*, (1864) 9 Cox 555.
[2] *Thomas*, (1815) 4 M. & S. 442.
[3] *Axtell*, (1661) Keyling 13
[4] *Bhagwan Singh* v. *Arjun Datt*, (1920) 18 A. L. J. R. 810.
[5] *Trainer*, (1864) 4 F. & F. 105.
[6] *Esop*, (1836) 7 C. & P. 456.
[7] Act XVIII of 1850, s. 1.

In a Calcutta case Markby, J., said: "The duties which he (a Magistrate) usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an offence or to vindicate the rights of a private individual; and if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these. This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any persons whose duty it is to adjudicate upon the rights or punish the misconduct of any given person, whatever form their proceedings may take, or however informal they may be. This has been so held in England[1]—and I do not see any reason to doubt that the same would be held here."[2]

1. **'Judge.'**—See s 19, *supra*.

2. **'Judicially'**—"The word 'judicial' has two meanings: it may refer to the discharge of duties exercisable by a Judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind,—*i.e.*, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in court, and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them, as, for instance, levying a rate."[3] It is not in respect of acts in Court, acts *sedente curia*, that a Judge has an immunity, but in respect of all acts of a judicial nature.[4] An order under the seal of a criminal Court to bring a native in that Court, to be there dealt with on a criminal charge, is an act of a judicial nature, and whether there was any irregularity or error in it, or not, would be dispunishable by ordinary process at law.[5] If it be once established, that the act in question emanated from, and was appropriate to, the legal duties of the office of a Judge, it must stand as an act purely judicial. Whether such act be done by the Judge in chamber or *sedente curia*, the privileges connected with the duties of the Judge's situation, and which are given for the public safety and advantage, in which the security and independence of the Judge are interwoven, must necessarily await upon such acts, as if they are judicial.[6]

If a party *bona fide*, and not absurdly, believes that he is acting in pursuance of a statute, he is entitled to the special protection which the legislature intended for him although he has done an illegal act.[7]

When there is jurisdiction, but the jurisdiction is exercised under a misapprehension, either with reference to a person not within it or in excess of the power of the tribunal, in such cases the persons acting with judicial authority would not be criminally responsible; but supposing there is no jurisdiction at all, that the whole proceeding is *coram non judice*, that the judicial functions are exercised by persons who have no judicial authority or power, and a man's life is taken, that is murder.[8]

3. **'Good faith.'**—See s. 52, *supra*. Where a criminal information is applied for against a Magistrate, the question for the Court is not whether the act done be found on investigation to be strictly right or not, but whether it proceeded from an unjust, oppressive, or corrupt motive or from mistake or error only.[9]

[1] *Tozer* v. *Child*, (1857) 7 E & B 377

[2] *Chunder Narain* v. *Brijo Bullub*, (1874) 14 Beng L R. 254, 257.

[3] Per Lopez, L. J., in *Royal Aquarium, etc., Society* v. *Parkinson*, [1892] 1 Q. B 431, 452

[4] *Calder* v. *Halket*, (1840) 2 M. I. A. 293, 308.

[5] *Ibid*, p 308.

[6] *Vide* the judgment of Lord Norbury in *Taaffe* v. *Downes*, (1814). This judgment was separately published at Dublin, but is not reported in any series of Reports.

[7] *Spooner* v. *Juddow*, (1850) 4 M. I. A. 353, 379

[8] *Vide* the judgment of Cockburn, C. J., in *Nelson* and *Brand*, (1867). This case is not reported in any series of Reports, but the Lord Chief Justice's charge to the jury is published in the form of a book.

[9] *Borron*, (1820) 3 B. & Ald. 432.

Act done pursuant to the judgment or order of Court.

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order[1] of, a Court of Justice,[2] if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction[3] to pass such judgment or order, provided the person doing the act in good faith[4] believes that the Court had such jurisdiction.

COMMENT.

This section is merely a corollary to s. 77. It affords protection to officers acting under the authority of a judgment or order of a Court of Justice. It differs from s. 77 on the question of jurisdiction. Under it the officer is protected in carrying out an order of a Court which may have no jurisdiction at all, if he believed that the Court had jurisdiction; whereas under s. 77 the Judge must be acting within his jurisdiction to be protected by it. It was Lord Hale's opinion that the order of a Court, having a colour of jurisdiction, though acting erroneously, is enough to justify the ministerial officer.

Mistake of law can be pleaded as a defence under this section.

1. '**Order.**'—If the form of the order is not in accordance with law, for example, an oral order for a written one, the persons executing such order will not be protected under this section. A person was arrested under s. 478 of the Code of Civil Procedure. On his being brought before the Court, the Judge orally ordered the bailiff to keep him in custody. The bailiff in turn orally ordered a process-server to take charge of him. It was held that the bailiff and the process-server were liable for wrongful confinement as s. 481 of the Civil Procedure Code only authorized a Judge to commit persons to jail under a particular form of order.[1]

2. '**Court of Justice.**'—See s. 20, *supra*.

3. '**Jurisdiction.**'—'Jurisdiction,' means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form.[2] A judicial officer, for instance, who, in the discharge of his judicial duties, issues a warrant which he has authority to issue, though the particular form or manner in which he issues it is contrary to law, acts within and not without the limits of his jurisdiction in this sense.[3]

4. '**Good faith.**'—See s. 52, *supra*. The arrest under civil process of a judgment-debtor going to a Court in obedience to a citation to give evidence, and made within the precincts of that Court, and with some show of violence and contempt of Court, was held not to entitle the officers making the arrest to protection under this section.[4]

Protection from civil liability.—The Judicial Officers' Protection Act[5] says that "no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

Protection of police-officers from prosecution or action.—The Police Act[6] says: "When any action or prosecution shall be brought or any proceedings

[1] *Maung Pu*, (1908) 4 L. B. R. 253.
[2] *Teyen* v. *Ram Lal*, (1890) 12 All. 115; *Calder* v. *Halket*, (1840) 2 M. I. A. 293.
[3] *Ibid.*
[4] *Thakoordass Nundee* v. *Shankar Roy*, (1865) 3 W. R. (Cr.) 53.
[5] Act XVIII of 1850, s. 1.
[6] Act V of 1861, s. 43, and The Madras District Police Act (Mad. Act XXIV of 1859), s. 54. But see The Madras City Police Act (Mad. Act III of 1888), s. 81; the Bombay City Police Act (Bom. Act IV of 1902), s. 140 (3); the Bombay District Police Act (Bom. Act IV of 1890), s. 60 (3); and the Bombay Village Police Act (Bom. Act VIII of 1867), s. 20.

held against any police-officer for any act done by him in such capacity, it shall be lawful for him to plead that such act was done by him under the authority of a warrant issued by a Magistrate.

"Such plea shall be proved by the production of the warrant directing the act, and purporting to be signed by such Magistrate, and the defendant shall thereupon be entitled to a decree in his favour, notwithstanding any defect of jurisdiction in such Magistrate. No proof of the signature of such Magistrate shall be necessary, unless the Court shall see reason to doubt its being genuine:

"Provided always that any remedy which the party may have against the authority issuing such warrant shall not be affected by anything contained in this section."

Act done by a person justified, or by mistake of fact believing himself justified, by law

79. Nothing is an offence which is done by any person who is justified by law,[1] or who by reason of a mistake of fact[2] and not by reason of a mistake of law[3] in good faith,[4] believes himself to be justified by law in doing it.

ILLUSTRATION.

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment, exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

COMMENT.

Distinction between ss. 76 and 79.—The distinction between s. 76 and this section is that in the former a person is assumed to be bound, and in the latter to be justified by law, in other words the distinction is between a real or supposed legal obligation and a real or supposed legal justification, in doing the particular act.

"Under both (these sections) there must be a bona fide intention *to advance the Law*, manifested by the circumstances attending the act which is the subject of charge; and the party accused cannot allege generally that he had a good motive, but must allege specially that he believed in good faith that he was bound by Law (s. 76) to do as he did, or that being empowered by law (s. 79) to act in the matter, he had acted to the best of his judgment exerted in good faith."[1]

Application of the section to special or local law.—The Madras High Court has held that the plea of justification provided by this section is available only for an offence punishable by the Code and not for offences punishable by any special or local law and hence the belief of the accused that he was justified in his act does not exculpate him from punishment for his guilt under the Forest Act.[2] The Bombay High Court has held otherwise in a case in which the accused, a contractor engaged by the Public Works Department, quarried stones required for a public road, from a place which was pointed out to him by the officers of that department. The place in question was in a protected forest and no permission was taken of the Forest Department for quarrying. The accused was convicted under the Indian Forest Act, but the High Court quashed the conviction on the ground that the accused was entitled to the protection under this section.[3]

1. **'Justified by law.'**—This phrase is used in its proper and strict sense in reference to something needing to be vindicated as being in conformity with law.

[1] 1st Rep., s. 114.
[2] *Lewis*, (1913) 15 Cr. L. J. 171.
[3] *Kasim Ismail Saib*, (1912) 14 Bom. L. R. 365.

2. '**Mistake of fact.**'—'Mistake' is not mere forgetfulness.[1] It is a slip "made, not by design, but by mischance."[2] Mistake, as the term is used in jurisprudence, is an erroneous mental condition, conception, or conviction induced by *ignorance, misapprehension, or misunderstanding of the truth, and resulting in* some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being intended or known at the time. It may concern either the law or the facts involved.

A mistake of fact consists in an unconsciousness, ignorance, or forgetfulness of a fact past or present, material to the transaction, or in the belief of the present existence of a thing *material to the transaction, which does not exist, or in the past* existence of a thing which has not existed.

Under s. 76 and this section the mistake must be one of fact and not of law. At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence. Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty as in lunacy.[3] If a man, for instance, intending to kill a thief in his own house, kills a member of his family, he will be guilty of no offence.[4] "It may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence."[5] Where, through mistake, a man, intending to do a lawful act, does that which is unlawful, here the deed and the will act separately, there is not that conjunction between them which is necessary to form a criminal act "*Ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary...It is known in war, that it is the greatest offence for a soldier to kill, or so much as to assault his general: suppose then the inferior officer sets his watch, or sentinels, and the general to try the vigilance or courage of his sentinels comes upon them in the night in the posture of an enemy,...the sentinel strikes, or shoots him, taking him to be an enemy; his ignorance of the person excuseth his offence."[6] Similarly, where a man made a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, and killed a person who was not a burglar, it was held that he had committed no offence.[7] In other words, he was in the same situation *as far as regarded the homicide as if he had killed a burglar.*

But where an act is clearly a wrong in itself, and a person, under a mistaken impression as to facts which render it criminal, commits the act, then, according to the *ratio decidendi* in *Prince's case*,[8] he will be guilty of a criminal offence.

Cases.—Mistake of fact.—Good defence.—The accused, a police constable, saw the complainant, early one morning, carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen, he went up *to the complainant and* questioned him. The complainant gave answers that were not satisfactory and refused to allow the constable to inspect the cloth, and a scuffle thereupon ensued between the two. The complainant was arrested by the constable, but was released by the Inspector of Police. The complainant then prosecuted the constable for wrongful restraint and confinement, and the Magistrate convicted the constable *of the said offence.* The High Court held that the conviction was wrong as the constable acted under a *bona fide* belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant to clear up his suspicions was an indication of good faith and he was,

[1] Per Esher, M. R., in *Barrow* v. *Isaacs & Son*, [1890] 1 Q B. 417.

[2] Per Lord Russell, C. J., in *Sandford* v. *Beal*, (1895) 65 L. J. Q. B. 73, 74, 73 L. T. 406.

[3] Per Cave, J., in *Tolson*, (1889) 23 Q. B. D. 168, 181, 16 Cox 629.

[4] 1 Hale P. C. 42, 43; *Levett*, (1639) Cro. Car. 538.

[5] Per Stephen, J., in *Tolson*, sup., p 188

[6] 1 Hale P. C. 42.

[7] *Levett* sup.

[8] (1875) L R. 2 C. C. R. 154. See *Tolson*, sup., p 189.

therefore, protected by this section.[1] A Chowkidar in good faith took the complainant for a thief, and captured him. It was held that he was entitled to the benefit of s. 76 and this section. The Court said: "If there was any mistake regarding the fact of complainant's being a thief, it was a mistake of fact, and not a mistake of law."[2] Where certain persons went to execute a warrant of arrest against their judgment-debtor, and a palanquin with closed doors was noticed to be coming out of the male apartments of the house, and they believing that the judgment-debtor was effecting his escape in it, stopped it and examined it, although the persons accompanying it protested and said there was a lady in it and there turned out to be in it a *pardanishin* lady of rank, it was held that the accused were protected by this section.[3]

Where the act of conveying liquor without a permit was made penal by the Madras Abkari Act[4] and the onus of proving that the act was not an offence was thrown by the Act upon the accused, it was held that the accused had discharged the onus by proving that they believed in good faith that they were not transporting liquor[5]

English cases.—The prisoner was convicted of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. She believed in good faith and on reasonable grounds that her husband was dead. It was held that a *bona* [illegible] the death of the husband at the time of the s[illegible]nce to the indictment, and that the convictio[illegible]ohibited a licensed victualler from supplying liquor to a police constable on duty, and a victualler did supply liquor to a constable *bona fide* believing that he was off duty, it was held that he had committed no offence[7]

Bad defence.—A police-officer saw a horse tied up in B's premises, and because it happened to resemble one which his father had lost a short time previously, he jumped at once to the conclusion that B had either stolen the horse himself, or had purchased it from the thief, and compelled B to account for his possession [illegible]

It was held that the police-officer had not acted in good faith, that is, with due care and attention, and that this section did not protect him.[8]

English cases.—It is no defence to an indictment for unlawfully taking an unmarried girl under the age of sixteen years out of the possession, and against the will of her father, that the accused *bona fide* and reasonably believed that the girl was older than sixteen.[9] One of the grounds for this decision was that, notwithstanding such belief, the prisoner intended to do and did a wrongful or immoral act, and not an innocent act, when he took the girl away. This case may be thus distinguished from *Tolson's case*, in which the conduct of the woman was not in the smallest degree immoral, but was, on the other hand, perfectly natural and legitimate. The accused was convicted under a statute of receiving lunatics into her house, not being a house duly licensed under the statute, but it was found that though the persons so received were lunatics, the defendant honestly, and on reasonable grounds, believed that they were not lunatics. It was held that such belief was immaterial and that the conviction was right[10] It is not easy to draw

[1] *Bhawoo Jivaji* v. *Mulji Dayal*, (1888) 12 Bom. 377. See *Lawrence* v. *Hedger*, (1810) 3 Taunt. 14

[2] Per Campbell, J., in *Protab Chowkeedar*, (1865) 2 W. R. (Cr.) 9

[3] *Kanai Lal Gowla*, (1897) 24 Cal. 885

[4] Madras Act I of 1886, s. 64.

[5] *Kandan*, (1894) 1 Weir 40 See *Waman Dhanraj*, (1908) 10 Bom L R 171.

[6] *Tolson*, (1889) 23 Q B D 168.

[7] *Sherras* v *De Rutzen*, [1895] 1 Q B 918

[8] *Sheo Surun Sahai* v *Mahomed Fazil Khan*, (1868) 10 W. R. 20

[9] *Prince*, (1875) L. R. 2 C C R 154.

[10] *Bishop*, (1879) 5 Q B. D 259.

a distinction between *Tolson's case* and this case. But the decision in this case [illegible] licensed person to sell any intoxicating liquor to any drunken person; and a publican sold such liquor to an intoxicated person who had given no indication of intoxication, and without being aware that the person so served was drunk, it was held that the prohibition [illegible] served with liquor w[illegible] a statute imposed penalties on every holder of a license who knowingly sold or delivered any [illegible] y child under fourteen for consumption by any person, [illegible] liquors as were sold or delivered in corked and sealed v[illegible] nner, and a licensee delivered liquor to a child under fourteen in a vessel not corked and sealed, it was held that he was liable under the statute, although he honestly believed when he delivered the liquor that the vessel was so corked and sealed.[2]

3. 'Mistake of law.'—A mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment upon facts as they really are. Mistake in point of law in criminal cases is no defence. "Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and *compos mentis*, from the penalty for the breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do."[3]

Some of the decisions profess to see a clear and practical distinction between ignorance of law and mistake of law, and assert that much of the confusion in the books upon this s[illegible] norance, it is said, implies [illegible] pretend to knowledge; bu[illegible] esult of laches, which is criminal; mistake argues diligence, which is commendable. But whatever merit this distinction may possess in academic discussion, it has been rejected by the Courts as being a refinement too subtle for application to practical affairs.

"If any individual should infringe it (the statute law of the country) through ignorance or carelessness, he must abide by the consequence of his error; it is not competent to him to aver in [illegible] law of the land, and that no [illegible]

Austin[5] says "that if i[illegible] tion, the Courts would be in [illegible] solve, and which would render the administration of justice [illegible] If ignorance of law were admitted as a [illegible] always be alleged by the party, and [illegible] bound to decide the point. Whether the part[illegible] ignorant of the law, and was so ignorant of the law that he had no *surmise* of its provisions, could scarcely be determined by any evidence accessible to others. And for the purpose of determining the *cause* of his ignorance (its *reality* being ascertained), it were incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution."

Although ignorance of law does not excuse a person, who does an action which is an offence irrespectively of any guilty knowledge on the part of the alleged offender, yet, when to constitute the offence it must be shown that there was a

[1] *Cundy* v. *Le Cocq*, (1884) 13 Q. B. D. 207.
[2] *Brooks* v. *Mason*, [1902] 2 K. B. 743.
[3] 1 Hale P. C. 42.
[4] Per Collins, C. J., in *Fischer*, (1891) 14 Mad. 342, 354.
[5] Jurisprudence, (4th Edn.), Vol. I, pp. 498, 499.

certain knowledge, the offence is not committed by one who acts without that knowledge, and it is immaterial whether the absence of the knowledge required to constitute the offence proceeded from ignorance of law or ignorance of fact. For, though ignorance of law is no ground of defence, it is evidence of mental condition.[1]

The maxim *ignorantia juris non excusat*, in its application to criminal offences, admits of no exception, not even in the case of a foreigner who cannot reasonably be supposed in fact to know the law of the land.[2] In a case two Frenchmen were charged with wilful murder because they had acted as seconds in a duel in which one man had met his death. They alleged that they were ignorant of the fact that by the law of England killing an adversary in a fair duel amounted to murder. Coleridge, J., said: "We are told to lay down a different rule to what we should apply to native born subjects, because these persons are foreigners and [illegible] ord Chief Justice, [illegible] with in the same [illegible] e of a native, be received as an excuse for a crime, nor can it any more be urged in favour of a foreigner"[3]

Ignorance of a statute newly passed.—Although a person commits an act which is made an offence for the first time by a statute so recently passed as to render it impossible that any notice of the passing of the statute could have reached the place where the offence has been committed, yet his ignorance of the statute will not save him from punishment. In the case in which this principle has been laid down, the accused, a captain of a vessel, was indicted for maliciously shooting a mariner of another vessel. The latter vessel was sailing without colours and was so conducting herself as to give the accused reasonable ground to think that she was an enemy. However, on boarding her, he found that she was an English vessel, but for some reason he and the captain of the vessel quarrelled The accused left her and when he got on board his own vessel he ordered three guns to be fired, one of which wounded the mariner It was insisted on behalf of the accused that he had a right to fire upon the vessel, because the captain did not produce her papers, that he did not shoot at the mariner but at the ship, and that the prisoner could not be found guilty of the offence with which he was charged, because the statute 39 Geo III., c 37, upon which the prisoner was indicted, came into force on the 10th May, 1799, and the fact charged in the indictment happened on the 27th June following, when the prisoner could not know that any such statute existed. The jury said that they were satisfied that the accused did not fire upon the vessel for non-production of her papers, but in consequence of the quarrel which had taken place between him and the captain of the other vessel. Lord Eldon held that he was of opinion that the guns might be considered as shot at each individual on board her; that the accused was, in strict law, guilty within the statute 39 Geo. III., c. 37, though he could not then know that it had passed; and that his ignorance of that fact could in no otherwise affect the case than that it might be the means of recommending him to a merciful consideration. On a reference to twelve other judges it was held that the accused could not have been tried if the statute 39 Geo. III., c 37, had not passed, and as he could not have known of that statute, they thought it right he should have a pardon.[4] An act, though not unlawful in its commencement, becomes unlawful when a statute makes it so, notwithstanding the ignorance of the doer of the act that any such statute is in force.[5] But before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance;

[1] (1881) 1 Wer 74, 75

[2] *Esop*, (1836) 7 C & P. 456.

[3] *Barnard* and *Allain*, (1852) Dearsly 51, 454, 59

[4] *Richard Bailey*, (1800) R. & R. 1.

[5] *Burns v. Nowell*, (1880) 5 Q. B D. 448,

Martial law.—"The proclamation of martial law is, in fact, no more than a declaration that under circumstances of urgent public danger *all law if for a time suspended*, and that for the safety of the State, the Government deems it necessary to *set aside the ordinary rules of law* by a military force, and to proceed summarily to put down the rebellion, or to punish those who are concerned in it. Courts-martial are employed on such occasions, in order to guard against the danger of subjecting innocent persons to military executions, by instituting an inquiry, necessarily only summary, into the guilt of the parties whose immediate punishment is necessary for the restoration of tranquillity and the suppression of rebellion. But courts-martial so assembled have nothing in common with the tribunals bearing the same name, which, under the Mutiny Act, take cognizance of military offences, etc. Courts-martial of such description have powers lawfully defined by the laws under which they are created, and the sentences passed become matters of record which can be enforced by the military authorities, which is not the case with courts-martial assembled for the punishment of rebels, under proclamation of martial law, without the sanction of any positive enactment. Sentences of such courts add nothing to the legality of the punishments inflicted, and serve only to show that these punishments have not been inflicted without due inquiry into the guilt of those who were subjected to them. Accordingly, it is the practice, where martial law has been exercised and punishments have been inflicted under it, that where the danger is over, the legislature should be applied to for laws of indemnity for the security of those by whom these powers have been exercised, and for whom *there is no legal warrant*, however necessary it may have been to assume them."[1]

The civil Courts have no jurisdiction *durante bello* to interfere with the decision of a military court sitting in a martial law area, even where a capital sentence has been pronounced, and is about to be executed, for an offence not punishable capitally under the ordinary criminal law.[2] The High Court in Ireland has held that it has the power when its jurisdiction is invoked to decide whether a state of war exists which justifies the application of martial law; but once such a condition of affairs is established to the satisfaction of the Court, it cannot interfere to determine what is or what is not necessary.[3]

Liability of private persons.—Private persons acting under ss. 43, 59, 77 and 78 of the Code of Criminal Procedure[4] will be protected under this section.

PRACTICE.

Procedure.—Jurisdiction.—*Act of State.*—It is within the province of munici- [illegible] to determine the true character of the acts done by a public functionary, [illegible] that the particular act in question is [illegible] authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it.[5]

Punishment.—Ignorance of law is no defence, but it is a matter to be taken into consideration in mitigation of punishment.[6]

Accident in doing a lawful act.

80. Nothing is an offence which is done by accident[1] or misfortune, and without any criminal intention[2] or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

[1] Finlayson's Review of authorities as to suppression of Riot or Rebellion, p. 96.
[2] *John Allen*, [1921] 2 I. R. 241.
[3] *Strickland*, [1921] 2 I. R. 317.
[4] Act V of 1898.
[5] *Musgrave v. Pulido*, (1879) 5 App. Cas. 102, 111.
[6] *Esop*, (1836) 7 C. & P. 456.

ILLUSTRATION.

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

COMMENT.

This section exempts the doer of an innocent or lawful act in an innocent or lawful manner from any unforeseen evil result that may ensue from accident or misfortune. If either of these two elements is wanting the act will not be excused on the ground of accident.

1. **'Accident.'**—An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things.[1] An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.[2] The idea of something fortuitous and unexpected is involved in the word 'accident.'[3] An injury is said to be accidentally caused whensoever it is neither wilfully nor negligently caused.[4]

[illegible] minal Law further [illegible] intended or likely to injure him, using due care. The scholar dies. Such a death is accidental.

(2) A turns B, a trespasser, out of his house, using no more force than is necessary for that purpose. B resists but without striking A. They fall in the struggle and B is killed. Such a death is accidental.

(3) A, a workman, throws snow from a roof, giving proper warning. A passenger is nevertheless killed. Such a death is accidental.

(4) A takes up a gun, not knowing whether it is loaded or not, points it in sport at B and pulls the trigger B is shot dead. Such a death is not accidental. If A had had reason to believe that the gun was not loaded, the death would have been accidental, although he had not used every possible precaution to ascertain whether the gun was loaded or not

2. **'Criminal intention'**—See Comment under s. 81, *infra*.

CASES.

Shooting accident.—Two men, accused and deceased, went into a jungle, shikaring porcupines. They agreed to take up certain positions in the jungle and lie in wait for game. This was done. After a while, the accused heard a rustle, and believing it was a porcupine fired in that direction. The shot, however, reached his companion and caused his death. It was held that the accused was protected by this section, the affair being a pure accident.[5]

English cases.—A man found a pistol in the street, which he had reason to believe was not loaded, having tried it with a rammer; he carried it home and shewed it to his wife; and she standing before him he pulled up the cock, and touched the trigger. The pistol went off and killed the woman. The rammer, perhaps, was too short and deceived him. It was held that the man was guilty of manslaughter. Foster thinks that this is an extremely hard case "because accidents of this lamentable kind may be the lot of the wisest and the best of mankind, and most commonly fall amongst the nearest friends and relations."[6] A man and his wife went to take a dinner at the house of a friend. He carried his gun

[1] Per Willes, J., in *Fenwick* v. *Schmalz*, (1868) L. R. 3 C. P. 313, 316.

[2] Stephen's Digest of Crim. L., Art. 231.

[3] Per Lord Halsbury in *Hamilton, Fraser & Co.* v. *Pendorf & Co.*, (1887) 12 App. Cas. 518, 524.

[4] 10th Par. Rep. 16.

[5] *Timmappa*, (1901) 3 Bom. L. R. 678.

[6] *Rampton's case*, Kel. 41, Foster, 263.

with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. He went to Church after dinner and in the evening returned home bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He taking it up touched the trigger, and the gun went off and killed the wife, whom he dearly loved. It came out in evidence, that, while the man was at Church, a person belonging to the family had privately taken the gun out to shoot and had returned it loaded to the place where it was put in the friend's house. The prisoner was acquitted on the ground that he had reasonable grounds to believe that the gun was not loaded.[1] A person was charged with having fired a fowling-piece loaded with small shot, in a field within an easy shot of a high road, where persons frequently passed, and in the direction of the road, and killed a girl passing at the time. It appeared that the shot was really a long one, being above fifty yards, and that it proved fatal only by one of the leads having unfortunately penetrated the child's eye, while the other shot hardly penetrated the skin. It was held that the death was accidental.[2]

Act likely to cause harm, but done without criminal intent, and to prevent other harm.

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention[1] to cause harm, and in good faith[2] for the purpose of preventing or avoiding other harm to person or property.[3]

Explanation.—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

ILLUSTRATIONS.

(*a*) A, the captain of a steam-vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down C.

(*b*) A in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

COMMENT.

An act which would otherwise be a crime may in some cases be excused if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.[3]

[1] Foster, 265 [2] Alison, 144. [3] Stephen's Digest of Crim. L., Art. 33.

Wherever necessity forces a man to do an illegal act, *forces* him to do it, it justifies him, because no man can be guilty of a crime without the will and intention of his mind. It must be voluntary. A man who is absolutely by natural necessity forced, his will does not go along with the act.[1]

1. 'Without any criminal intention.'—Under no circumstances can a person be justified in intentionally causing harm; if he causes the harm without any criminal intention, and merely with the knowledge that it is likely to ensue, he will not be held responsible for the result of his act, provided it be done in good faith to avoid or prevent other harm to person or property.

'Criminal intention' simply means the purpose or design of doing an act forbidden by the criminal law without just cause or excuse. An act is intentional if it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied. The motive for an act is not a sufficient test to determine its criminal character. By a motive is meant anything that can contribute to give birth to, or even to prevent, any kind of action. Motive may serve as a clue to the intention; but although the motive be pure, the act done under it may be criminal. Purity of motive will not purge an act of its criminal character.

"Under the Penal Code no man can be tried for any delusion or misconception of mind, however culpable and criminal such delusion or misconception may appear to be."[2]

Mens rea.—It is one of the principles of the English criminal law that a crime is not committed if the mind of the person doing the act in question be innocent. It is said that *actus non facit reum, nisi mens sit rea* (the intent and act must both concur to constitute the crime). This principle was discussed elaborately by Wills, J., in *Tolson's case*[3] in which the prisoner was convicted of bigamy, having gone through the ceremony of marriage within seven years, after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead. It was held by the majority of the Court that a *bona fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong. "The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute—fornication or seduction, for instance—which nevertheless no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as, for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of justice and, indeed, the foundations of civil society rest upon the principle that obedience to the law whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen.

"Although prima facie and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether

[1] Per Lord Mansfield in *George Stratton*, (1779) 21 St. Tr. 1046, 1223.

[2] Per Stuart, C. J., in *Abdul Kadir*, (1880) 3 All. 279, 280.

[3] (1889) 23 Q. B. D. 168, 172, 173.

there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of the thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had bona fide made an accidental miscalculation or an erroneous measurement. The Acts are properly

"Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable." But in the same case Stephen, J., remarks that the phrase *non est reum, nisi mens sit rea* "naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a 'mens rea' or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. 'Mens rea' means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a "mens rea" or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, in other words, that immorality is essential to crime...

"The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition."[1]

It, therefore, appears that the above maxim has not so wide an application as it is sometimes considered to have. It has undergone a modification owing to the greater precision of modern statutes. It is impossible to apply it generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each act that is under consideration to see whether and how far knowledge is of the essence of the offence created. Crimes are at the present day much more accurately defined by statutes or otherwise than they formerly were.

But *Sherras* v. *De Rutzen*[2] seems very like an emphatic re-assertion of the doctrine that *mens rea* is an essential ingredient in every offence except in three cases[3]: (1) cases not criminal in any real sense but which in the public interest are prohibited under a penalty, *e.g.*, Revenue Acts; (2) public nuisances; and (3) cases criminal in form but which are really only a summary mode of enforcing a civil right.

An intention to offend against the penal provisions of an Act constitutes *mens rea*. Sir Richard Couch, in delivering judgment of the Judicial Committee of

[1] *Tolson*, (1889) 23 Q. B. D. 168, 185, 186, 187.

[2] [1895] 1 Q. B. 918.

[3] *Vide* the judgment of Wright, J., in *ibid.*

the Privy Council,[1] observed : " It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory, there must be mens rea on the part of the accused, and that he may avoid conviction by shewing that such mens did not exist. That is a proposition which their Lordships do not desire to dispute ; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of mens rea in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent."

The maxim *actus non facit reum, nisi mens sit rea* has, however, no application to the offences under the Code. Because the definitions of various offences contain expressly a proposition as to the state of mind of the accused. The definitions state whether the act must have been done ' voluntarily ', ' knowingly,' ' dishonestly,' or ' fraudulently ' or the like. Every ingredient of the offence is stated in the definitions. So *mens rea* will mean one thing or another according to the particular offence. The guilty mind may thus be a fraudulent mind, or a dishonest mind, or a negligent or rash mind

When guilty intent is of the gist of an offence, evidence of similar acts to those charged at or about the same time as the latter is admissible to prove the intent.[2]

2. ' **Good faith**'.—See s. 52, *supra*.

3. ' **Preventing. . . harm to person or property.**'—This is the case in which evil is done to prevent a greater evil. It is to this ground of justification that we must refer the extreme measures which may become necessary on occasions of contagious diseases, sieges, famines, tempests, shipwrecks. But the more serious a remedy of this nature is, the more evident ought its necessity to be The welfare of the State has served as a pretext for all crimes. To give validity to this means of justification three essential points must be established :—the certainty of the evil to be avoided, the absolute inapplicability of any means less costly, the certain efficacy of the means employed.[3]

Where a chief constable, not in his uniform, came to a fire and wished to force his way past the military sentries placed round it, was kicked by a sentry, it was held that, as the sentry did not know who he was, the kick was justifiable for the purpose of preventing much greater harm under this section and as a means of acting up to the military order. " The kick would be justified under s. 81. . .as given in good faith for the purpose of preventing much greater harm, the looting of the house or the spread of the fire, on the same principle that the man is excused. by that section who in a great fire pulls down other people's houses to prevent the conflagration from spreading."[4] Where a Magistrate arrested a drunken person whose conduct was at the time a grave danger to the public, it was held that the Magistrate was protected under this section or ss. 96 to 105.[5] A person placed poison in his toddy pots, knowing that, if taken by a human being, it would cause injury, but with the intention of thereby detecting an unknown thief who was in the habit of stealing the toddy from his pots. The toddy was drunk by, and caused injury to, some soldiers who purchased it from an unknown vendor. It was held that the person was rightly convicted under s. 328, and that this section did not apply.[6]

English cases.—A man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder ; although at the time of the

[1] *Bank of New South Wales* v. *Piper*, [1897] A. C. 383, 389.
[2] *Dudley West*, (1916) 12 Cr. App. R. 145.
[3] Bentham.
[4] Per Jardine, J., in *Bostan valad Futtehhan*, (1892) 17 Bom. 626, 628.
[5] *Gopal Naidu*, (1922) 46 Mad 605, F.B.
[6] *Dhania Daji*, (1868) 5 B. H. C. Cr. C. 59.

act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life. At the trial of an indictment for murder it appeared, upon a special verdict, that the prisoners D and S, seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean and was probably more than 1,000 miles from land; that on the eighteenth day, when they had been seven days without food and five without water, D proposed to S that lots should be cast who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the twentieth day D, with the assent of S, killed the boy, and both D and S fed on his flesh for four days; that at the time of the act there was no sail in sight nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then or very soon fed upon the boy, or one of themselves, they would die of starvation. It was held, upon those facts, that there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder.[1] Lord Coleridge, C. J., in *Dudley's case*[2] said: "The temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequences; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead*; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. '*Necesse est ut eam, non ut vivam*,' is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made ... It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be 'No.'—

> 'So spake the Fiend, and with necessity,
> The tyrant's plea, excused his devilish deeds.'

It is not suggested that in this particular case the deeds were 'devilish'; but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. ... It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime."

[1] *Dudley and Stephens*, (1884) 14 *Q. B. D.* 273. [2] *Ibid*, pp. 287, 288.

A and B, swimming in the sea after a ship-wreck, get hold of a plank not large enough to support both; A pushes off B, who is drowned. This, in the opinion of Sir James Stephen, is not a crime, as A thereby does B no direct bodily harm, but leaves him to his chance of another plank.

Doctrine of self-preservation.—The authors of the Code remark:—"We long considered whether it would be advisable to except from the operation of the penal clauses of the Code acts committed in good faith from the desire of self-preservation; and we have determined not to except them.

"We admit, indeed, that many acts falling under the definition of offences ought not to be punished when committed from the desire of self-preservation; and for this reason, that, as the Penal Code itself appeals solely to the fears of men, it never can furnish them with motives for braving dangers greater than the dangers with which it threatens them. Its utmost severity will be inefficacious for the purpose of preventing the mass of mankind from yielding to a certain amount of temptation. It can, indeed, make those who have yielded to the temptation miserable afterwards. But misery which has no tendency to prevent crime is so much clear evil. It is vain to rely on the dread of a remote and contingent evil as sufficient to overcome the dread of instant death, or the sense of actual torture. An eminently virtuous man indeed will prefer death to crime; but it is not to our virtue that the penal law addresses itself; nor would the world stand in need of penal laws if men were virtuous. A man who refuses to commit a bad action, when he sees preparations made for killing or torturing him unless he complies, is a man who does not require the fear of punishment to restrain him. A man, on the other hand, who is withheld from committing crimes solely or chiefly by the fear of punishment, will never be withheld by that fear when a pistol is held to his forehead or a lighted torch applied to his fingers for the purpose of forcing him to commit a crime.

"It would, we think, be mere useless cruelty to hang a man for voluntarily causing the death of others by jumping from a sinking ship into an overloaded boat. The suffering caused by the punishment is considered by itself an evil, and ought to be inflicted only for the sake of some preponderating good. But no preponderating good, indeed no good whatever, would be obtained by hanging a man for such an act. We cannot expect that the next man who feels the ship in which he is left descending into the waves, and sees a crowded boat putting off from it, will submit to instant and certain death from fear of a remote and contingent death. There are men, indeed, who in such circumstances would sacrifice their own lives rather than risk the lives of others. But such men act from the influence of principles and feelings which no penal laws can produce, and which if they were general, would render penal law unnecessary. Again, a gang of dacoits, finding a house strongly secured, seize a smith, and by torture and threats of death induce him to take his tools and to force the door for them; here, it appears to us, that to punish the smith as a housebreaker would be to inflict gratuitous pain; we cannot trust to the deterring effect of such punishment. The next smith who may find himself in the same situation will rather take his chance of being, at a distant time, arrested, convicted and sentenced to imprisonment, than incur certain and immediate death.

"In the cases which we have put, some persons may perhaps doubt whether there ought to be impunity; but those very persons would generally admit that the extreme danger was a mitigating circumstance to be considered in apportioning the punishment. It might, however, with no small plausibility be contended that if any punishment at all is inflicted in such cases, that punishment ought to be not merely death, but death with torture; for the dread of being put to death by torture might possibly be sufficient to prevent a man from saving his own life by a crime; but it is quite certain, as we have said, that the mere fear of capital punishment which is remote, and which may never be inflicted at all, will never

prevent him from saving his life. And *a fortiori*, the dread of a milder punishment will not prevent him from saving his life. Laws directed against offences to which men are prompted by cupidity, ought always to take from offenders more than those offenders expect to gain by crime. It would obviously be absurd to provide that a thief or a swindler should be punished with a fine not exceeding half the sum which he had acquired by theft or swindling, in the same manner, laws directed against offences to which men are prompted by fear ought always to be framed in such a way as to be more terrible than the dangers which they require men to brave. It is on this [illegible] soldier who runs away in action is punished with a [illegible] to the moral depravity which his offence indicates [illegible] *mest and benevolent man and* irreproachable in all the relations of civil life; yet he is punished as severely as a deliberate assassin, and more severely than a robber or a kidnapper. Why is this? Evidently because, as his offence arises from fear, it must be punished in such a manner that timid men may dread the punishment more than they dread the fire of the enemy.

"If all cases in which acts falling under the definition of offences are done from the desire of self-preservation were as clear as the cases which we have put of the man who jumps from a sinking ship into a boat, and of the smith who is compelled by dacoits to force a door for them, we should, without hesitation, propose to exempt this class of acts from punishment. But it is to be observed, that in both these cases the person in danger is supposed to have been brought into danger, without the smallest fault on his own part, by mere accident, or by the depravity of others. If a captain of a merchantman were to run his ship on shore in order to cheat the insurers, and then to sacrifice the lives of others in order to save himself from a danger created by his own villainy; if a person who had joined himself to a gang of dacoits with no other intention than that of robbing were, at the command of his leader, accompanied with threats of instant death in case of disobedience, to commit murder, though unwillingly, the case would be widely different, and our former reasoning would cease to apply; for it is evident that punishment which is inefficacious to prevent a man from yielding to a certain temptation may often be efficacious to prevent him from exposing himself to that temptation. We cannot count on the fear which a man may entertain of being brought to the gallows at some distant time as sufficient to overcome the fear of instant death; but the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions, in whose society no person who shrinks from any atrocity that they may command can be certain of his life. Nothing is more usual than for pirates, gang-robbers and rioters to excuse their crimes by declaring that they were in dread of their associates, and durst not act otherwise. Nor is it by any means improbable that this may often be true. Nay, it is not improbable that crews of pirates and gangs of robbers may have committed crimes which every one among them was unwilling to commit, under the influence of mutual fear; but we think it clear that this circumstance ought not to exempt them from the full severity of the law.

"Again nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts. It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that, when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not keep him from committing theft; yet it by no means follows that it is irrational to punish him for theft; for though the fear of punishment is not likely to keep any man from theft when he is actually starving, it is very likely to keep him from being in a starving state. It is of no effect to counteract the irresistible motive which immediately prompts to theft; but it is of great effect to counteract the motives to that idleness and that profusion which end in bringing

a man into a condition in which no law will keep him from committing theft. We can hardly conceive a law more injurious to society than one which should provide that as soon as a man who had neglected his work, or who had squandered his wages in stimulating drugs, or gambled them away, had been thirty-six hours without food, and felt the sharp impulse of hunger, he might, with impunity, steal food from his neighbours.

"We should, therefore, think it in the highest degree pernicious to enact that no act done under the fear even of instant death should be an offence. It would *a fortiori* be absurd to enact that no act under the fear of any other evil should be an offence.

"There are, as we have said, cases in which it would be useless cruelty to punish acts done under the fear of death, or even of evils less than death. But it appears to us impossible precisely to define these cases. We have, therefore, left them to the Government, which, in the exercise of its clemency, will doubtless be guided in a great measure by the advice of the Courts."[1]

But in their First Report the Commissioners say: "We think that a distinction may be drawn between cases in which a man does a thing which is an offence by law, spontaneously, to save his own life, and cases in which he does such a thing, from what is called duress, that is from the compulsion of others to save his life threatened by them.

"With respect to the former, we agree with the authors of the Code that it is impossible to define precisely those cases in which it may be proper to excuse the parties, and that it is expedient to leave them to the discretion of the Government."[2] They then proposed s. 64 to meet the latter kind of cases.

As to the doctrine of compulsion and necessity, see Comment under s. 94, *infra*.

Act of a child under seven years of age.

82. Nothing is an offence which is done by a child under seven years of age.

COMMENT.

Under the age of seven years no infant can be guilty of a crime; for, under that age an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion.[3] He cannot distinguish right from wrong. If the accused were a child under seven years of age, the proof of that fact would be *ipso facto* an answer to the prosecution.[4] Accused purchased for one anna, from a child aged six years, two pieces of cloth valued at fifteen annas, which the child had taken from the house of a third person. It was held that, assuming that a charge of an offence under s. 411 could not be sustained, the accused was clearly guilty of criminal misappropriation, if he knew that the property belonged to the child's guardian and dishonestly appropr[illegible]

[illegible]

[illegible]nder seven years is only confined to the Penal Code, and does not extend to local or special Acts. See, for instance, the Indian Railways Act[7] as to the offences committed by children against certain provisions of that Act. See also *ante* s. 6, ill. (*a*).

[1] Note B, p. 111, 112, 113.
[2] Sections 167, 168.
[3] 1 Hale P. C. 27, 28; *Marsh* v. *Loader*, (1863) 14 C. B. N. S. 535.
[4] *Lulhini Agradanini*, (1874) 22 W. R. (Cr). 27.
[5] *Malhulshah*, (1886) 1 Weir 470.
[6] *Marsh* v. *Loader*, supra.
[7] Act IX of 1890, s. 130.

Act of a child above seven and under twelve of immature understanding.

83. Nothing is an offence which is done by a child above seven years of age and under twelve,[1] who has not attained sufficient maturity of understanding [2] to judge of the nature and consequences of his conduct [3] on that occasion.

COMMENT.

In construing this section the capacity of doing that which is wrong is not so much to be measured by years, as by the strength of the offender's understanding and judgment. The circumstances of a case may disclose such a degree of malice as to justify the maxim *malitia supplet ætatum.*[4]

1. **'Under twelve.'**—With reference to the precocity of children in the East, the rule of the Indian Code which fixes the age of twelve as the period, after which the plea of immaturity of understanding shall not be allowed, appears to be proper.[5]

2. **'Sufficient maturity of understanding.'**—"Where the accused is above seven years of age and under twelve, the incapacity to commit an offence only arises where the child has not attained *sufficient maturity, etc., and such non-*attainment would have apparently to be specially pleaded and proved, like the incapacity of a person who, at the time of doing an act charged as an offence, was alleged to have been of unsound mind. *The Legislature is manifestly referring in* s. 83. . .to an exceptional immaturity of intellect."[3] Maturity of understanding is to be presumed in the case of such a child unless the negative be proved on the *defence.*[4]

3. **'Consequences of his conduct.'**—"It is not apparently the penal consequences to the offender that are referred to, but the natural consequences which flow from a voluntary act, such for instance as that, when fire is applied to an inflammable substance, it will burn, or that a heavy blow with an axe or a sword will cause death or grievous hurt."[5]

Theft by a child.—Where a child of nine years of age stole a necklace, worth Rs. 2-8, and immediately afterwards sold it to the accused for five annas, the child was discharged under this section, but the accused was convicted because the act of the child, though under twelve years of age, showed that he had attained a sufficient maturity of understanding to judge of the nature and consequences of his conduct, and that the act of the child was therefore a theft, and that the accused was rightly convicted of receiving stolen property.[6]

Bigamy by a child of ten years.—Where a child of ten years married again during th[illegible] be perfor[illegible] maturity [illegible] *on the occasion of the second marriage.*[7]

Murder by a girl of ten years.—The accused who was about ten years of age slept with her mother-in-law the night before them under. Her husband aged about *nineteen slept with his brother in another hut in the same homestead.* In the early morning the mother-in-law woke up the accused, and told her to go about her household duties. Shortly after this the accused was seen running out of the *house and her husband was found mortally wounded on the neck.* She hid herself in a field and was not found until the afternoon. It was held that she was

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[5] Per Jackson, J., in *Lukhini Agradanini,* sup.

[6] *Begaravi Krishna,* (1883) 6 Mad. 373.

[7] *Godi,* (1896) Cr. R. No. 55 of 1896, Unrep. Cr. C. 876.

doli capax and that the Court could infer from the circumstances of the case such a degree of malice as to justify the application of the maxim *malitia supplet ætatum.*[1]

English law.—According to English law an infant between the age of seven and fourteen years is presumed to be *doli incapax.* If a child more than seven and under fourteen years of age is indicted for felony, it will be left to the jury to say whether the offence was committed by the prisoner, and, if so, whether at the time of the offence, the prisoner had a guilty knowledge that he was doing wrong.[2] In cases of murder if it appear to the Court and jury that the infant was *doli capax* and could discern between good and evil when the offence was committed, he may be convicted of the capital offence and executed.[3] But an infant under fourteen, if indicted for murder, must be proved conscious of the nature of the act.[4]

Infants above fourteen and under twenty-one are subject to all kinds of punishments; for it is *presumptio juris* that after fourteen years they are *doli capaces,* and can discern between good and evil.[5]

English cases.—A boy of eight was hanged in 1629 for burning two barns as it appeared that he had malice, revenge, craft, and cunning.[6] Where a boy of ten killed his playfellow, the fact that he hid the body away was held sufficient to rebut the presumption of *doli incapax* and he was hanged. So a girl of thirteen was burnt for killing her mistress.[7] Where an infant of nine years of age killed an infant of the like age and hid both the blood and the body, and afterwards confessed the crime, it was held that he might lawfully be hanged but pardon was asked for.[8] Similarly, where a boy of ten years of age murdered a girl of about five years of age, under circumstances of "mischievous discretion," he was sentenced to death, though he was afterwards pardoned by the King upon condition of his entering immediately into the sea-service. The judges unanimously laid down: "There are many crimes of the most heinous nature, such as in the present case the murder of young children, poisoning parents or masters, burning houses, etc., which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old may savour of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offences; and as the sparing this boy, *merely on account of his age,* will probably have a quite contrary tendency, in justice to the public, the law ought to take its course; unless there remaineth any doubt touching his guilt."[9] A confession made by a boy under fourteen years of age, who had committed murder, was held to be admissible against him.[10]

Rape.—The rule at common law is that in regard to the offence of rape *malitia non supplet ætatum*; a boy under fourteen is under a physical incapacity to commit the offence. That is a *presumptio juris et de jure,* and judges have time after time refused to receive evidence to shew that a particular prisoner was in fact capable of committing the offence. The Criminal Law Amendment Act[11] has not altered the common law principle.[12] Nor can a boy under fourteen be convicted of an assault with intent to commit rape,[13] or of feloniously carnally knowing and abusing a girl under ten years of age.[14] But he can be guilty as a principal in the second degree[15] or may be convicted of an indecent assault.[16] This presumption

[1] *Mussamut Aimona,* (1864) 1 W. R. (Cr.) 43.

[2] *Elizabeth Owen,* (1830) 4 C. & P. 236; [illegible]

[3] [illegible]

[4] [illegible]

[5] [illegible]

[6] *Ibid,* p. 25.

[7] *Ibid,* p. 26.

[8] *Ibid,* p. 27.

[9] [illegible]

[10] [illegible]

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Bigamy by a child of ten years.—Where a child of ten years married again during the life-time of her husband, the marriage being negotiated and caused to be performed by her mother, the child was held not to have attained sufficient maturity of understanding to judge of the nature and consequences of her conduct on the occasion of the second marriage.[7]

Murder by a girl of ten years.—The accused who was about ten years of age slept with her mother-in-law the night before them under. Her husband aged about nineteen slept with his brother in another hut in the same homestead. In the early morning the mother-in-law woke up the accused, and told her to go about her household duties. Shortly after this the accused was seen running out of the house and her husband was found mortally wounded on the neck. She hid herself in a field and was not found until the afternoon. It was held that she was

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[2] *Elizabeth Owen*, (1830) 4 C. & P. 236; *Sidney Smith*, (1845) 1 Cox 260.
[3] 1 Hale P. C. 26.
[4] *Vamplew*, (1862) 3 F. & F. 520.
[5] 1 Hale P. C. 26.
[6] *Ibid*, p. 25.
[7] *Ibid*, p. 26.
[8] *Ibid*, p. 27.

of English law has no application to India.[1] A boy of twelve can be convicted of attempt to commit rape.[2]

PRACTICE.

Evidence.—It is not that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender, but it is generally desirable that there should be some reliable evidence on the point, and especially when it is necessary to determine the period of detention. Where the age of the accused is under twelve years, the Magistrate should, considering the provisions of this section, find that he has attained sufficient maturity of understanding to judge of the nature and consequences of his act.[3]

An objection that the accused is of such an age as not to have attained sufficient maturity of understanding to judge of the nature and consequences of his conduct is not one of a preliminary character, but rather a matter of defence to be considered with the other issues arising in the case.[4]

Where a child under twelve years of age commits an offence when he is unable to understand the nature of the offence, he cannot be debarred under s. 105 of the Indian Evidence Act from the defence allowed him by this section because of his ignorance of Court procedure.[5]

Act of a person of unsound mind.

84. Nothing is an offence which is done by a person who, at the time of doing it,[1] by reason of unsoundness of mind,[2] is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.[3]

COMMENT.

The policy of the law is to control not only the sane, but so far as is possible, also the insane. It is not, therefore, every person mentally diseased who, *ipso facto*, is exempted from criminal responsibility. Such exemption is allowed only where the insane person "is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law." This section lays down the legal test of responsibility in cases of alleged unsoundness of mind. It is by this test, as distinguished from the medical test, that the criminality of an act is to be determined.[6] This provision of our law is in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords in *M'Naghten's case*.[7]

A man who by reason of mental disease is prevented from controlling his own conduct, and a man who is deprived, by disease affecting the mind, of the power of passing a rational judgment on the moral character of the act he meant to do, is entitled to the benefit of this section.[8] A human creature deprived of reason, and disordered in his senses, is still an animal, or instrument possessing strength and ability to commit violence; but he is no more so than a mere mechanical machine which, when put in motion, performs its powerful operations on all that comes in its way, without consciousness of its own effects, or responsibility for them. In like manner, the man under the influence of real madness has properly no will, but does what he is not conscious or sensible of doing and therefore cannot be made answerable for any consequences.[9]

[illegible] 27.

[2] *Ali Raza*, (1924) 28 O. C. 69.

[6] *Lakshman Dagdu*, (1886) 10 Bom. 512; *Nga Kan Hla*, (1914) 2 U. B. R 28.

[7] (1843) 4 St. Tr. (N.) S.) 847, 10 C. & F. 200.

[8] *Halil Shah*, (1887) P. R No. 42 of 1887.

[9] *Kinloch's case*, (1795) 25 How. St. Tr. 1000.

There are four kinds of persons who may be said to be *non compos mentis* (not of sound mind): (1) an idiot; (2) one made *non compos* by sickness; (3) a lunatic or madman; and (4) one that is drunk.

(1) An idiot is a fool or madman from his nativity, and one who never has any lucid intervals; and such an one is described as a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, etc. A person deaf or dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law, as applicable to particular offences, is an idiot; but if it can be shown that he has the use of understanding, which many of that condition discover by signs, then he may be tried, convicted, and presumed to be punished, although great caution should be observed in such proceedings.[1]

(2) A person made *non compos mentis* by sickness is excused in criminal cases from such acts as are committed while under the influence of his disorder.[2] Several causes have been assigned for this disorder: such as the distemper of the humours of the body; the violence of a disease, as a fever or palsy; or the concussion or hurt of the brain; and, as it is more or less violent, it is distinguishable in kind or degree, from a particular *dementia*, in respect of some particular matters, to a total alienation of the mind, or complete madness.[3]

(3) A lunatic is one who is affected by his disorder only at certain periods and vicissitudes, having intervals of reason. Such a person during his frenzy is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent.[4]

That is the species of madness called lunacy, where persons are subject to temporary paroxysms in which they are guilty of extravagance, such persons committing crimes when they are not affected by the malady would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil, they would be answerable for their conduct. And that is the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement.[5]

Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

(4) As to persons who are drunk, see s. 85, *infra*.

1. 'At the ti[illegible] it must clearly be [illegible] accused was labou[illegible] not to know the *nature and quality* of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.[6] If he did know it, he was responsible.[7] A plea of insanity at the time of trial will not avail the accused.[8] In such a case he will be tried in accordance with the special procedure laid down in the Code of Criminal Procedure.

2. 'Unsoundness of mind.'—Whether the want of capacity is temporary or permanent, natural or supervening, whether it arises from disease, or exists from the time of birth, it is included in this expression. Thus an idiot who is a person without understanding from his birth, a lunatic who has intervals of reason, and

[1] Russell, 118; Archbold 23, 1 Hale P.C. 34

[2] 1 Hale P. C 30

[3] Russell, 119; 1 Hale P. C 30

[4] *Ibid*, p. 120; *ibid*, p. 31

[5] *Bellingham's case*, Collinson on Lunacy, p. 636; *Edward Oxford*, (1840) 9 C & P 525, 533; *Offord*, (1831) 5 C & P. 168; *Hadfield's case*, Collinson on Lunacy, p. 480

[6] Third question and answer in *M'Naghten's case*, (1843) 10 C & F. 200, 204; *Edward Oxford*, sup. *Pursoram Doss*, (1867) 7 W R (Cr) 42; *Jugo Mohen Malo*, (1875) 24 W. R (Cr) 5

[7] *Harka*, (1906) 26 A. W. N. 193

[8] *Nota Ram*, (1866) P. R. No 56 of 1866.

a person who is mad or delirious, are all persons of "unsound mind." There are [illegible] irresponsible, must reach that degree which is described in the latter part of this exception.

If a person is of unsound mind, he is to be judged by the ordinary rules in regard to insanity, no matter whether the insanity arose from disease of the brain or from persistent indulgence in intoxicating drugs or liquor.[1]

An idiot or lunatic, even if he is conscious of his act, has no capacity to know its nature and quality, and is *therefore not responsible*. Mad men, especially those under the influence of some delusion, may have capacity enough to know the nature of the act, but unless they also know that they are doing 'what is either wrong or contrary to law,' they are not responsible. A common instance is, where a man fully believes that the act he is doing, *e.g.*, killing another man, is done by the immediate command of God.[2]

"It is only unsoundness of mind which materially impairs the cognitive faculties of the [illegible] bility, the natur[illegible] as would make [illegible] is doing what is wrong or contrary to law...A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under an insane delusion believe an innocent man whom he kills to be a man that was going to take his life; in which case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land."[3] A person whose cognitive faculties are not so impaired as to make it impossible for him to know the nature of his act or that he was doing what was wrong or contrary to law is not exempted from criminal responsibility.[4]

It is not every kind of frantic humour or something unaccountable in a man's actions that points him out to be such a mad man as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such an one is never the object of punishment.[5] Want of any motive for the doing of an act cannot be taken as evidence of maniacal tendency.[6]

Partial delusion.—Whether a person who, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is to be therefore excused depends upon the nature of the delusion. If he labours under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts, with respect to which the delusion exists, were real. For example, if under the influence of his delusion, a person supposes another man to be in the act of attempting to take away his life, and he kills that man as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and killed him in revenge for such supposed injury, he would be liable to

[1] *Harka*, (1903) 26 A. W. N.
[2] M. & M. 61.
[3] Per O[illegible]
Kader Nasy[illegible] 23 C [illegible]
Chajju [illegible] No. [illegible]
Ramzan, ([illegible] 191
[4] *Ram Sundar Das*, (1919) 23 C. W. N. 621, 20 C. L. J. 209.
[5] *Edward Arnold*, (1724) 16 St. Tr. 695.
[6] [illegible] (1859) 1 F. & F. 666.

punishment.[1] If a person afflicted with an insane delusion, in respect of one or more particular subject or person, commits crime, knowing that he was acting contrary to law, but did the act complained of with a view, under the influence of an insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed.[2]

Moral insanity.—This is a form of insanity when a man's intellectual faculties are sound, but his moral sense is affected or diseased. The functions of the mind are of a twofold nature—those of the intellect, or faculty of thought, such as perception or judgment; and those of the moral sentiments and affections, the propensities and the passion; and the latter may be diseased while the intellectual faculties are sound.[3] "We learn, however,... that insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed. It may be that our law, like the law of England, limits non-liability only to those cases in which insanity affects the cognitive faculties; because it is thought that those are the cases to which the exemption rightly applies, and the cases, in which insanity affects only the emotions and the will, subjecting the offender to impulses, whilst it leaves the cognitive faculties unimpaired, have been left outside the exemption, because it has been thought that the object of the criminal law is to make people control their insane as well as their sane impulses... We are not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired."[4]

The delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, are delusions of the senses, or such as relate to facts or objects—not mere wrong notions, or impressions, of a moral nature, and the aberration must be mental, not moral, to affect the intellect of the individual. It is not enough that they show a diseased or depraved state of mind, or an aberration of the moral feelings; the sense of right and wrong being still, although it may be perverted, yet not destroyed, and the theory of a moral insanity, or insanity of the moral feelings, while the sense of right and wrong remains, is not to be reconciled with the legal doctrine on the subject.[5] The circumstance of the prisoner having acted under an irresistible influence to the commission of an offence is no defence if at the time he committed the act he knew he was doing what was wrong. "If an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw ar [illegible] it. There are three powerful restraints [illegible] the person who is suffering under such [illegible] restraint of conscience, and the restrai[illegible] held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration."[6]

The circumstance of an act being apparently motiveless is not a ground from which the existence of an irresistible influence can be inferred. Motives exist unknown and innumerable which might prompt the act. A morbid and restless but resistible thirst for blood would itself be a motive urging to such a deed for its

[1] Fourth question and answer in *M'Naghten's case*, (1843) 10 C. & F. 200; *Ghatu Pramanik*, (1901) 28 Cal. 613.

[2] First question and answer in *M'Naghten's case*, sup.; *Townley*, (1863) 3 F. & F. 839.

[3] From the speech of Sir Alexander Cock-

own relief.[1] It is dangerous ground to take to say that a man must be insane because men fail to discern the motive for his act.[2]

Insanity brought on by drunkenness.—In a recent case the House of Lords have laid down after a review of English cases bearing on the subject that insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged only under certain circumstances. Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime ought to be taken into consideration, with the other facts proved, in order to determine whether he had that intent. In this case the accused ravished a girl of thirteen years of age and in furtherance of the act of rape placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation. The sole defence was a plea of drunkenness. It was held that drunkenness was no defence unless it could be established that the accused at the time of committing rape was so drunk that he was incapable of forming the intent to commit it (which was not alleged), inasmuch as the death resulted from a succession of acts, the rape and the act of violence causing suffocation, which could not be regarded independently of each other; and that the prisoner was guilty of murder.[3]

Drunkenness is no excuse, but *delirium tremens* caused by drinking, and differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility.[4] If voluntary drunkenness has caused a disease which has produced such incapacity as is mentioned in this section then the act will be excused, though the disease may be of a temporary nature.[5] The accused while proceeding towards his field met a boy who was returning home, and without speaking a word he killed the boy with a single stroke of a club as he passed and then made off across a filed. The blow dealt was unpremeditated, there being no quarrel or dispute of any kind. The evidence showed that the accused was addicted to intemperate habits by excessive use of opium, and that for some days before and after killing the boy the accused was irresponsible for his actions. It was held that the accused was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law.[6] The accused after partaking of intoxicating liquor walked two miles in the sun to a village where he was hit on the head by another person He pursued that person to a certain house, but not finding him there he attacked and wounded with a club five women who were in the house. The Civil Surgeon thought that the accused was not fully responsible for his actions owing to the mental state caused by the wound on the head, the alcohol he had taken, and the walk in the sun It was held that the facts were not sufficient to bring the case within the provisions of this section The term 'unsoundness of mind' cannot be construed so widely as to cover the loss of self-control following a hostile blow on the head. The assault on the women was the outcome of hostile rage.[7]

Homicidal mania. Homicidal mania or monomania is commonly defined to be a state of partial insanity, accompanied by an impulse to the perpetration of murder, from which it is also sometimes called impulsive or paroxysmal mania. There may or may not be evidence of intellectual aberration, but the main feature of the disorder is the existence of a destructive impulse which, like a delusion, cannot be controlled by the patient This impulse, thus dominating over all other feelings, leads a person to destroy those to whom he is most fondly attached, or any one who may be involved in his delusion Sometimes the impulse is long felt, but concealed and restrained; there may be merely signs of depression and

[1] *Hearn*, (1858) 1 F. & F. 650, 8 Cox, (1860) F. R. No. 1 (F. R. 19).
[2] 8 J. & C. (1864) 3 C. & K. 187, 188.
[3] *Director of Public Prosecutions v. Beard*, (1920) A. C. 479.
[4] *Davis*, (1881) 14 Cox 563.
[5] *Ah Lin Ahum*, (1882) 23 Cal. 157.
[6] *Ibid.*
[7] *Maung Gyi*, (1912) 7 L. B. R. 13.

melancholy, low spirits and loss of appetite, as well as eccentric or wayward habits, but nothing to lead to a suspicion of the fearful contention which may be going on within the mind. As in moral mania, many of those who are in habits of daily intercourse with the patients have been first astonished by the act of murder, and then only for the first time led to conjecture that certain peculiarities of language or conduct, scarcely noticed at the time, must have been symptoms of insanity. Occasionally the act of murder is perpetrated with great deliberation, and apparently with all the marks of sanity.[1] Homicidal maniacs need have no motive to perpetrate the crime.[2]

Impulsive insanity.—It is said that on particular occasions men are seized with irrational or irresistible impulses to kill, to steal, or to burn, and under the influence of such impulses they sometimes commit acts which would otherwise be most atrocious crimes. It would be absurd to deny the possibility that such impulses may occur, or the fact that they have occurred and have been acted on. Instances are given in which the impulse was felt and resisted. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse was really irresistible as well as unresisted. If it was irresistible, the person accused is entitled to be acquitted, because the act would not then be voluntary and not properly his act. If the impulse was resistible, the fact that it proceeded from disease is no excuse at all. If a man's nerves were so irritated by a baby's crying that he instantly killed it, his act would be murder; it would not be less murder if the same irritation and the corresponding desire were produced by some internal disease. The great object of the criminal law is to induce people to control impulses; and there is no reason why, if they can, they should not control insane as well as sane impulses. The proof that an impulse was irresistible depends principally on the circumstances of the particular case. The commonest and the strongest cases are those of women who, without motive or concealment, kill their children after recovery from child-bed.[3]

3. **'Nature of the act or . . . what is either wrong or contrary to law.'**—The question in each case must be, whether the accused person was in a state to know the nature of the act and its criminal character as against the law of the land. That is, it must be ascertained whether he was conscious of doing what he ought not to do.

If the accused were conscious that the act was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable. His liability will not be diminished if he did the act complained of with a view, *under the influence of insane delusion*, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, if he knew that he was acting contrary to law.[4] A person may be both insane and responsible for his actions.[5] Where a man deliberately murdered his wife under the belief that she was haunted by evil spirits, and that if he killed her the evil spirits would leave her, he was held guilty of murder.[6]

The inquiry must be directed to the particular thing done and not to any other, because a man may be responsible for some things, and not for others. Thus everything depends on the attitude of the prisoner's mind with regard to the particular act charged against him. If it was a guilty mind with regard to that act, its general derangement will not be an excuse. Thus, in the case of Lord Ferrers, who was tried before the House of Lords for the murder of his steward, it was shown that he was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions, but as it

[1] Taylor's Medical Jurisprudence, Vol I [illegible]

[2] [illegible]

[3] [illegible]

[4] *Southey*, (1865) 4 F. & F. 864; *Leigh*, (1866) 4 F. & F. 915.

[5] *Davis*, (1881) 14 Cox 563, 564; *Lachhman*, (1923) 22 A. L. J. R. 116.

[6] *Seat Ali*, (1917) 3 P. L. W. 356.

appeared that the murder was deliberate and the Earl knew what he was doing, he was executed.[1]

Any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong.[2]

Where the unsoundness of mind deposed to is not such as would make the accused incapable of knowing the nature of the act, or that he is doing what is contrary to law, he cannot be exonerated from responsibility for crime under this section.[3]

Homicide by a person suffering from fever.—Where an accused, who was suffering from fever which caused him while suffering from its paroxysms to be bewildered and unconscious, killed his children at being annoyed at their crying, but he was not delirious then, and there was no evidence to show that he was not conscious of the nature of his act, it was held that he could not be entitled to protection under this section.[4]

The accused stabbed a child (his brother's wife) with a sword and killed her. No motive could be assigned for his attack on the child, and it appeared that he had been in the habit of treating the child kindly and affectionately. He was suffering from fever and want of food at the time, and the medical evidence showed it was possible that the act was committed under a sudden attack of homicidal mania. It was held that he was liable for murder.[5]

Homicide by a Ganja-smoker.—The accused, an habitual *ganja*-smoker, killed his wife and children, because she quarrelled with him and objected to go to a village where he proposed to go. It was held that until the accused's habit of smoking *ganja* had induced in him such a diseased state of mind as to make him incapable of knowing the nature of his act or criminality, this section did not apply in his favour.[6]

Homicide under the influence of religious enthusiasm.—Where a father sacrificed his son because wealth had not accompanied the son's birth and afterwards cut his own throat as a protest against his deity's injustice, he was held guilty of murder. The Court said: "Although there may have been some degree of religious enthusiasm or even hallucination, there is nothing to show that Bishen (the father) killed his child whilst in a state of mind that incapacitated him from knowing right from wrong. It seems to us rather that he did expect to receive some worldly benefit from the sacrifice of his son, and that wealth would come to him, and his dead child be restored to life again together."[7]

Melancholic homicidal mania.—The accused who was charged with committing murder was a young man of weak intellect, and the motive actuating the offence was trivial and inadequate. As soon as he had killed his uncle by hacking him on the head and neck with a sword, the prisoner rushed about, brandishing his weapon and shouting "Victory to Kali." He attempted to strike other persons including his own father. When the paroxysm had passed off, during the police inquiry, the prisoner appeared to be rational, but immediately afterwards he developed aphasia, attempted to commit suicide and was undoubtedly insane from that time for a period of five years. It was held that the above were the

(1912) 15 O. C. 321.

[4] *Lakshman Dagdu*, (1886) 10 Bom. 512.

[5] *Venkatasami*, (1889) 12 Mad. 459.

[6] *Sakharam valad Ramji*, (1890) 14 Bom. 564; *Tiacouri Dhopi*, (1922) 27 C. W. N. 290.

[7] *Bishendharee Kahar*, (1867) 7 W. R. (Cr. 64, 66

signs and indicia of insanity as expressed in works on the subject of medical jurisprudence, and that the prisoner was suffering from a fit of melancholic homicidal mania at the time he hacked the deceased with the sword and was, by reason of unsoundness of mind, incapable of knowing that he was doing an act which was wrong or contrary to law, and therefore he was not guilty of murder.[1]

Homicide under the influence of morbid feeling.—The accused was seen near a boy who was playing in a public place. Some hours afterwards the child's dead body was found there; the throat was cut and there were marks of a violent struggle. [illegible] circumstances [illegible] morbid feeling; [illegible] that he was guilty of murder.[2]

The accused killed his wife and child. There was no motive to explain the double murder and the accused admitted without reservation what he had done and made no attempt at concealment or escape. According to the accused his mind was a blank at the time of the occurrence and he was not conscious of what he did. There was some evidence that the accused had not been quite himself, and that he had been disturbed and distressed by the shortage of cloth, rice and fodder. There was no reliable evidence that his intellect was deranged. It was held that he was guilty of murder.[3]

Homicide without motive.—The accused, a soldier, shot his officer through the head; the only evidence for the defence being that the act was sudden, without apparent motive, and that he had been [illegible] under depression. It was held that was [illegible] that the sole question was whether the [illegible] that his expressions soon after the act [illegible] inadequacy of motive was immaterial, th[illegible][4]

Homicide under the influence of insane delusions caused by loss of blood.—A married woman killed her husband immediately after an apparent recovery from a disease which caused a great loss of blood and brought on insane delusions of the senses, and which had been renewed at the time of murder. It was held that she had not been in such a state of mind at the time of the act as to know its nature or be accountable for it.[5]

Homicide by a person in a paroxysm of insanity.—Where a married woman, fondly attached to her children, and apparently most happy in her family, poisoned two of them, but it appeared that there was insanity in her family, it was held she was not guilty as she had been in a paroxysm of insanity at the time of the act.[6]

Homicide by a monomaniac.—Where the accused, labouring under a notion that the inhabitants of Hadleigh and particularly one C were continually issuing warrants against him with intent to deprive him of his liberty and life, shot C, it was held that the prisoner laboured under that species of insanity which was called monomaniac and was therefore not liable for his act.[7]

Homicide by a person suffering from a failure of reasoning powers.—Where the accused cut his wife's throat without any rational motive, and was captured at once without any attempt on his part to escape or offer resistance, and the evidence showed that before the commission of the offence he suffered from a failure of reasoning powers and also that he entertained delusions as to dangers which threatened his wife. It was held that the facts proved unsoundness of mind which prevented the accused from knowing the nature of his act.[8]

[1] *Shibo Koeri*, (1905) 10 C. W. N. 725.
[2] *Burton*, (1863) 3 F. & F. 772.
[3] *Ram Sundar Das*, (1919) 23 C. W. N. 621, 29 C. L. J. 209.
[4] *Dixon*, (1869) 11 Cox 341.
[5] *Law*, (1862) 2 F. & F. 836
[6] *Vyse*, (1862) 3 F. & F. 247.
[7] *Offord*, (1831) 5 C. & P. 168.
[8] *Dil Gazi*, (1907) 34 Cal. 686, *Musammat Anandi*, (1923) 45 All. 329.

surprising that in moments of mental excitement this restraining phantom easily fades from view, and acts are done that shock and surprise educated and law-abiding men, and give them an impression that mental derangement alone can account for such criminality. It is such an impression, no doubt, that led the District Magistrate in the present case to his finding of what has been called 'inferential insanity.' But it was an erroneous inference. It probably arose from an unconscious but natural tendency which we all have of judging others by ourselves. The Magistrate having concluded with case and certainty that he would never have committed such motiveless acts of violence except in a state of insanity, proceeded to infer that nobody else, including the criminal before him, would likewise do them except under a like disability. We often hear the expression 'No one but a mad man would do such a thing'; but a closer examination will always convince the speaker that he is measuring others by the standard of his own mind, and running all the risks of inaccuracy which attend upon the custom of drawing general con- [illegible] of the argu- [illegible] nding people [illegible] ill be evident to everybody. Circumstantial evidence, to justify a judicial finding solely based on it, must be of a kind which excludes all other reasonable and probable hypotheses except the one set up. The accused in this case suddenly wounded two men, apparently without motive, and laughed when questioned about his conduct shortly after. Such conduct is of course consistent with his being insane: but it is at least equally consistent with the mere indulgence of a savage but reasoning instinct—with a brutal but perfectly sane desire to cause bloodshed—with a foolish and reckless but still not insane craving for notoriety—and with possibly one or more of several other rational and culpable states of mind. Therefore accused's conduct alone c[illegible] of any [illegible] with ec[illegible] by any [illegible] cause for impairment of the intellect, or of a single display of previous or subsequent eccentricity on the part of the accused; and it is therefore impossible to sustain the inference upon which accused has been discharged. On the contrary, his conduct in running away and concealing himself in the house of a friend in another village, immediately after he had wounded the two men, seems to me a strong indication of the existence of a consciousness in his mind that he had done what was wrong. So that, even if we could infer the presence of a certain amount of mental derangement, it did not amount to legal insanity, since the cognitive faculty had apparently not been destroyed by it."[1]

Onus.—The burden of proving the defence afforded by this section rests on the prisoner.[2] But if it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general exception would apply, then it is open to the Court to consider whether the evidence proves to its satisfaction that the accused comes within the exception.[3] Mental derangement a year previous to the act being committed, combined with peculiar circumstances, have been held sufficient to shift the burden of proof.[4] The evidence must prove an alienation of reason preventing the moral sense.[5]

Procedure.—The procedure for the trial of insane persons is laid down in Chap. XXXIV of the Code of Criminal Procedure

[1] *Katay Kisan*, (1904) 17 C. P. L. R. 113, 124.

[2] *Irapa*, (1895) Unrep. Cr. C. 818; *Niaz Ali*, (1904) 25 A. W. N. 2; *Katay Kisan*, sup. *Chandu Lal*, (1923), 21 A. L. J. R. 776. See Indian Evidence Act (I of 1872), s. 105.

[3] *Musammat Anandi*, (1923) 45 All. 329.

[4] *Arzao Bebee*, (1865) 2 W. R. (Cr.) 33.

[5] *Nobin Chunder Banerjee*, (1873) 20 W. R. (Cr.) 70, 13 Beng. L. R. App. 20.

(but resistible) thirst for blood, would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing the murder.'

"These remarks are very pertinent in a country where we have constantly to deal with criminals upon whose savage instincts neither religion nor conscience can be seriously regarded as restraints, and who can only be kept from the most atrocious crimes against the persons of others by their fear of the law. Human nature is manifold. Man, *at his best*, is only a very highly developed animal, with all the instincts and passions of the inferior animals. In him they are softened, modified and controlled by generations of civilization and education, and restrained by example, social opinion, and the fear of punishment in this world or the next. Man, *at his worst*, is very little above the lower animals, and is only made more dangerous by that reason which distinguishes him from them. With him, criminal longings are natural and familiar, and he is only kept from yielding to them by a dread of punishment. Cruelty—that is, a desire to inflict suffering for the pleasure of witnessing it—is a natural instinct. We find it in the highly civilized and educated despot who is freed from all restraint by the possession of absolute power: we find it in all classes of reasoning mankind: we find it in children who are left to follow the promptings of their own natures: and we find it in nearly all the lower animals. It is this natural instinct which lends to a real battle far more interest than is conveyed by the most scientific of sham fights, not only to those fighting, but to those looking on, whatever may be the excuses and justifications used to cover the bloodshed. It is because of this natural instinct that the most humane, educated, highly civilized, and sometimes most religious, sportsmen are conscious—very clearly conscious—of a greater pleasure in shooting at living game than at inanimate targets of any kind, however carefully devised to satisfy the mere desire for skill in the use of weapons. Many other instances of the kind might be put forward. Education, religion, civilization, all strive to cover up or find excuses for this blood-thirstiness, but it is there as part of our animal nature: it may be controlled into absolute impotence, but it can never be eradicated.

"The crime called 'running *amok*' is common enough in India. In some few cases it may be due to real insanity, or to a temporary mental disorder caused by drugs or other intoxicants. But I believe that in the majority of cases it is nothing but the reckless indulgence of a *natural desire to kill*. The records of criminal justice in India teem with cases where the injury inflicted by the criminal on his victim is out of all proportion to the motive or provocation which gave rise to the crime, and this, where there has not been the least reason for suspecting any degree of insanity. I have, in my own limited experience, had cases where a young boy, some 15 years of age, killed his sleeping father for the sake of getting hold of five rupees in the pocket of the latter; where a young man killed his sleeping mother after deliberate premeditation, because of a petty dispute as to his share in the family rice crop; and where a perfectly sane and affectionate father dashed out the brains of his favourite child—a boy 2 or 3 years of age—in order to point a curse at a creditor who was pressing him for a *petty debt*. Each of these cases simply shewed the breaking out of a naturally savage nature, through the feeble, artificially created, restraint which usually kept it down.

"In the cases of a large majority of Indian rustics of the class of the accused, the lack of education and the narrow vista of a village life, result in their having only a vague idea of the power of the law, and their want of knowledge and imagination prevents them from realising anything even approximate to the more serious of the consequences that may ensue from disobedience to it. It is not therefore

an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party."[1]

Although simple frenzy occasioned immediately by drunkenness is no excuse yet if by one or more such practices, an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed frenzy thereby caused, puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first.[2]

1. 'Without his knowledge.'—If a man is made drunk through stratagem or the fraud of others, or through ignorance, or through any other means causing intoxication without the man's knowledge or against his will, he is excused. If a person, by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes such a temporary or permanent frenzy, this puts him into the same condition as any other frenzy, and equally excuses him.[3]

Offence requiring a particular intent or knowledge committed by one who is intoxicated.

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

COMMENT.

As certain guilty knowledge or intention forms part of the definitions of many offences, this section is provided to meet those cases. It says that a person voluntarily drunk will be deemed to have the same knowledge as he would have had if he had not been intoxicated.

In England it has been held that where the intention of a person committing a crime is an element of the crime itself, the fact that he was intoxicated at the time he committed the act may be taken into consideration in considering whether he formed the intention necessary to constitute the crime.[4] Recently, in *Rex* v. *Beard*,[5] the House of Lords after referring to various cases have laid down that evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent. Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was effected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. The Court of Criminal Appeal has held that intoxication may reduce homicide to manslaughter.[6] It has also held that drunkenness is not a good defence unless it can be positively proved that it was of such a nature that the accused did not know the difference between right and wrong.[7]

The Calcutta High Court has in an early case observed: "Voluntary drunkenness does not, of course, palliate any offence, but it is generally taken

[1] Per Alderson, B., in *Meakin*, (1836) 7 [illegible]

[2] 1 Hale P. C. 32.

[4] *Doherty*, (1887) 16 Cox 306. See also [illegible] K.

[illegible] 54.

Where the defence of insanity is set up in order to warrant the jury in acquitting the prisoner, it must be proved affirmatively that he is insane, if the fact be left in doubt, and if the crime charged in the indictment be proved it is their duty to convict.[1]

Punishment.—Partial delusion, or the mere existence of mental disease, does not exempt a person from criminal responsibility, though mental weakness caused by disease is an extenuating circumstance affecting the sentence.[2] The accused had intentionally killed another man, and it was found on the evidence that he was at the time insane, but not to such a degree that he did not know the nature of his act or that what he was doing was wrong and contrary to law. It was held that, although the accused was not entitled to the benefit of this section, it was not proper that he should be hanged, but rather he should be sentenced to transportation for life, so that the Government might be in a position to make such modification (if any) of the sentence as might be indicated by further observation of the prisoner.[3]

Acquittal.—The following is suggested as a suitable form of finding of acquittal on the ground of insanity :—

"The Court, concurring with the Assessors, finds that——did kill——by striking him on the head with a club, but that, by reason of unsoundness of mind, he was incapable of knowing that he was doing an act which was wrong or contrary to law, and that he is not therefore guilty of the offence specified in the charge, viz., and the Court directs that the said——be acquitted, and that, under the provisions of s. 471, Criminal Procedure Code, the said——be kept in safe custody in the——pending the orders of the Local Government."[4]

Act of a person incapable of judgment by reason of intoxication caused against his will.

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge[5] or against his will.

COMMENT.

Voluntary drunkenness is no excuse for the commission of a crime.[5] At the same time drunkenness does not, in the eye of the law, make an offence the more heinous.[6] It is a species of madness for which the mad man is to blame. The law pronounces that the obscuration and divestment of that judgment and human feeling which in a sober state would have prevented the accused from offending, shall n
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from a madness which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for. However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made

[1] *Michael Stokes*, (1848) 3 C. & K. 185.

[2] [illegible] 200 : *Nga Pa*

[3] *Bodhee Khan*, (1866) 5 W. R. (Cr.) 79 ; *Boodh Dass*, (1866) P. R. No. 41 of 1866.

[4] *Zoolfkar Khan*, (1871) 16 W. R. (Cr.) 36.

[5] Beng. L. R. App. 21.

[6] 7th Parl. Rep., s. 19.

[7] *Kendrick* v. *Hopkins*, (1580) Cary's Rep. 133.

Every man is free to inflict any suffering of damage he chooses on his own person and property; and if instead of doing this himself, he consents to its being done by another, the doer commits no offence. A man may give away his property; and so another who takes it by his permission does not commit theft. He may inflict self-torture or he may consent to suffer torture at the hands of another.[1] The authors of the Code say: "We conceive the general rule to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned. Both the general rule and the restrictions may, we think, be easily vindicated. If Z, a grown man, in possession of all his faculties, directs that his valuable furniture shall be burned, that his pictures shall be cut to rags, that his fine house shall be pulled down, that the best horses in his stable shall be shot, that his plate shall be thrown into the sea, those who obey his orders, however capricious those orders may be, however deeply Z may afterwards regret that he gave them, ought not, as it seems to us, to be punished for injuring his property. Again, if Z chooses to sell his teeth to a dentist, and permits the dentist to pull them out, the dentist ought not to be punished for injuring Z's person. So if Z embraces the Mahomedan religion, and consents to undergo the painful rite which is the initiation into that religion, those who perform the rite ought not to be punished for injuring Z's person

"The reason on which the general rule which we have mentioned rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions. It is by no means true that men always judge rightly of their own interest. But it is true that, in the vast majority of cases, they judge better of their own interest than any lawgiver, or any tribunal, which must necessarily proceed on general principles, and which cannot have within its contemplation the circumstances of particular cases and the tempers of particular individuals, can judge for them. It is difficult to conceive any law which should be effectual to prevent men from wasting their substance on the most chimerical speculation, and yet which should not prevent the construction of such works as the Duke of Bridgewater's canals. It is difficult to conceive any law which should prevent a man from capriciously destroying his property, and yet which should not prevent a philosopher, in a course of chemical experiments, from dissolving a diamond, or an artist from taking ancient pictures to pieces, as Sir Joshua Reynolds did, in order to learn the secret of the colouring. It is difficult to conceive any law, which should prevent a man from capriciously injuring his own health, and yet which should not prevent an artisan from employing himself in callings which are useful and indeed necessary to society, but which tend to impair the constitutions of those who follow them, or a public spirited [illegible]
It is chie [illegible]
it sufficie [illegible]
harm themselves.

"But though in general we would not punish an act on account of any harm which it might cause to a person who had consented to suffer that harm, we think that there are exceptions to this rule, and that the case in which death is intentionally inflicted is an exception.

"It appears to us that the reasons which render it highly inexpedient to inflict punishment in ordinary cases of harm done by consent of the person harmed do not exist here. The thing prohibited is not, like the destruction of property, or like the mutilation of the person, a thing which is sometimes pernicious, sometimes innocent, sometimes highly useful. It is always, and under all circumstances,

[1] 1 M. & M. 64.

into account as throwing light on the question of intention."[1] The legislature appears to have intended to make a distinction between the presumption as to knowledge and the presumption as to intention, and though ordinarily intention is to be inferred from knowledge, it is not to be inferred when the knowledge is merely a legal fiction.[2] In a Madras case, the question as to knowledge and intention which should be attributed to a drunken person has been discussed without unanimity on the point.[3]

A full bench of the former Chief Court of Lower Burma laid down that the omission of any express provision in this section regarding the intention which is to be attributed to a drunken man doing an act which is an offence when done with a particular knowledge or intent leaves it open to the Courts to deal with the question of intention on the general principles of law. The drunkenness of an accused person at the time he committed the act, charged as an offence, may be and should be taken into consideration in cases where intention on the part of the accused is necessary to constitute the offence charged, and that the intention which would be ascribed to a sober man in connection with an act must not necessarily be ascribed to a drunken man who does the same act. The question of intention must be determined in each individual case according to the actual facts proved according to accepted principles.[4]

Although this section attributes to a drunken man the knowledge of a sober man when judging of his action, it does not give him the same intention, and, therefore, drunkenness or a state of intoxication affords a sufficient excuse for not exacting the extreme penalty of the law.[5] Though voluntary drunkenness cannot excuse the commission of an offence, yet where, as upon a charge of murder, the question is whether an act was premeditated or done only from sudden heat and impulse, the fact of the party being intoxicated is held to be a circumstance proper to be taken into consideration. The sentence of death was accordingly commuted to transportation for life.[6]

Act not intended and not known to be likely to cause death or grievous hurt done by consent.

87. Nothing which is not intended to cause death or grievous hurt,[1] and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any *person, above eighteen years of age, who has given consent,*[2] whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

ILLUSTRATION.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

COMMENT.

This section appears to proceed upon the maxim *volenti non fit injuria*: he who consents suffers no injury. This rule is founded upon two very simple propositions: (1) that every person is the best judge of his own interest; (2) that no man will consent to what he thinks hurtful to himself.

[1] Per *Glover, J., in Bam Sakoy Bhur,* (1864) W. R. (Gap No.) Cr. 24. See *J. M.*, (1910) 1 U. B. R. (1910-13) 17.

[2] *Abdul Karim,* (1892) S. J. L. B. 650; *Nga Ba Gyaw,* (1911) 1 U. B. R. (1910-13) 105.

[3] *In re Mandra Gadaba,* (1914) 38 Mad. 479.

[4] *Tun Baw,* (1912) 6 L. B. R. 160, F.B.

[5] *Pal Singh,* (1917) P. W. R. No. 37 of 1917; *Tincowri Dhopi,* (1922) 27 C. W. N. 290, 39 C. L. J. 34.

[6] *Booth Dass,* (1866) P. R. No. 41 of 1866.

manslaughter.[1] If, while engaged in a friendly game, one of the players commits an unlawful act whereby death is caused to another, he is guilty of manslaughter. In such a case it is immaterial to consider whether the act which caused death was in accordance with the rules and practice of the game. The act would be unlawful if the person committing it intended to produce a serious injury to another, or if, in committing an act which he knows may produce a serious injury, he is, indifferent and reckless as to the consequences.[2]

"It seems also, that in cases of friendly contests with weapons, which, though not of a deadly nature, may yet breed danger, there should be due warning given that each party may start upon equal terms. For, if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, from whence death ensued; the want of due and friendly caution would make such act amount to manslaughter, but not to murder, because the intent was not malicious.

"But though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and so no danger to be reasonably apprehended; if death casually ensue, it is but misadventure."[3]

PRACTICE.

Evidence.—Prize-fight.—Although all persons present at and sanctioning a prize-fight, where one of the combatants is killed, are guilty of manslaughter, yet they are not such accomplices as require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter.[4]

Act not intended to cause death done by consent in good faith for person's benefit.

38. Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit[1] it is done in good faith, and who had given a consent,[2] whether express or implied, to suffer that harm or to take the risk of that harm.

ILLUSTRATION.

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

COMMENT.

No consent can justify an intentional causing of death. But a person for whose benefit a thing is done, may consent that another shall do that thing, even if death may probably ensue. The last section allows any harm to be indicted short of grievous hurt: this section sanctions the infliction of any harm as it is for the benefit of the person to whom it is caused

The authors of the Code say: "In general we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it If, for example, he sets fire to a house in a town at night, with no other object than that of facilitating a theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, we punish him as a murderer. But there is, as it appears to us, a class of cases in which it is absolutely necessary to make a distinction. It is often the wisest thing that a man can do to expose his

[1] Alison, 144
[2] *Bradshaw*, (1878) 14 Cox 83.
[3] 1 East P. C. 269.
[4] *James Hargrave*, (1831) 5 C & P. 170.

a thing which a wise lawgiver would desire to prevent, if it were only for the purpose of making human life more sacred to the multitude. We cannot prohibit men from destroying the most valuable effects or from disfiguring the person of one who has given his unextorted and intelligent consent to such destruction or such disfiguration, without prohibiting at the same time gainful speculations, innocent luxuries, manly exercises, healing operations. But by prohibiting a man from intentionally causing the death of another, we prohibit nothing which we think it desirable to tolerate.

"It seems to us clear, therefore, that no consent ought to be a justification of the intentional causing of death."[1]

Scope.—The section does not permit a man to give his consent to anything intended or known to be likely to cause his own death or grievous hurt. It only justifies any harm short of grievous hurt. The question of benefit to the person harmed is immaterial under this section, though material under the preceding one. See also s. 91, *infra*.

1. **'Grievous hurt.'**—See s. 320, *infra*.

2. **'Consent.'**—See s. 90, *infra*, which gives a negative explanation of this word. 'Consent' is defined in the Indian Contract Act as follows:—"Two or more persons are said to consent when they agree upon the same thing in the same sense" Sir James Stephen says that in criminal law 'consent' means "a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents."

A claimed to be *dah* (an edged instrument) proof and invited B to put his claim to the test. B thereupon cut A on the arm inflicting a wound as a result of which A bled to death. It was held that A's consent was given under a misconception of fact, but that in the circumstances B could not be supposed to be aware of his mistake. B had no intention of causing death or grievous hurt and was therefore entitled to the benefit of this section.[2]

Manly sports and exercises.—Ordinary games such as fencing, single sticks, boxing, football, and the like are protected by this section. But a prize-fight is illegal, and all persons aiding and abetting therein are guilty of assault, and that the consent of the person actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault.[3] All persons who by their presence encourage a fight from which death ensues to one of the combatants are guilty of manslaughter, although they neither say nor do anything.[4] No persons can by agreement go out to fight with deadly weapons, doing by agreement what the law says shall not be done, and thus shelter themselves from the consequences of their acts.[5] All struggles in anger, whether by fighting or wrestling, or any other mode—all kinds of contests in anger are unlawful.[6] There is nothing unlawful in sparring unless, perhaps, the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match, does not amount to manslaughter.[7]

If death ensue in consequence of such games as are entered into to give strength, skill, or activity in the use of arms, or for sport or recreation, as wrestling by consent, playing at cudgels, fencing, archery, etc., it is held in England to be misadventure. The true principle which distinguishes such cases from those where death ensues in consequence of an intent to do a slight injury is, that here bodily harm is not the motive on either side. Proper caution and perfect fair play should be used on both sides: for, if any improper advantage be taken, it will amount to

[1] Note B, pp. 106–108
[2] *Shwe Kin*, (1915) 8 L. B. R. 166.
[3] *Coney*, (1882) 8 Q. B. D. 534; *Perkins*, (1831) 4 C. & P. 537; *Orton*, (1878) 14 Cox 226.
[4] *Edward Murphy*, (1833) 6 C. & P. 103.
[5] *Bradshaw*, (1878) 14 Cox 83.
[6] *Canniff*, (1840) 9 C. & P. 339.
[7] *Young*, (1866) 10 Cox 371.

for it is not to be conceived that such a one could obtain the free and intelligent consent of any person to his performing upon him an operation dangerous to life but by misrepresentation; and such a one could hardly satisfy a Court of Justice that he had undertaken the operation in good faith under cl. 72 (this section), for good faith must surely be construed here to mean, a conscientious belief that he had skill to perform the operation and by it to benefit the party, while the supposition is that he was unskilled and ignorant."[1]

[illegible]

A person who so 'takes a leap in the dark' is guilty of gross negligence.[3] Death caused by administering an improper medicine is manslaughter.[4] But even an unlicensed practitioner will not be criminally responsible for the death of a person, occasioned by his treatment, unless his conduct is characterised either by gross [illegible] to his patient's safety.[5] If he is guilty of [illegible] after he has applied a remedy, or of gross [illegible] ath ensues in consequence of either, he is liable to be convicted of manslaughter.[6]

A person uneducated in matters of surgery operated on a man for internal piles by cutting them with an ordinary knife, and the man died from hæmorrhage. He was charged, under s. 304A, with causing death by doing a rash and negligent act. It was contended that, inasmuch as the prisoner had performed similar operations on previous occasions, it was not a rash act within the meaning of that section, and that at all events he was entitled to the benefit of this section as he did the act in good faith, without any intention to cause death, and for the benefit of the patient who had accepted the risk. It was held that having regard to the meaning of 'good faith' he was not entitled to the benefit of this section: and that this section did not apply to the case, as it was not shown by the accused that the deceased knew the risk he was running in consenting to the operation, and he could not therefore be said to have accepted the risk.[7]

The accused operated upon a patient for cataract, with the result that the patient lost the sight of her left eye. It was found that the operation was performed with the consent of the patient, and in good faith and for her benefit, and that it was performed in accordance with the recognized Indian method of treatment for cataract. It was held that the accused had committed no offence under the Code.[8]

English cases.—In an action against a chemist and druggist upon an alleged retainer (as a surgeon and apothecary) to treat the plaintiff for a certain disorder (for which mercurial treatment was improper), it was held that mercurial treatment, in a case for which it was wholly unfit, was such negligence or ignorance as would sustain an action.[9] A person in the habit of acting as a man-midwife tore away part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, as a result of which the patient died. It was held that he was not indictable for manslaughter, unless he was guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.[10] The accused, a person not a regular practitioner, administered lobelia, a dangerous medicine, which produced death. It was held that the question for the jury was whether he had acted so rashly and carelessly as to cause death.[11] Any person

[1] 1st Rep., s. 123.
[2] *Ruddock v. Lowe*, (1865) 4 F. & F. 519
[3] *Markus*, (1864) 4 F. & F. 356.
[4] *Nanny Simpson's case*, (1829) 1 Lewin 172; *Joseph Webb*, (1834) 2 Lewin 196
[5] *John Long*, (1830) 4 C. & P. 398.
[6] *John Long*, (1831) 4 C. & P. 423.
[7] *Sukarou Kobiraj*, (1887) 14 Cal. 566. See *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7.
[8] *Suraj Bali*, (1903) 28 A. W. N. 91, 5 A. L. J. R. 155.
[9] *Jones v. Fay*, (1865) 4 F. & F. 525.
[10] *John Williamson*, (1807) 3 C. & P. 635.
[11] *Crick*, (1858) 1 F. & F. 519.

life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labour under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigour. We do not conceive that it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself to be likely to cause it. Again, if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death. We propose, therefore, that it shall be no offence to do even what the doer knows to be likely to cause death if the sufferer being of ripe age has, undeceived, given a free and intelligent consent to stand the risk, and if the doer did not intend to cause death, but on the contrary, intended in good faith the benefit of the sufferer."[1] See also s. 91, *infra*.

1. **'Benefit.'**—Mere pecuniary benefit is not benefit within the meaning of this section.[2]

2. **'Good faith, and who has given a consent.'**—Nothing is said to be done in good faith which is done without due care and attention.[3] Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. A surgeon undertakes that he will perform a cure, but he does not undertake to use the highest possible degree of care and skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill. He does not undertake to use the highest possible degree of skill.[4] Any person, whether a licensed medical practitioner or not, who deals with the life or health of any person, is bound to have competent skill; and is bound to treat his patients with care, attention, and assiduity; and if a person dies for want of either, the person is guilty of manslaughter.[5] To render a medical man liable for negligence, or want of due care and skill, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care, there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result.[6] The Court (or the jury) has to consider whether in the execution of that duty which a doctor had undertaken to perform, he is proved to have shewn such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of.[7] The question is whether, under all the circumstances, the prisoner acted with criminal inattention and carelessness.[8]

But if a person *bona fide* and honestly exercising the best skill to cure a patient, perform an operation which causes the patient's death, he is not guilty of manslaughter and it makes no difference whether the party be a regular or an irregular surgeon.[9]

Unqualified persons.—The Law Commissioners observe that this section will not excuse dangerous operations performed by unqualified persons: "We apprehend that 'an unqualified and ignorant quack' could hardly be excused,

[1] Note B, p. 108.
[2] Explanation to s. 92, *infra*.
[3] Section 52, *supra*.
[4] *Lanphier* v. *Phipos*, (1838) 8 C. & P. 475.
[5] *Catherine Spiller*, (1832) 5 C. & P. 333.
[6] *Rich* v. *Pierpont*, (1862) 3 F. & F. 35.
[7] *Ferguson's case*, (1830) 1 Lewin 181.
[8] *Crook*, (1859) 1 F. & F. 521.
[9] *Van Butchell*, (1829) 3 C. & P. 629.

2. **'Benefit.'**—Mere pecuniary benefit is notbenefit within the meaning of this section.[1]

Provisos.—The authors of the Code say: "We cannot safely confide to him the interest of his neighbours in the same unreserved manner in which we confide to him his own, even when he sincerely intends to benefit his neighbours. Even parents have been known to deliver their children up to slavery in a foreign country, to inflict the most cruel mutilations on their male children, to sacrifice the chastity of their female children, and to do all this declaring, and perhaps with truth, that their object was something which they considered as advantageous to the children. We have therefore not thought it sufficient to require that on such occasions the guardian should act in good faith for the benefit of the ward. We have imposed several additional restrictions which, we conceive, carry their defence with them."[2]

The following illustrations had been given by the authors of the Code to illustrate the meaning of this section; but except illustration (*d*) all were omitted by the Commissioners. They, however, elucidate the purport of the section very clearly:—

(*a*) A, a parent, whips his child moderately, for the child's benefit. A has committed no offence.

(*b*) A confines his child, for the child's benefit. A has committed no offence.

(*c*) A, in good faith, for his child's pecuniary benefit, emasculates his child. Here, inasmuch as A has caused grievous hurt to the child for a purpose other than the preventing of death or grievous hurt to the child, A is not within the exception.

(*f*) A, intending in good faith the pecuniary benefit of Z, his daughter, a child under twelve years of age, abets a rape committed by B on Z. Neither A nor B is within the exception.

90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury,[1] or under a misconception of fact,[2] and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent known to be given under fear or misconception.

if the consent is given by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of insane person.

unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Consent of child.

COMMENT.

This section does not define 'consent,' but describes what is not consent.

[1] Explanation to s. 92, *infra*. [2] Note B, p. 1 [illegible]

Consent is an act of reason, accompanied with deliberation, the mind weighing, as in balance, the good and evil on each side.[1] Consent means *an active will in the mind* of a person to permit the doing of the act complained of, and knowledge of what is to be done, or of the nature of the act that is being done, is essential to a consent to the act.[2]

Under this section the consent must be free, *i.e.*, it must not be caused by coercion, fraud, or misrepresentation. Consent under the Code is not valid if obtained by either misrepresentation or concealment, and implies not only a knowledge of the risk but a judgment in regard to it, a deliberate free act of the mind.[3] Suppose an ignorant person to represent himself as having skill to perform a difficult operation, and by this pretence to obtain consent to perform it, such consent can avail him nothing.[4] But where the facts which invalidate a consent are unknown to the person to whom it is given, as if other persons without his knowledge represent that he possesses medical skill and thus obtain consent to his administering a potent medicine, etc., this will not make the consent invalid.

Consent differs from submission.—"There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere *submission* involves *consent*."[5] "Mere submission by one who does not know the nature of the act done cannot be consent."[6]

1. '*Fear of injury.*'—This is a very wide expression. 'Injury' seems to be limited to physical injury.

2. '*Misconception of fact.*'—Consent given under a misconception is invalid, if the person to whom the consent is given is aware of its existence. An honest misconception by both the parties, however, does not invalidate the consent. In a case the private parts of the deceased were cut off by the accused who were eunuchs. The accused pleaded that a similar operation was performed on them; that they never understood the practice of emasculation to be forbidden; and that they acted under the free consent of the deceased. It was held that where a man of full age submitted himself to emasculation, performed neither by a skilful hand, nor in the least dangerous way, and died from the injury, the persons concerned in the act were guilty of culpable homicide and not murder.[7] The accused, who professed to be snake-charmers, persuaded the deceased to allow themselves to be bitten by a poisonous snake, inducing them to believe that they had power to protect them from harm. It was held that the consent given by the deceased allowing themselves to be bitten did not protect the accused, such consent having been founded on a *misconception of facts, that is, in the belief that the accused had power* by charms to cure snake-bites and the accused knowing that the consent was given in consequence of such misconception.[8] The prisoner was indicted for indecently assaulting two boys, each of whom was eight years of age. The boys stated in evidence that they did not know what he was going to do them when he did each of the acts in question. It was held that the prisoner was guilty as the boys merely submitted to his act not knowing its nature.[9]

Misrepresentation.—A consent given on a misrepresentation of fact is one given under a misconception of fact within the meaning of this section. The misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given.[10] The prisoner professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen,

[1] Story, s. 220.
[2] *Lock*, (1872) L. R. 2 C. C. 11.
[3] *Nagamuddin*, (1891) 492.
Hijrah, (1866) 5 W. R. (Cr.) 7.
(1869) 12 W. R. (Cr.)
Shwe Kin, (1915) 8 L. B. R.
F.B.
[4] *Sukaroo Kobiraj*, (1
[5] Per Coleridge, J., in & P.
722, 724.
[6] Per Quain, J., in *Loc*
] 36 Mad. 453: *Musammat* No. 17 of 1916.

consulted him with respect to illness from which she was suffering. He advised that a surgical operation should be performed, and under pretence of performing it, had carnal connection with the prosecutrix. She submitted to what was done under the belief that he was merely treating her medically and performing a surgical operation. It was held that the prisoner was guilty of rape.[1]

Consent in cases of rape.—This section will only protect a man from the charge of rape if he has the intelligent consent of the prosecutrix. According to the English law a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape.[2] See s. 376, *infra*.

Indecent assault.—In two cases it has been held that an indecent assault is within the rule that fraud vitiates consent. In the first case, the prisoner, knowing that he had a foul disease, induced a girl, who was ignorant of his condition, to consent to sleep with him, and infected her.[3] In the second case, the prisoner having gonorrhœa had connection with a girl without informing her of the fact and the disease was communicated to her. It was held in both these cases that the prisoner was guilty of an indecent assault.[4] But both these cases were unfavourably commented upon in *R.* v. *Clarence*,[5] which practically lays down that concealment of the physical condition of the accused is not such a fraud as to create criminal liability. In this case the prisoner had connection with his wife at a time when he was suffering from gonorrhœa, the wife not knowing about the disease. It was held that the conduct of the prisoner did not amount to assault occasioning actual bodily harm. In each of the two cases mentioned above the prosecutrix was a young girl and not a town woman. In the case of a town woman a question may be raised as to the implied consent to take risks flowing from promiscuous embraces.

PRACTICE.

Evidence.—The onus of proving consent is on the accused. The evidence of consent which would be sufficient in a civil transaction must be equally sufficient in exculpation of a prisoner's guilt.[6]

Exclusion of acts which are offences independently of harm caused.

91. The exceptions in sections 87 and 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

ILLUSTRATION.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

COMMENT.

This section says in explicit terms that consent will only condone the act causing harm to the person giving the consent which will otherwise be an offence. If the act is an offence independently of the harm which it has caused then the doer will not be protected by the consent given.

[1] *Flattery*, (1877) 2 Q. B. D. 410.

[2] *Fletcher*, (1866) L. R. 1 C. C. R. 39; *Barratt*, (1873) L. R. 2 C. C. R. 81.

[3] *Bennett*, (1866) 4 F. & F. 1105.

[4] *Sinclair*, (1867) 13 Cox 28.

[5] (1889) 22 Q. B. D. 23, 16 Cox 511. See also *Hegarty* v. *Shine*, (1878) 14 Cox 145, where the Court expressed the opinion that the concealment of a venereal disease from a woman could not constitute an assault.

[6] *Annto Burnapat*, (1866) 6 W. R. (Cr.) 57.

Act done in good faith for benefit of a person without consent.

92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit[1] it is done in good faith,[2] even without that person's consent,[3] if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit: Provided—

Provisos.

First.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt[4] or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

ILLUSTRATIONS.

(*a*) Z is thrown from his horse, and is insensible A, a surgeon, fin[illegible]ds that Z requires to be trepanned. A, not intending Z's death, but in good faith[illegible], for Z's benefit, performs the trepan before Z recovers his power of judging for[illegible] himself. A has committed no offence.

(*b*) Z is carried off by a tiger. A fires at the tiger knowing it to [illegible] be likel[illegible] that the shot may kill Z, but not intending to kill Z, and in good faith [illegible]ntendin[illegible] Z's benefit. A's ball gives Z a mortal wound. A has committed no offe[illegible]nce.

(c) A, a surgeon, sees a child suffer an accident which is likely to pr[illegible] unless an operation be immediately performed. There is not time to a[illegible] the child's guardian. A performs the operation in spite of the entreatie[illegible] child, intending, in good faith, the child's benefit. A has committed no o[illegible]

(*d*) A is in a house which is on fire, with Z, a child. People bel[illegible] a blanket. A drops the child from the house-top, knowing it to be [illegible] the fall may kill the child, but not intending to kill the child, and in [illegible] good faith, the child's benefit. Here, even if the child is killed by the [illegible] committed no offence.

Explanation.—Mere pecuniary benefit is not benefit [illegible] the meaning of sections 88, 89 and 92.

COMMENT.

The logical place of this section would be after s. 89.

Object.—The principal object of ss. 88, 89 and this section [illegible] medical practitioners. The authors of the Code observe :—

"There yet remains a kindred class of cases which are by no [illegible] occurrence. For example, a person falls down in an apoplectic [illegible] alone can save him, and he is unable to signify his consent to be bled. [illegible] who bleeds him commits an act falling under the definition of an [illegible] surgeon is not the patient's guardian, and has no authority from any su[illegible]

yet it is evident that the surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings [illegible] t below, [illegible] . Here, [illegible] it down knew that it would very probably be killed, and though he was not the child's parent or guardian, he ought not to be punished.

"In these examples there is what may be called a temporary guardianship justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with which the law invests every person who is present when a great crime is committed, or when the public peace is concerned. To acts done in the exercise of this temporary guardianship, we extend by clause 72 (this section) a protection very similar to that which we have given to the acts of regular guardians."[1]

The following illustrations[2] further elucidate the meaning of the section :—

(1) A is rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

(2) If the accident made him mad, the amputation in spite of his resistance would be no offence.

(3) B is drowning and insensible. A, in order to save his life, pulls B out of the water with a hook which injures him. This is no offence.

1. **'Benefit'**—See explanation.

2. **'Good faith.'**—See s. 52, *supra.*

Where the accused, a man of education and wealth and living in a town where medical attendance could be procured, chained up his brother, who was subject to fits of violent insanity with lucid intervals, for over three months in a cruel way, it was held that he could not be said to have acted with due care and attention and was guilty of an offence under s. 344.[3]

3 **'Consent'**—See s. 90, *supra.*

4. **'Grievous hurt.'**—See s. 320, *infra.*

5. **'Hurt.'**—See s. 319, *infra.* Section 89 provides for 'grievous hurt' in a similar ase.

6. **'Pecuniary benefit.'**—The explanation to this section, coupled with s. 88, does not justify the performing of a dangerous surgical operation by an unskilled person, although it was not intended to cause death, for the mere pecuniary benefit of the person voluntarily submitting to it.[4]

Communication made in good faith.

93. No communication made in good faith[1] is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

ILLUSTRATION.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

COMMENT.

This section is introduced to protect the innocent without unduly cloaking the guilty. It requires that communication should have been made (1) in good

[1] Note B, p. 109.
[2] Stephen's Digest of Crim. Law, Art. 226.
[3] *Shimbhu Narain,* (1923) 45 All. 495.
[4] *Baboolun Hajrah,* (1866) 5 W. R. (Cr.) 7.

faith, and (2) for the benefit of the person to whom it is made. The illustration speaks of the case of a surgeon. Very often a timely warning to the patient of his approaching death is necessary in order that he may be able to arrange his affairs to his own satisfaction. In such a case the doctor will be protected under this section if the patient dies of the shock resulting from the communication.

1. 'Good faith.'—See s. 52, *supra*.

Act to which a person is compelled by threats.

94. Except murder,[1] and offences against the State punishable with death,[2] nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death[3] to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law, for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

COMMENT.

The Indian law about compulsion and necessity as a justification of an act otherwise criminal is based on the law of England. By this section a person is excused from the consequences of any act, except (1) murder,[1] and (2) offences against the State punishable with death, done under fear of instant death. Fear of hurt or even of grievous hurt is not a sufficient justification. In English law fear of grievous hurt is a good justification.

Object.—Stephen[2] says: "Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, if you do it I will hang you. Is the law to withdraw its threat if some one else says, if you do not do it I will shoot you?

"Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands. If impunity could be so secured a wide door would be opened to collusion, and encouragement would be given to associations of malefactors, secret or otherwise."

[1] *Killikyatara Bomma*, [1912] M. W. N. 1108.

[2] History of Crim. Law, Vol. II, p. 107.

1. **'Murder.'**—See s. 300, *infra*. 'Murder' in this section does not include abetment of murder punishable under s. 109. Where a confessional statement by the wife, charged with abetment of murder, alleged that she held her husband's legs while another struck him with an axe, but that she protested against the murder, and only assisted because such other person threatened to kill her also, it was held that the omission of the Judge to direct the jury that, if they believed the statement, she could not, having regard to this section, be convicted of abetment of murder under s. 109, was a misdirection vitiating the conviction.[1]

2. **'Offences against the State.'**—See s. 121, *infra*, for offences against the State punishable with death.

3. **'Instant death.'**—There must be reasonable fear, at the very time, of instant death. Persons who do criminal acts from fear of anything but instant death do them at their peril.[2] Persons who had offered or given bribes to certain officials in the Revenue Department of the Government in order to avoid pecuniary injury or personal molestation were not protected by this section.[3] Mere menace of future death will not be sufficient. Where certain witnesses gave false evidence, and then pleaded that they were coerced to do so by a Police Inspector, it was held that they were guilty as there was no proof of instant death.[4] A policeman stood by, acquiescing in an assault on a prisoner committed by another policeman for the purpose of extorting a confession. He was bound under the Bombay District Police Act (IV of 1890) to arrest persons committing assaults likely to cause grievous bodily injury but he did not. It was held that nothing but fear of instant death was a defence for a policeman who tortured any one by orders of his superior.[5]

Doctrine of compulsion and necessity.—"No one can plead the excuse of necessity or compulsion as a defence of an act otherwise penal, except as provided in s. 94... 'Lord Hale argues that our law is better than that laid down by the Jesuitical Casuists of France, in this respect, as it prevents aggrieved persons pretending to judge their own cause, and then proceeding to illegal means of redress, as when servants, judging themselves in want of clothes or victuals, get them by robbing their masters.'[6] Mr. Branson cited *McGrowther's case*,[7] as showing how any other rule would make crime triumphant. Where some prisoners pleaded that in 1746 they joined the Duke of Perth in arms against the King, because they feared that their houses would be burned and their goods spoiled, all the Judges concurred that the prisoners were rightly convicted; and Sir M. Foster points out that if threats of this kind were an excuse, it would be in the power of any leader of a rebellion to indemnify all his followers The same consideration applies to people who bribe public officers, a crime more common here than high treason. If the law allowed the bribers to escape criminal liability... by pleading and proving that they were put in fear of some pecuniary injury or some stoppage of promotion, that would be tantamount to encouraging the corruption, as the corrupt Judge or officer would then be able by a politic use of threats to give an indemnity to all who paid him money...In dealing with the question of guilty or not, the law does not, where there is no fear of instant death, require the Courts to discuss the philosophy of free will, or determine whether the person who bribes to secure some advantage to himself is a victim of extortion, or feels helpless or not"[8] "No man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind."[9]

[1] *Umadasi Dasi*, (1924) 52 Cal. 112.
[2] *Mogualal*, (1889) 14 Bom. 115, 131, 132
[3] *Ibid.*
[4] *Somoo*, (1868) 10 W. R. (Cr) 48.
[5] *Latifkhan*, (1895) 20 Bom. 394
[6] 1 Hale P. C. 51.
[7] (1746) 9 St. Tr. 566, Foster's C. L. 13, 18.
[8] Per Jardine, J., in *Mogualal*, supra, p. 131, 133, 134, 135.
[9] *Tyler*, (1838) 8 C. & P. 616, 620.

The same learned Judge in another Bombay case[1] remarks: "All our training as judges, all the great decisions make us look with dislike on any theory which makes crime easy and excuses atrocious acts. . . Except where unsoundness of mind is proved, or real fear of instant death is proved, the burden being on the prisoner, the pressure of temptation is not an excuse for breaking the law. . . Our Courts have no duty cast on them of discussing the varying motives to crime as a matter of metaphysics—of sitting as did the fallen angels reasoning high of

'Providence, foreknowledge, will and fate,
Fixed fate, free will, foreknowledge absolute,
And found no end in wandering mazes lost.'"

See also the remarks of Lord Coleridge in *R.* v. *Dudley*[2] (*vide* cases under s. 81, *supra*.)

English law.—The English law excuses a person who has been forced to commit an offence by fear of death or of grievous bodily harm, except in cases of treason or homicide. The fear of having houses burnt or goods spoiled is no excuse in the eye of the law for joining and marching with rebels.[3] A person is excused, under certain conditions, if he is forced to levy war against the King or to adhere to the King's enemies provided he uses every reasonable endeavour to resist or escape.[4] According to English law a married woman charged with the commission of any criminal act, except treason, homicide, and probably robbery, is, in case her husband shall be present at the time of the commission of such act, presumed to have acted under his coercion, and such coercion [illegible] that she did not so act. There is no provision in [illegible] circumstances in the Penal Code.

PRACTICE.

Procedure.—Punishment.—The moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment.[5]

Act causing slight harm.

95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper[1] would complain of such harm.

COMMENT.

The maxim *de minimis non curat lex* (the law does not take account of trifles) is the foundation of this section.

Object.—The authors of the Code observe: "Clause 73 (this section) is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen in [illegible] of his waters, an assault to cover him [illegible] commode him by pressing against [illegible] nerable acts without performing which men cannot live together in society, acts which all men constantly do and

[1] *Devji Govindji*, (1895) 20 Bom 215, 222, 223.
[2] (1884) 14 Q. B. D 273.
[3] *McGrouther's case*, (1746) Foster 13, 18, 9 St. Tr. 391, 398, 566
[4] 7th Part. Rep., 73.
[5] Stephen's History of Crim. Law, Vol. II, p. 107

suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident, and we think it far better expressly to except them from the penal clauses of the Code than to leave it to the judges to except them in practice; for if the Code is silent on the subject, the judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law, or by wresting the language of the law from its plain meaning."[1]

Scope.—This section has no application, unless the act in question amounts to an offence under the Code, but for the operation of this section. Where the accused who was ordered by his employers in Calcutta to take certain bags of papers and forms belonging to them to their yard to burn and destroy them, instead of doing that took them to a place for sale, it was held that his act did not amount to criminal breach of trust and that this section had therefore no application.[2] The section has no application where the act charged against the accused person amounts to an offence irrespectively of whether he thereby caused, intended to cause, or knew himself to be likely to cause, harm The accused was arrested under s. 131 of the Railways Act for being found in a state of intoxication on a railway station. The Magistrate discharged him on the ground that the harm done was so slight that "no notice would be taken of it under s. 95 of the Indian Penal Code beyond a mere warning." It was held, on revision, that the accused should have been convicted because to be drunk upon any part of a railway was to commit an offence under s. 120A of the Railways Act, and the fact that he caused little or no annoyance to any one in particular could not exempt him from conviction under that section.[3]

This section leaves unaffected the Madras Regulations (XI of 1816, s. 10, and IV of 1821, s. 6) as to trivial offences.

1. **'Person of ordinary sense and temper.'**—Such person must be taken from the class to which the complainant belongs.

CASES.

Acts causing slight harm—Where a person was convicted for taking pods, almost valueless, from a tree standing on Government waste land[4]; where a person complained of the harm caused to his reputation by the imputation that he was travelling with a wrong ticket[5]; where a young woman, of questionable character, was going through a public thoroughfare to fetch water, and the accused caught hold of her hand, the act of the accused was considered to be a mere piece of foolish and vulgar chaff which seriously to treat as a crime would be absurd[6]; where the accused was convicted of mischief for taking some earth of hardly any appreciable value from an open piece of ground[7]; where a person removed a semi-decayed branch of a tamarind tree not belonging to him, and overhanging the roof of his house, because it inconvenienced him[8]; where a barrister and a pleader were engaged in a case, and the latter made a remark conveying an imputation on the former upon which the former called the latter a "liar"[9]; where a pleader said to the pleader of the opposite party that the status of a witness who received Rs. 10 to Rs. 15 a month was higher than his[10]; where a person killed a goat by *jhatka* process and exposed its flesh for sale in the presence of Mahommedans so as to

[1] Note B, pp. 109, 110.

[2] [illegible]

[illegible]

from a tree.

[3] *South Indian Railway Co.* v. *Ramakrishna*, (1889) 13 Mad. 34.

[4] *Bhairon Misr*, (1887) 7 A. W. N. 73.

[7] *Gulzari Lal*, (1882) 2 A. W. N. 229.

[8] *Jiwa Ram*, (1888) 8 A. W. N. 100, *Mahomed Khan*, sup.

[9] *Vansittart*, (1883) 3 A. W. N. 46; *Amir Hasan*, (1883) 3 A. W. N. 167.

[10] *Sharif Ahmad* v. *Qabul Singh*, (1921) 43 All. 497, 502.

insult them[1]; and where a pleader said *halkat bhanchod* to a person who insisted on sitting in the Pleaders' Room after he was pushed out of it, this section was held applicable.[2]

A Deputy Magistrate went to a place to enquire into a petition made by the residents for funds to enable them to dig a well and in the course of a discussion with the people assembled, he remarked that as some of the residents were well-to-do men, they must make the well themselves, whereupon the accused who were present there said to the Deputy Magistrate: "Then why do you make an enquiry, go away quietly." It was held that the accused were not guilty of any offence as their statement came within the purview of this section.[3]

Acts causing serious harm.—Where a blow was given across the chest with an umbrella by a dismissed policeman to a District Superintendent of Police because his application to reconsider his case had been rejected[4]; where the accused tore up a paper which showed a money debt due from him to the prosecutor, though it was unstamped, and therefore not a legal security[5]; where the accused was charged with the offence of theft in respect of three pice worth of dung-cakes and mangoes[6]; where a respectable man was taken by the ear[7]; where a man of low caste instituted prosecution for defamation on his being falsely charged with theft[8]; and where a person was dubbed *kulabhrastha*, *i.e.*, prostitute's son, in a book published by the accused, this section was held to be not applicable.[9]

PRACTICE.

The Central Provinces Circular.—Magistrates should also bear in mind the provisions of s. 95 of the Indian Penal Code and apply them reasonably to the complaints before them, with reference to the position in life of the parties concerned, and the habits of the class to which they belong.[10]

OF THE RIGHT OF PRIVATE DEFENCE.

Things done in private defence.

96. Nothing is an offence which is done in the exercise of the right of private defence.

COMMENT:

Object.—The authors of the Code say: "We propose... to except from the operation of the penal clauses of the Code large classes of acts done in good faith for the purpose of repelling unlawful aggressions. In this part of the chapter we have attempted to define, with as much exactness as the subject appears to us to admit, the limits of the right of private defence. It may be thought that we have allowed too great a latitude to the exercise of this right; and we are ourselves of opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hand, and to [illegible] in repelling injury, it would have been fit to pro- [illegible] the danger is on the other side; the [illegible] elves; the patience with which they submit to the cruel depredations of gang-robbers, and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most remarkable, and at the same time one of the most discouraging symptoms which the state of society in India presents to us. Under these circumstances we are

[1] *Kirpa Singh*, (1912) P. W. R. (Cr.) No. 26 of 1912.

[2] *Moro Balvant Marathe*, (1913) 15 Bom. L. R. 1039.

[3] *Jaykrishna Samanta*, (1916) 21 C. W. N. 95.

[4] *Govt. of Bengal* v. *Sheo Gholam Lalla*, (1875) 24 W. R. (Cr.) 67.

[5] *Ramasami*, (1888) 12 Mad., 148. See *Maula Bakhsh*, (1904) 27 All. 28; *Kashi Nath Naek*, (1897) 25 Cal. 297

[6] *Ranchore*, (1888) Cr. R. No. 61 of 1888, Unrep. Cr. C. 400.

[7] *Shoshi Bhusan Mukerjee* v. *Walmsley*, (1897) 1 C. W. N. cxxxiv.

[8] *Nobin Dome*, (1865) 2 W. R. (Cr.) 35.

[9] *Ramanuja Chariar* v. *Prathivathi Bayan Karam*, (1911) 2 M. W. N. 8.

[10] C. P. Cr. C. No. 8, s. 4.

desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence. We are of opinion that all the evil which is likely to arise from the abuse of that right is far less serious than the evil which would arise from the execution of one person for overstepping what might appear to the Courts to be the exact line of moderation in resisting a body of dacoits."[1]

This right of defence is absolutely necessary. The vigilance of Magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men so effectually as the fear of the sum total of individual resistance Take away this right and you become in so doing the accomplice of all bad men.[2]

Scope.—There is no right of private defence under the Code against any act which is not in itself an offence under it [3] The defence of possession either of goods or lands against a mere trespass, not a crime, does not, strictly speaking, justify even a breach of the peace.

Limitations.—The right is subject in all cases to the restriction contained in cls. 3 and 4 of s. 99 [4]

Aggression.—This right cannot be pleaded by persons who, believing they will be attacked, court the attack.[5]

PRACTICE.

The accused must plead the right of defence. It is for those who raise this plea to prove it. If raised, a full account of the occurrence must be given in evidence.[6] Because it is necessary that all the circumstances should be pleaded before a Court and the plea ought to be proved by satisfactory evidence.[7] In a case the Allahabad High Court held that a Court ought not to set up such a plea when the accused himself has not done so [8] Recently it has held that even where a right of private defence is not pleaded, the Court, on finding on the evidence before it, that the accused acted in the exercise of his right of private defence, is bound to take cognizance of the fact[9]. The Madras High Court has ruled that even if the accused does not specifically plead private defence, he may be acquitted if the evidence showed that he was acting in self-defence.[10] Woodroffe, J, has observed in a full bench decision of the Calcutta High Court that it cannot be laid down as a general proposition of universal applicability that a Court cannot and should not consider a case in favour of the accused which he has not raised. If such a case arises on the prosecution evidence, it should be put to the jury for their consideration whatever line might have been taken by the accused or his counsel.[11] Similarly, the Lahore High Court has held that when there is evidence proving that a person accused of killing or injuring another acted in the exercise of the right of private defence the Court may not ignore that evidence and convict the accused merely because the latter set up a different defence and denied having committed the assault.[12]

The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the statute law. An accused can set up an alternative inconsistent defence [13]

[1] Note B, p. 110.
[2] Bentham.
[3] *Ganouri Lal Das*, (1889) 16 Cal. 206, 218.
[4] *Josef Casorati*, (1879) P. R No. 36 of 1879.
[5] *Nowabdee*, (1864) W. R. (Gap. No.) Cr. 11.
[6] *Jamsheer Sirdar*, (1877) 1 C. L. R. 62; In re *Kali Churn Mookerjee*, (1882) 11 C. L. R. 232.
[7] *Fatehali*, (1909) Crim. Rev. Application No. 222 of 1909, Unrep. (Bom.)
[8] [illegible]
[9] [illegible]
[10] *Ghulam Rasul*, (1921) 3 L. L. J., 284.
[11] *Yusuf Husain*, (1918) 40 All. 284; *Faudi Keor*, (1919) 1 P. L. T. 79.

An accused person who at his trial has *not pleaded the right of* private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court *competent to raise* such a plea on his behalf.[1]

Right of private defence of the body and of property.

97. Every person has a right, subject to the restrictions contained in section 99, to defend—

First.—His own body and the body of any other person,[2] against any offence affecting the human body;

Secondly.—The property, whether moveable or immoveable,[3] of himself or of any other person, against any act which is an offence falling under the definition of theft,[3] robbery,[4] mischief[5] or criminal trespass,[6] or which is an attempt[7] to commit theft, robbery, mischief or criminal trespass.

COMMENT.

This section says what the extent of the right of defence is. Section 99 speaks of the limitations on the exercise of this right.

This section is much wider than the English law. Under it even a stranger may defend the person or property of another person; whereas under the English law there must be some kind of relationship existing, such as that of master and servant or husband and wife or guardian and ward, before this right could be exercised on behalf of another. Under the English law a person has no right to commit an assault merely in defence of other persons.

A full bench of the Madras High Court has laid down that the right of private defence as laid down in ss. 96 to 105 enables the arrest of any person when he has not been guilty of an offence for which arrest without warrant is permitted (*e.g.*, drunkenness), when the person arresting or confining has a genuine and *reasonable apprehension that to allow the other to remain at large will endanger* the person and property of others. Where, therefore, a village Magistrate arrested a drunken person whose conduct was at the time a grave danger to the public, it was held that he was not guilty of any offence.[2]

Scope.—As to the defence of property the section speaks of "theft and robbery" but not offences like "house-breaking" and "dacoity." It, therefore, seems that the mention of "theft" must be taken to include all offences *ejusdem generis*. The same consideration applies to the mention of "mischief" and "criminal trespass."

1. 'Any other person.'—"It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is a noble movement which makes us forget our own danger at the first cry of distress. It concerns the public safety that every honest man should consider himself as the natural protector of every other."[3] The section embodies this principle and it provides that every person has a right to defend the property of himself or of any other person.

Defence of person.—Where a person assisted by a friend retaliated severely on another, who trespassed into his house with the object of having intercourse with his wife, both were held to have committed *no offence*.[4]

The deceased BW was on a cart when the accused KD came up near it. He said to KD, "Is that you"? and on KD replying "yes," he began using *abuse* and kicked KD. The latter then called out to the accused PS, who came running

[1] *Tinmal*, (1899) 21 All. 122.
[2] *Gopal Naidu*, (1922) 46 Mad. 605, F.B.
[3] Bentham.
[4] *Dhaunan Teli*, (1873) 20 W. R. (Cr.) 36.

up with a bottle in his hand and evidently with the intention to strike the deceased with it and he admitted that he did strike him. Then BW slashed at KD with his *dah* first and then turned on PS and slashed at him with it. He hit KD on the forearm and the injury caused did not turn out to be very serious. But the result of the blow which hit PS was that three of his fingers were cut off. Then it was that KD took a knife from somewhere about his person and stabbed BW with it in a vital part of the body causing BW's death. It was held that although the deceased had turned upon PS, KD had the right to cause death to the deceased, if he might reasonably apprehend at the time that PS's life was in danger owing to the conduct of the deceased; that a man in KD's position might reasonably apprehend that the conduct of the deceased indicated an intention on his part to go on using the *dah* against them to either kill or inflict the gravest injury to his companion. If the deceased had the chance of using the *dah* again on PS there was a possibility and probability of PS losing his life and that, under the circumstances, the act of KD in taking out the knife and stabbing the deceased was covered by s. 100 and that KD did not exceed the right of self-defence.[1]

Where a body of about ten men, belonging to the decree-holder's party, went with Court officers upon a plot of land in the joint possession of the judgment-debtors to take symbolical possession thereof, and the drummer was assaulted by one of the latter, whereupon the accused and their party replied by an attack upon the opponents, during the course of which one of the accused's party fractured the skull of the drummer's assailant by an isolated act, but the accused continued to beat him after he had fallen helpless on the ground, it was held that the accused had a right of private defence under the circumstances, but having exceeded such right by beating the wounded man after he had fallen, they were guilty of hurt.[2]

Where a person grows crops on a piece of land which another person cuts and carries away and stacks in a field of a third party without interruption and retires from the field and then the person growing the crops comes up in numbers armed with clubs and other weapons, not to commit a premeditated riot but merely to take away the crops they are entitled to and not to use any force unless they are opposed or attacked, and, while so acting within their rights in collecting their own crops with a view to take them away, they are attacked by the party of the person who stacked the crops who were also similarly armed, first, by clods of earth and, then, with spears, they have the right to defend their persons from an attack with clods and spears, an attack which reasonably causes apprehension that death will be the result, and to cause any injury short of death.[3] Where a person who had seized cattle which had been trespassing on his lands, gathered together a number of men to assist him in resisting an anticipated attempt to rescue the cattle, and a fight between the parties took place, in which several men on each side were killed and injured, it was held that the person who had seized the cattle and his party were protected by this section.[4]

English case.—Under circumstances which might have induced the belief that [illegible] ife, their son shot and killed his father. It [illegible] grounds for believing and honestly believed [illegible] defence of his mother, the homicide was excusable.[5]

2. **'Immoveable property.'**—A party in possession of land is legally entitled to defend his possession against another party seeking to eject him by force[6]; or

[1] *Nga Kyaw Dun*, (1993) 10 Burma L. R. 99. See *Mi Hla So* v. *Nga Than*, (1911) 4 B. L. T. 268.

[2] *Kunja Bhuiya*, (1912) 39 Cal. 896.

[3] *Baburam Raut*, (1912) 17 C. L. J. 394

[4] *Nareshi Singh*, (1923) 2 Pat. 595.

[5] [illegible] ul-R. R.

An accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court competent to raise such a plea on his behalf.[1]

Right of private defence of the body and of property.

97. Every person has a right, subject to the restrictions contained in section 99, to defend—

First.—His own body and the body of any other person,[1] against any offence affecting the human body;

Secondly.—The property, whether moveable or immoveable,[2] of himself or of any other person, against any act which is an offence falling under the definition of theft,[3] robbery,[4] mischief[5] or criminal trespass,[6] or which is an attempt[7] to commit theft, robbery, mischief or criminal trespass.

COMMENT.

This section says what the extent of the right of defence is. Section 99 s of the limitations on the exercise of this right.

This section is much wider than the English law. Under it even a s may defend the person or property of another person; whereas under the law there must be some kind of relationship existing, such as that of m servant or husband and wife or guardian and ward, before this right exercised on behalf of another. Under the English law a person has r commit an assault merely in defence of other persons.

A full bench of the Madras High Court has laid down that the rig defence as laid down in ss. 96 to 105 enables the arrest of any person not been guilty of an offence for which arrest without warrant (*e.g.*, drunkenness), when the person arresting or confining has reasonable apprehension that to allow the other to remain at lar the person and property of others. Where, therefore, a village M a drunken person whose conduct was at the time a grave dan it was held that he was not guilty of any offence.[2]

Scope.—As to the defence of property the section spe robbery" but not offences like "house-breaking" and "dace seems that the mention of "theft" must be taken to include *generis*. The same consideration applies to the mention "criminal trespass."

1. 'Any other person.'—"It is a noble movement nation which kindles at the sight of the feeble injured by movement which makes us forget our own danger at th concerns the public safety that every honest man show natural protector of every other."[3] The section em provides that every person has a right to defend the p other person.

Defence of person.—Where a person assisted by on another, who trespassed into his house with th with his wife, both were held to have committed n

The deceased BW was on a cart when the ac said to KD, "Is that you"? and on KD replyi and kicked KD. The latter then called out to

[1] *Timmal*, (1898) 21 All. 122.
[2] *Gopal Naidu*, (1922) 46 Mad. 605, F.B.
[3] J
[4]

The auction purchaser does not commit any criminal act in going to assert his title and to take possession of the property purchased by him by ousting the judgment-debtor, who became a trespasser after the date of delivery of possession.[1]

Where the common intention of an assembly of more than five persons was to resist by force an unlawful trespass on land it was held that they were not guilty of rioting.[2]

7. 'Attempt'—See s. 511, *infra*.

Defence of property.—Plea allowed.—The villagers belonging to C walked religious procession, through a part of the village of K, carrying with them a vessel containing water which purported to be consecrated. The villagers of K objecting, obstructed the procession, whereupon the members of it resisted the obstruction, and used some violence, causing grievous hurt to one of the obstructers and hurt to others of them. It was held that they were justified in exercising their right of private defence of body and property and the harm inflicted was not more than necessary for the purpose of self-defence.[3] Where persons, who actually grew the disputed crop and who were no parties either to the civil suit for possession which was decreed against their landlord, or to the delivery of possession of the land, resisted the action of the complainant who went to take possession under the decree of the civil Court, it was held that they were justified in claiming what they had grown and in resisting the complainant.[4]

Criminal trespass.—A Police officer attempted to carry on a general search for stolen property (not authorized by law). One of the accused in resisting such a search pushed the Sub-Inspector and the latter ordered two constables to climb on his roof and break into the house, whereupon the villagers assumed a threatening attitude and threatened to cut them to pieces if they entered the house and this empty threat was sufficient to prevent the police from committing the trespass. It was held that the accused were justified in resisting the search, and they had not exceeded the right of private defence.[5]

Plea disallowed.—Accused was out in the jungles with his gun; an altercation took place between him and the deceased, the former interfering to prevent the latter from committing real or supposed cattle trespass; the deceased thereupon with a large club attacked the accused, who fired without any particular aim, but lowering the muzzle of the gun so as not to hit a vital part, and death immediately resulted from the wound thus inflicted. It was held that the accused's act was not a legal exercise of the right of private defence as he had only to stand back and he was safe.[6]

Altercation between two parties.—Party A sowed a crop in a field to which apparently they were entitled. Party B, claiming the field and the crop as theirs, entered upon the land and began to cut the crop. Party A, having watched party B enter upon the land, took counsel together and then proceeded to attack party B, and a fight ensued, in which grievous hurt was caused. It was held that it was not open to party A to plead [illegible] private defence of property.[7] [illegible] of possession and sowing of [illegible] It is not found that there was time to have recourse to the authorities. This case is not supported by *Q.-E.* v. *Prag*

[1] [illegible]

[2] [illegible] *Guru* [illegible] App [illegible] 64.

[3] *Regula Bheemappa*, (1902) 26 Mad. 249.

[4] *Gajendra Ghorai*, (1911) 15 C. L. J. 80.

[5] *Prankhang*, (1912) 16 C. W. N. 1078

[6] *Kureem Buksh*, (1867) P. R. No. 13 of 1868. See to the same effect, *Gurdit Singh*, [illegible] *Singh*, princi-

to steal from it[1]; or to do an act which will have the effect of causing injury to it, *e.g.*, by cutting a bund.[2] It is immaterial whether the person in possession of the property had or had not the right to possession. If a zemindar's people enter upon crops with the intention of distraining without notice, the ryot owners are justified in considering such action as trespass.[3] But mere persistence in demanding rent will not amount to trespass so as to justify an assault on the person making the demand.[4] A landlord who had not tendered to his tenant such a lease as the latter was bound to accept under the Madras Rent Recovery Act (Mad. Act VIII of 1865) distrained his cattle for arrears of rent, the assistance of the police having been procured for the purpose. The tenant, with the assistance of seven other persons, forcibly obstructed the removal of the cattle which had already been actually seized and driven for some yards. It was held that the tenants were not entitled to the right of defence and were guilty of rioting.[5]

When an attack is made on persons acting in the lawful exercise of their right over property, they are entitled to the right of private defence, and the only question that arises thereafter is whether any member of the party individually exceeded the right. Persons exercising their lawful rights are not members of an unlawful assembly, nor can the assembly become unlawful by their repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence. In such a case each is liable only for his individual acts done in excess of such right.[6]

3. **'Theft.'**—See s. 378, *infra*. Where a number of persons were justified in resisting the theft of their crops they could not all be considered as members of an unlawful assembly with the common object of asserting a right to the land on which the crops stood, because some of their number exceeded the right of private defence. But if after some of them had exceeded the right of private defence, others continued in the assembly aiding and abetting them, they could all be considered members of an unlawful assembly.[7]

4. **'Robbery.'**—See s. 390, *infra*.

5. **'Mischief.'**—See s. 425, *infra*.

6. **'Criminal trespass.'**—See s. 441, *infra*. A rightful owner is entitled to physically turn out a trespasser or one trying to infringe upon his rights. A person exercising this right should, however, not use more force than is reasonable to defend his possession from a trespasser.[8] A person in possession of lands is, however, not justified in confining persons who commit trespass.[9]

"A *civil trespass* will not excuse the firing a pistol at a trespasser in sudden resentment or anger. If a person takes *forcible* possession of another man's close, so as to be guilty of *a breach of the peace*, it is more than a trespass. So, if a man with force invades and enters into the *dwelling* of another. But a man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity. But, the making an attack upon a dwelling, and especially *at night*, the law regards as equivalent to an assault on a man's person; for a man's house is his castle, and, therefore, in the eye of the law, it is equivalent to an assault; but no *words* or *singing* are equivalent to an assault, nor will they authorize an assault in return."[10]

[1] *Mokee*, (1869) 12 W. R. (Cr.) 15.
[2] *Biryon Singh* v. *Khub Lall*, (1873) 19 W. R. (Cr.) 66; *Shunker Singh* v. *Burmah Mahto*, (1875) 23 W. R. (Cr.) 25. *Ganouri Lal Das*, (1889) 16 Cal. 206.
[3] *Kankai Shahu*, (1875) 23 W. R. (Cr.) 40.
[4] *Mahomed Jan* v. *Khadi Sheik*, (1871) 16 W. R. (Cr.) 65 (75).
[5] *Ramayya*, (1889) 13 Mad. 148.
[6] *Kunja Bhuiya*, (1912) 39 Cal. 896; [illegible] 335. [illegible] 13 [illegible] (Cr.) 64.
[10] *Meade*, (1823) 1 Lewin 184, 185.

The auction purchaser does not commit any criminal act in going to assert his title and to take possession of the property purchased by him by ousting the judgment-debtor, who became a trespasser after the date of delivery of possession.[1]

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Altercation between two parties.—Party A sowed a crop in a field to which apparently they were entitled. Party B, claiming the field and the crop as theirs, entered upon the land and began to cut the crop. Party A, having watched party B enter upon the land, took counsel together and then proceeded to attack party B, and a fight ensued, in which grievous hurt was caused. It was held that it was not open to party A to plead that they were acting in the exercise of their right of private defence of property.[7] This case does not lay down sound law. The finding of possession and sowing of the crops on the part of A brings the case under this section subject to s. 99. The taking of counsel before action will not by itself deprive the accused of his right of private defence. It is not found that there was time to have recourse to the authorities. This case is not supported by *Q.-E.* v. *Prag*

[1] *Ram Krishna Singh*, (1922) 3 P. L. T. 235.
[2] *Kalee Mundle*, (1880) 10 C. L. R. 278; *Guru Charan Chang*, (1870) 6 Beng. L. R. App. 9; *Toolsee Singh*, (1868) 10 W. R. (Cr.) 64.
[3] *Regula Bheemappa*, (1902) 26 Mad. 249.
[4] *Gajendra Ghorai*, (1911) 15 C. L. J. 80.
[5] *Prankhang*, (1912) 16 C. W. N. 1078.
[6] *Kureem Buksh*, (1867) P. R. No. 13 of 1868. See to the same effect, *Gurdit Singh*, (1872) P. R. No. 12 of 1872.
[7] *Kaliji*, (1901) 24 All. 143. *Kadhu Singh*, (1902) 24 All. 298, lays down the same principle on similar facts.

Dat,[1] though it professes to follow that case; and is directly in conflict with *Q.-E.* v. *Narsang Pathabhai*[2], *Pachkauri* v. *Q.-E.*[3], and *K.-E.* v. *Ayya Annasamy Aiyar*[4], and has not been referred to in *Emp.* v. *Hira*[5]. In the last case certain persons who were lawfully in possession, as tenants of agricultural land, having reason to suppose that it was possible that they might be attacked and ejected from the land by force, made a practice of keeping their clubs in readiness, and also persuaded the tenants of some adjacent fields to do likewise. The expected attack came, and there was a somewhat severe fight, in the course of which both parties were injured. It was held that the defenders were within their rights in holding themselves in readiness to repel an attack if and when it should come.

The petitioners went with three ploughs on the land to which the complainant had the right of possession, and of which he was in possession till such entry, and began to plough up the land, to uproot some castor plants and throw them away. While they were thus in actual but temporary occupation, the complainant and his party went on the land and tried to unyoke the cattle, whereupon a riot took place. It was held that the petitioners were not justified in entering on the land, in ploughing it, uprooting the plants and throwing them away, that they were members of an unlawful assembly, the common object of which was to enforce a right or supposed right for the exercise of which they were prepared to use force, and that their action in beating the complainant's party was not justified by the fact of their having obtained temporary occupation.[6]

Right of private defence against the act of a person of unsound mind, etc.

98. When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth,[1] the want of maturity of understanding,[2] the unsoundness of mind,[3] or the intoxication[4] of the person doing that act, or by reason of any misconception[5] on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

ILLUSTRATIONS.

(*a*) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane

(*b*) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

COMMENT.

This section lays down that for the purpose of exercising the right of private defence physical or mental incapacity of the person against whom the right is exercised is no bar.

1. '**Youth.**'—See ss. 82-83, *supra*.
2. '**Want of maturity of understanding.**'—See s. 83, *supra*.
3. '**Unsoundness of mind.**'—See s. 84, *supra*
4. '**Intoxication.**'—See s. 85, *supra*.
5. '**Misconception.**'—See ss. 76-79, *supra*.

[1] (1895) 20 All. 459
[2] (1899) 14 Bom. 441.
[3] (1897) 24 Cal. 686.
[4] (1901) 25 Mad. 624.
[5] (1922) 45 All. 250.
[6] *Jairam Mahton*, (1907) 35 Cal. 103.

Acts against which there is no right of private defence.

99. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.[1]

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law [2].

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities [3].

Extent to which the right may be exercised.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence [4].

Explanation 1.— A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded.

COMMENT.

This section enumerates the limitations put on the exercise of the right of defence.

1. **First clause.**—This clause applies to those cases in which the public servant is acting (1) in good faith, and (2) under colour of his office, though the particular act being done by him may not be justifiable by law.

'**Grievous hurt.**'—See s. 320, *infra.*

'**Public servant.**'—See s. 21, *supra.*

'**Good faith.**'—See s. 52, *supra.*[1]

'**Under colour of his office.**'—The protection is intended to be given only to a public servant acting honestly in the legitimate discharge of powers conferred or of duties imposed upon him.

'**Not strictly justifiable by law.**'—This section has no application to a case where the initial proceeding, and the power under which any public servant purports to act are altogether without jurisdiction[2] and entirely *ultra vires*[3]. But the protection afforded under it to public servants is not lost to them by reason of any mistake on their part in the exercise of their proper functions.[4] The section thus

[1] *Bhawoo Jivaji* v. *Mulji Dayal*, (1888) 12 Bom. 377; *Pukot Kotu*, (1896) 19 Mad. 349.

[2] *Jogendra Nath Mukerjee*, (1897) 24 Cal. 320; *Haq. Dad*, (1925) 6 Lah. 392.

[3] *Tulsiram*, (1888) 13 Bom. 168; *Lalkhraj*, (1891) 11 A. W. N. 195; *Asa*, (1913) P. L. R. No. 325 of 1913.

[4] *Tiruchittambala Pathan*, (1896) 21 Mad. 78. See *Bhola Makto*, (1904) 9 C. W. N. 125; *Kishen Lal*, (1924) 22 A. L. J. R 501.

applies to cases where there is an excess of jurisdiction as distinct from a complete absence of jurisdiction, to cases where the official has done wrongly what he might have done rightly, but not to cases where the act could not possibly have been done rightly.[1] Thus resistance to the execution of an illegal warrant is justifiable in exercise of the right of private defence.[2] Resistance to a general search for stolen property is justifiable as the law requires the mention of specific things.[3]

Cases.—Resistance to an officer acting without a warrant.—A police-officer attempted without a search-warrant to enter into a house in search of property alleged to have been stolen and was obstructed and resisted. It was held that, even though the officer was not strictly justified in searching the house without a warrant, the person obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of his obstruction, as it was not shown that the officer was acting otherwise than in good faith and without malice.[4]

Resistance to an officer acting on an illegal warrant or order.—Where, on the complaint of one G that his wife was wrongfully confined by his father-in-law, a warrant was issued under s. 96, Criminal Procedure Code, and the police-officer, attempting to execute this warrant at the house of the father-in-law, was obstructed by him and seven others who used criminal force, it was held that, as the warrant issued was wholly illegal, the accused were not deprived of the right of defence.[5] Where the accused was convicted of having assaulted a peon when executing a writ of delivery of possession of a share in a tank by ordering some fishermen to cast their nets in the tank and catch fish for the decree-holder as provided in the writ, it was held that whatever mistake there might be in the procedure of the Munsif in giving the direction in the writ, the accused had no right of private defence against the peon who was a public servant acting under colour of his office in good faith.[6] A Magistrate has no jurisdiction to issue an order under s. 144, Criminal Procedure Code, in favour of any person and ask the police to allow him to cut the crops, without making any inquiry as to who was in possession of the lands, and the third party, whose possession is found, has a right of private defence of property and that party is not deprived of that right simply because the police were there armed with an illegal and unjustifiable order of the Magistrate.[7]

Illegal attachment does not justify resistance.—Where articles protected from attachment were attached, it was held that this act did not justify resistance.[8] Where the property of a person was wrongfully attached as the property of certain absconders, it was held that the rightful owner had no right of private defence of his property, as the police-officer was acting in good faith under colour of his office, and that even supposing the order of attachment might not have been properly made, that would in itself be no sufficient ground for such a defence.[9] This decision seems questionable. There is no right of private defence if the proceedings of a public officer are not "strictly justifiable by law." But in this case the action of the police-officer was entirely *ultra vires* as the property in question did not belong to the absconders, and there is no room left for the operation of the first two clauses of this section. See *Q.-E.* v. *Tulsiram*[10]; *Jagarnath Mandhata* v. *Q.-E.*[11]; and *Q.-E.* v. *Jogendra Nath Mukerjee*[12].

Apprehension of death or grievous hurt.—An Excise Inspector pursued an armed smuggler, and on coming up with him ordered him to stop and fired his

[1] *Bisu Haldar*, (1907) 11 C. W. N. 836, 6 C. L. J. 127; *Shaikh Moinuddin*, (1921) 2 P. L. T. 455.

[2] *Musammat Hafizan Bibi* v. *Musammat Suba Bibi*, (1922) 27 C. W. N. 854.

[3] *Prankhang*, (1912) 16 C. W. N. 1078; *Government of Assam* v. *Sahebulla*, (1923) 27 C. W. N. 857, P.B.

[4] *Vyankatrav Shrinivas*, (1870) 7 B. H. C. (Cr. C.) 50; *Pukot Kotu*, (1896) 19 Mad. 349; *Attar Singh*, (1917) P. L. R. No. 57 of 1918.

[5] *Bisu Haldar*, sup.

[6] *Pro Lal Mukerjee*, (1913) 18 C. W. N. 548.

[7] *Shaikh Moinuddin*, sup.

[8] *Poomalai Udayan*, (1898) 21 Mad. 296.

[9] *Bhas Lal Chowdhry*, (1902) 29 Cal. 417.

[10] (1888) 13 Bom. 163.

[11] (1897) 24 Cal. 324.

[12] (1897) 24 Cal. 320.

revolver twice to frighten him, whereupon the smuggler drew a sword and cut the Inspector on the thigh. It was held that the smuggler had reasonable ground for believing that the Inspector intended to cause death or grievous hurt and did not exceed the right of private defence.[1]

2. **Second clause.**—The first clause speaks of the acts done by a public servant, this clause, of acts done under the direction of a public servant. Under this clause it is not necessary that the doer should be a public servant. He must only act under the directions of a public servant. Explanation 2 must be read conjointly with this clause. Notwithstanding this clause, a person can resist a public servant if the latter's conduct is altogether illegal. Thus, where a licensed vaccinator unlawfully attempted to take lymph from the arm of a person who objected to it, it was held that the resistance was justifiable.[2]

Cases.—Resistance to the execution of a warrant.—Where a police-officer attempted to execute a warrant, the issue of which was illegal, it was held that the accused were justified in their resistance.[3] It was held similarly where a constable conducted a search without any authority.[4] Where the warrant issued for the arrest of a debtor was initialled though not fully signed, it was held that he had no right of private defence.[5]

Resistance to the execution of not a strictly legal order.—An order to the Police purporting to be made under s. 145, Criminal Procedure Code, directing them to take charge of some crops in dispute, was not strictly legal, and in execution of such order the Police went to the spot where the crop was stored and after announcing the order proposed to guard it. It was held that the accused in seizing several men of the Police party and carrying them off into confinement had exceeded their right of private defence.[6]

3. **Third clause.**—This clause must be read with the first clause of s. 105.[7] It places an important restriction on the exercise of the right of private defence

'Time to have recourse to the protection of the public authorities.'—No man has the [illegible] the protection of his person or property, [illegible] ss by recourse to the public authorities. [illegible] likely to cause damage to the person or property of another person, must be restricted and recourse to the public [illegible] order to protect [illegible] have recourse [illegible] e Indian Penal Code.[8] There is no right of private defence where two parties arm themselves for a fight to enforce their right or supposed right, and deliberately engage in large numbers in a fight. In such a case, if it is not shown that the accused were acting within the legal limits of the right of private defence, it does not matter which party was the first to attack.[9] The right of private defence being granted for defence only, it must not and cannot legally be exercised when there is 'time to have recourse to the protection of the public authorities.' This does not mean that a person in actual possession is, when attacked, to abandon his property to the mercy of the marauders, with a view of making an application to the Police for assistance.[10] The

[1] *Nga Nan Da*, (1919) 3 U. B. R. 176.
[2] *Jagarnath Mandhata*, (1897) 24 Cal. 324, *Mangobind Muchi*, (1899) 3 C. W. N. 627; *Bahal*, (1906) 26 A. W. N. 98.
[3] *Jogendra Nath Mukerjee*, (1897) 24 Cal. 320, *Bisu Haldar*, (1907) 11 C. W. N. 836, 6 C. L. J. 127.
[4] *Idu Mandal*, (1907) 6 C. L. J. 753.
[5] *Janki Prasad*, (1886) 8 All. 293.
[6] *Bhola Mahto*, (1904) 9 C. W. N. 125.
[7] *Narsang Pathabhai*, (1890) 14 Bom. 441.
[8] *Jairam Mahton*, (1907) 35 Cal. 103.
[9] *Kabiruddin*, (1908) 35 Cal. 368; *Maniruddin*, (1908) 35 Cal. 384, *Ambika Lal*, (1908) 35 Cal. 443; *Bechar Anop*, (1915) 17 Bom. L. R. 888, 3 Bom. Cr. C. 100.
[10] *Anumantan*, (1880) 1 Weir 44; *Shamsher Khan*, (1896) 16 A. W. N. 170; *Jogeshar Rai*, (1916) 15 A. L. J. R. 47.

law must not be invoked to oppress persons who, when there is no time to have recourse to the public authorities, find themselves in a position in which they must either exert the privilege of private defence as provided and restricted by the law or submit to a forcible invasion of the right of person or property in cases where, under s. 97, the law does not require any such submission.[1] At the same time the right of private defence does not take the place of the functions of those public servants who are especially charged with the protection of life and property and the apprehension of offenders, and where the assistance of the public authorities can be procured, the right cannot be lawfully exercised.

The right of private defence of property commences when a reasonable apprehension of danger to the property commences [illegible] mences, the owner of the property is not called [illegible] to the time and place [illegible]

When a person is attacked while doing a lawful act, he is entitled to stand his ground and defend himself, and the law does not intend that he must run away to have recourse to the protection of the public authorities.[3] There is no obligation upon a person entitled to exercise the right of private defence and to defend his person or property, to retire merely because his assailant threatens him with violence.[4]

[illegible] that a person [illegible] an avoid injury [illegible] defence of the [illegible] the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger.[5] It never was intended that a man should submit to the deprivation of property in his possession without exercising any right of self-defence, and trust to recover it by the tedious operation of a case in the Civil Court with all the weight of possession, onus of proof, etc., against him.[6] A rightful owner has a right to eject a trespasser from his land by civil process, but it is not within his right to take a mob of men and forcibly clear the person in possession of the land in respect of which he had only title without possession. The right of private defence does not cover a case of taking or retaking possession by means of criminal force or show of criminal force.[7]

Cases.—Time to obtain protection of public authorities.—Where the servants of an indigo factory having been interfered with by the villagers to sow land, went out in force to effect their purpose and the villagers also went out armed to meet them, it was held that in the affray which followed neither party could plead the right of private defence of property as there was a Police Station near at hand.[8] The petitioners numbering from forty to sixty, armed with clubs, spears and heavy billets of wood, proceeded to the disputed land, attacked the complainant and his father, and destroyed the crops growing thereon. Both parties claimed the land as having fallen to their shares on partition. The Magistrate found that the complainant was in possession and had grown the crops. It was held that the right of private defence did not arise, as there was no invasion of the petitioner's rights on the day of occurrence, and, in any case, that they had ample time to have recourse to the authorities for the protection of their rights.[9] The complainant's party, consisting of twelve or thirteen persons, went with pickaxes to a *bund*

[1] *Nga Hla Tun U*, (1896) P. J. L. B. 219.
[2] *Narang Pathakhan*, (1890) 14 Bom. 441.
[3] [illegible]
[4] [illegible]
[5] [illegible] 454.
[6] [illegible]
[7] *Jasuram Marwari*, (1923) 2 Pat. L. R. 13.
[8] [illegible]
[9] [illegible]

(embankment) erected on the land of the master of the accused in order to cut it, as it obstructed the flow of water from their lands and destroyed their crops. The accused hearing of this at once assembled to the number of fifty or sixty, armed themselves with clubs and proceeded to the *bund*. At this time the complainant's party had either finished the cutting or ceased to do so, when he saw the accused approaching. The latter attacked the complainant's party and drove them to their village. One or more of the assailants also beat a man, who was present there, but was not connected with the cutting of the *bund*, both in the first attack and when they returned from the chase, and fractured his skull, in consequence of which he died shortly after. It was held that the accused were members of an unlawful assembly from the beginning, as they went armed with clubs and in large numbers to enforce their right at all hazards, that, if not so at the beginning, they became an unlawful assembly, and had no right of private defence, when the opposite party had ceased cutting the *bund*, and that even if they had, they exceeded their right by attacking their opponents and chasing them and by beating the deceased.[1] The accused made a combined attack upon M and R as they were throwing earth upon a narrow path of the *shamilat* and in so doing threw earth upon the fences with which the accused had formed enclosures upon the *shamilat*. The injury caused to R was not serious but M died of the blow caused by one of the accused. It was held that as the matter was not urgent and no serious loss of

ation, one evening, that the complainants intended to go on his land on the following day, and uproot the *juwari* seed sown in it. At about three o'clock next morning he was informed that the complainants had entered on his land, and were ploughing up the seed. Thereupon he at once proceeded to the spot, followed by the remaining accused, and remonstrated with the complainants, who commenced an attack on the accused. In the fight which ensued, both sides received serious injuries, and the leader of the complainant's party was killed. It was held that the complainants being the aggressors, the accused had the right of private defence; and that they were not bound to act on the information received on the previous evening, and seek the protection of the public authorities, as they had no reason to apprehend a night attack on their property.[3] Where the opponents of the accused erected some huts stealthily at night on a plot of land of which the accused were in peaceful possession and it was alleged that the opponents were in possession of the land for about fourteen hours and the accused at break of day on coming to know of this took the earliest opportunity to exercise their own right of private defence and came to the spot armed to turn out the opponents who were found by them still engaged in erecting more huts and there was a free fight between the parties and the accused did not inflict more hurt than was necessary for defending themselves, it was held that the accused were not guilty of rioting as they were entitled to their right of private defence.[4] Where a person who had seized cattle which had been trespassing on his lands, gathered together a number of men to assist him in resisting an anticipated attempt to rescue the cattle, and a fight between the parties took place. in which several men on each side were killed and injured, it was held that the person who had seized the cattle and his party had not exceeded the right of private defence[5]

4. Fourth clause.—The right of private defence is restricted to not inflicting more harm than it is necessary to inflict for the purpose of defence.[6] The amount

13 W. R. (Cr.) 55; *Josef Uasorah*, (1879) P. R. No. 36 of 1879.

of force necessary depends on the circumstances of the case, and there is no protection if the harm is caused by excessive violence quite unnecessary to the case.[1] For example, a person set by his master to watch a garden or yard, is not at all justified in shooting at, or injuring, in any way, persons who may come into those premises, even in the night. He ought first to see whether he could not take measures for their apprehension.[2] A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited and gives another a kick, it is an unjustifiable act.[3]

If the accused are justified in resisting the theft of their crops, they cannot be considered as members of an unlawful assembly, with the common object to assert a right to the disputed land and crops, because some members thereof may have exceeded the right of private defence; but if some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, and aid and abet the latter, they also must be considered as having exceeded the right.[4]

Cases.—Justifiable harm.—Where the accused finding a thief entering into his house at night, through an entrance made in the sidewall, seized him while intruding his body and held him with his face down to the ground to prevent his further entrance and thereby caused his death by suffocation[5]; where a person attacked by another with a spear struck a blow with a club which resulted in the death of the party attacking[6]; where a boy whose crop was frequently stolen found a person stealing and gave him some blows with a club which resulted in his death[7]; and where a number of armed men attacked a court-house, and one of the inmates shot an assailant[8] the right of private defence was held to be a good justification.

Where the tenants were found to have held their lands on the *batai* system, under which harvested crops should be taken to the village *khalihan*, but it appeared that they went in a large body armed with clubs with the avowed intention of removing them to their own houses, and were making up the crops already cut into bundles, whereupon the zemindar's watchmen remonstrated and a number of their *amlas* went to the spot armed with clubs and swords and a fight took place, owing to the interference of the leader of the tenants, in the course of which some of the tenants received slight incised wounds and one of them a severe one inflicted by one of the accused, and where it further appeared that the zemindar's people had, four days before the date of the occurrence, sent an urgent appeal to the Police for protection against a serious breach of the peace which seemed imminent, it was held that, inasmuch as the common object of the accused was to protect the zemindar's rights over the crops, and there was no specific finding by the Session Judge that their intention was to use more force than was necessary or that they had in fact used excessive force, they acted in the exercise of the right of private defence and were not guilty of rioting.[9]

More harm caused than necessary.—Where a person killed a weak old woman found stealing at night[10]; where a person caught a thief in his house at night and deliberately killed him with a pickaxe to prevent his escaping[11]; where the deceased attempted to take a pickaxe from the accused and the latter resisting struck him with it and killed him[12]; where a number of persons apprehending a thief committing house-breaking strangled him and subjected him to gross mal-treatment

1 *Gokool Bowree*, (1866) 5 W. R. (Cr.) 33.
2 *John Scully*, (1824) 1 C. & P. 319.
3 *Wild's case*, (1837) 2 Lewin 214.
4 *Baijnath Dhanuk*, (1908) 36 Cal. 296; *Kunja Bhuiya*, (1912) 39 Cal. 896.
5 *Kurrim Bux*, (1865) 3 W. R. (Cr.) 12.
6 *Moizudin*, (1869) 11 W. R. (Cr.) 41.
7 *Mokee*, (1869) 12 W. R. (Cr.) 15.
8 *Ram Lall Singh*, (1874) 22 W. R. (Cr.) 51.
9 *Ram Khelawan Singh*, (1909) 36 Cal. 827.
10 *Gokool Bowree*, sup.
11 *Durwan Geer*, (1866) 5 W. R. (Cr.) 73; *Fukeera Chamar*, (1866) 6 W. R. (Cr.) 59.
12 *Fuzza Meeah*, (1866) 6 W. R. (Cr.) 89.

when he was fully in their power and helpless[1]; where the accused fired a gun at persons at a distance of twenty-five yards, without a reasonable apprehension of danger, and injured them[2]; and where the accused armed with spears attacked and killed two persons unarmed who were ploughing a field believed by the accused to be their field[3] the right of private defence was negatived.[4] Where A trespassed on the lands of B, whose servants seized and confined A till the following day, when B gave information to the Police, it was held that the conduct of B and his servants in confining A could not be supported on the ground that they were exercising the right of private defence of property.[5] The accused who was watching his field (some of the grain of which had on previous occasions been stolen) saw the deceased cutting his corn. On being pursued the deceased ran his head against a tree and fell. The accused then hit him recklessly with a stick while on the ground, and fractured his skull in two places, causing death. It was held that the right of private defence of property had been exceeded and the accused was guilty of culpable homicide.[6] The accused, five in number, went on a moonlight night, armed with clubs and assaulted two men who were cutting their rice crop, one of whom received six distinct fractures of the bones of the skull besides a number of other wounds and was killed on the spot. It was held that they were guilty of murder as they had inflicted more harm than was necessary for the purpose of defending their property.[7] Where the accused, three of whom were armed with a sword, a *garasa* (scythe) and a *lobanda* (ironshod stick) respectively, and the rest with clubs, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some *musouri* crops, and attcked them, fatally wounding one and severely injuring another, it was held that the accused who ordered the attack, and those who used the sword, *garasa* and *lobanda*, had exceeded [illegible] others, who continued in the unlawful [illegible] the former[8] [illegible] stealing wood in his master's ground [illegible] The horse took fright and ran away and dragged the boy on the ground till his shoulder was broken, whereof he died. This was ruled to be murder.[9]

Arrest.—The English and Indian law differ somewhat on the point of arrest by, or by the direction of, public servants. Under the English law a person offering resistance to a public servant making an arrest is extenuated if the document of warrant or writ is defective in the frame of it, or if the manner of making the arrest is illegal, or if the name of the officer or party is entered without due authority; but the law of India allows no extenuation on any of these accounts as long as the act is *bona fide*.

Explanation.—Actual knowledge that a person is a public servant or acting by the direction of a public servant, or reasonable ground of knowledge, as from his dress, words, weapons, etc., will deprive those against whom he acts of the right of self-defence.[10]

When the right of private defence of the body extends to causing death.

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death[1] or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions[2] hereinafter enumerated, namely :—

[1] *Dhununjai Poly*, (1870) 14 W. R. (Cr.) 68.
[2] *Hussainuddy*, (1872) 17 W. R. (Cr.) 46.
[3] *Gour Chand Chung*, (1872) 18 W. R. (Cr.) 29.
[4] See also *Abdul Hakim*, (1880) 3 All. 253; *Subba Naik*, (1898) 21 Mad. 249.
[5] *Shurufooddin* v. *Kassinath*, (1870) 13 W. R. (Cr.) 64.
[6] *Bag*, (1902) P. R. No. 29 of 1902.
[7] *Mammun*, (1916) P. R. No. 35 of 1916.
[8] *Baijnath Dhanuk*, (1908) 36 Cal. 896.
[9] *Halloway*, (1628) 1 East P. C. 237, Cro. Car. 131, 1 Hale P. C. 454.
[10] M. & M. 76.

First.—Such an assault, as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt[3] will otherwise be the consequence of such assault;

Thirdly.—An assault with the intention of committing rape[4];

Fourthly.—An assault with the intention of gratifying unnatural lust[5];

Fifthly.—An assault with the intention of kidnapping[6] or abducting;

Sixthly.—An assault with the intention of wrongfully confining[7] a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

COMMENT.

This section justifies the killing of an assailant when apprehension of attrocious crimes enumerated in the several clauses is caused. It should be read subject to the provision of s. 99.

The section gives the right of private defence against actual assailants. It does not authorise the killing or causing of hurt to persons who may in future when reinforced by others become assailants.

1. **'Voluntary causing of death.'**—As to the meaning of the word 'voluntary,' see s. 39, *supra*. The law most undoubtedly authorizes a man who is under a reasonable apprehension that his life is in danger or his body in risk of grievous hurt to inflict death upon his assailant either when the assault is attempted or directly threatened, but the apprehension must be reasonable and the violence inflicted must not be greater than is reasonably necessary for the purpose of self-defence. It must be proportionate to and commensurate with the quality and character of the act it is intended to meet and what is done in excess is not protected.[1]

Homicide in self-defence is justifiable, although the party killing was guilty of an assault, or engaged in an unlawful conflict; provided (1) that the party killing did not either commence or provoke the attack with intent to kill or do grievous bodily harm; (2) that he declined further conflict, and quitted and retreated from it, so far as was practicable with safety; (3) that he killed the assailant because he had reasonable cause for believing it to be necessary so to do, in order to avoid immediate death.[2]

2. **'Any of the descriptions.'**—A man is not justified in shooting another who is about to arrest him, when there is nothing to show that he has reason to apprehend that any of the acts mentioned in this section would ensue.[3]

3. **'Grievous hurt.'**—See s. 320, *infra*.

4. **'Rape.'**—See s. 375, *infra*.

5. **'Unnatural lust.'**—See s. 377, *infra*.

6. **'Kidnapping.'**—See s. 359, *infra*.

7. **'Wrongfully confining.'**—See s. 340, *infra*.

[1] *Whitaker*, (1882) 2 A. W. N. 172.
[2] 10th Parl. Rep., 35.
[3] *Sher Baz*, (1879) P. R. No. 1 of 1880.

CASES.

First clause.—Apprehension of death.—The accused who were two in number were being searched by an armed gang who announced their intention to kill them. The accused took refuge in a dark kitchen of a house. The mob broke into the house and two of them made their way with torches to the kitchen and attacked the accused. One of the attacking party was hacked to death by the accused. It was held that the accused had committed no offence since they were fighting for life with a murderous mob in front and an enemy who made his way in the room where they had taken refuge and it was not surprising that they did their best to make sure that their enemy was dead.[1] A party of armed men escorting certain ladies met with resistance from certain persons one of whom levelled a gun against a member of the escorting party, but was stabbed to death. It was held that the act of killing was done in self-defence.[2]

Second clause.—Apprehension of grievous hurt.—*Plea allowed.*—A person rushed at the accused armed with a heavy weapon and showing every intention to assault him. The accused used his spear, when that person was in the very act of delivering a blow to him, and in doing so he killed that person. The Sessions Judge held that the right of private defence was exceeded, because the accused had an opportunity of running away. It was held that the accused reasonably anticipated grievous, and his uncle's son seized a second *jatu*, two feet long, and struck the assailant twice on the head with it in consequence of which he died, it was held that there was no excess of the right of private defence and the accused had committed no offence.[4]

The deceased, S, and three others, who formed his party, attacked with clubs the accused, B, and his party, three in number, as the result of a quarrel. One of the party of the deceased struck a blow on the accused which felled him to the ground. The accused rose up and inflicted a blow on the head of S, which fractured his skull causing death within a short time. It was held that under the circumstances of the case the accused did not exceed his right of private defence by inflicting the blow on the head of the deceased, as the circumstances were such as reasonably caused the apprehension that grievous hurt would, but for his action, after running some distance, found that he could not very well make his escape and he turned round and hit the deceased a blow and killed him, it was held that the appellant acted in self-defence and was not guilty of any offence.[6]

Plea disallowed.—The accused had an intrigue with one S, wife of A. S and A were sleeping one night in a house about eighty paces from the place where the accused slept. In the early morning S left her cot to visit the accused. A missed her and suspecting where she had gone followed her with a hatchet. He assaulted the accused and wounded him, whereupon the accused stabbed him with a knife and killed him. It was held that as the accused had not established that

1 *Gurlingappa Shidramappa*, (1921) 23 Bom. L. R. 817, 6 Bom. Cr. C. 66.

2 *Ramzani*, (1924) 23 A. L. J. R. 68.

3 *Nga Kyaw Zan*, (1903) 9 Burma L. R. 191. See *Nga Kyaw Dun*, (1903) 10 Burma L. R. 99.

4 *Puran*, (1904) 6 P. L. R. 49. See *Yusaf Khan*, (1919) P. W. R. No. 1 of 1920, 21 P. L. R. 2

5 *Bhut Nath Dome*, (1909) 13 C. W. N. 1180 See also *Baburam Raut*, (1912) 17 C. L. J. 394.

6 *Ram Sewak*, (1924) 23 A. L. J. R. 131.

voluntarily causing the death of his assailant was necessary for the purpose of defence he could not plead the right of defence.[1]

Third clause.—Rape.—Where the husband and other relations of a girl assaulted a man while he was in the very act of violating her, it was held that they were justified under this clause.[2]

PRACTICE.

Evidence.—Where the defence is that the party was about to commit such a crime as would justify his death, this must be proved, not indeed so as to establish the fact conclusively, but so as to prove that the accused had such grounds for supposing violence was intended as would warrant a rational man in so acting, and he must prove that the offence about to be committed could not have been prevented by milder means.[3]

When such right extends to causing any harm other than death.

101. If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

COMMENT.

Under this section any harm short of death can be inflicted in exercising the right of private defence in any case which does not fall within the provisions of the preceding section which dealt with offences in which the harm was likely to be very serious, and hence justified the killing of the assailant.

CASES.

A dispute arose between two parties, Mollahs and Shikdars. Shikdars attacked and killed one of the Mollahs who were exercising the right of retaking their own property. Three of the Shikdars were also wounded. The Shikdars were convicted of culpable homicide not amounting to murder and rioting. The Mollahs were held entitled to the protection conferred by this section.[4] A public servant while acting in the execution of his duties had his conveyance stopped by a number of camel-drivers whose camels were trespassing on the banks of a canal belonging to Government. A prisoner who had been legally arrested was forcibly rescued [illegible] personal violence fired his gun [illegible] wounded one of them. It was

Commencement and continuance of the right of private defence of the body.

102. The right of private defence of the body commences as soon as a reasonable apprehension[1] of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

COMMENT.

This section indicates when the right of private defence of the body commences and till what time it continues. It commences and continues as long as danger to body lasts.

[2] *Hakim*, (1884) P. R. No. 41 of 1884.
[3] *Jhakri Chamar*, (1912) 16 C. L. J. 440.
[4] *Josef Casorati*, (1879) P. R. No. 26 of 1879.
[5] *Tanoo Shikdar*, (1865) 3 W. R. (Cr.) 47.
[6] *Mukerji*, (1900) P. R. No. 5 of 1901.

1. **'Reasonable apprehension.'**—The right commences only on a reasonable apprehension of danger to the body caused by an attempt or threat to commit an offence.[1] There must be an attempt or threat, and consequent thereon an apprehension of danger; but it is not a mere idle threat, or every apprehension of a rash or timid mind, that will justify the exercise of the right. Reasonable ground for the apprehension is requisite. Suppose the threat to proceed from a woman or a child and to be addressed to a strong man: in such a case there could hardly be a [illegible] inent danger seems to be meant. But. [illegible] dangerous weapon in such a way that [illegible] his seems sufficient justification of the [illegible] ther has reason. [illegible] ho voluntarily [illegible] As if A know- [illegible] th deliberate purpose of resisting the attack with all necessary force, and does so, and thereby causes B's death. A appears to be entitled to the benefit of the exception, for he had a reasonable apprehension of danger when B attacked him, notwithstanding the attack was not unforeseen.[3] The view that a person should not exercise his right of self-defence, if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger.[4] A man may justify a battery if he proves merely an assault on the part of the prosecutor, and he need not stay until the prosecutor has actually struck him, but the battery must be such only as was necessary for his defence.[5]

A bare fear of any offence, however well grounded, as that another lies in wait to take away the party's life, unaccompanied by any overt act, indicative of such an intention, will not warrant him in killing that other by way of prevention. [illegible] accident; according to the degree of the caution used, and the probable grounds for such belief.[7]

CASES.

Reasonable apprehension.—Where the accused apprehending opposition went armed to appraise crops and on the arrival of the opposite party similarly armed did not wait till that party had attacked but proceeded to meet them and a fight took place, it was held that the accused had acted within the right of private defence which commenced as soon as the opposite party appeared with arms and began to move towards them which was a distinct threat to attack them.[8]

No reasonable apprehension.—A and B met at a drinking shop and drank together. On their departure A and B quarrelled about B having, as A declared, caused the death of the latter's four children by incantation. B admitted it, and said he would cause A to be taken by a tiger at once, at which A killed him with a club. It was held that A had no reasonable apprehension of danger.[9] Where the accused fired a gun at a person at a distance of twenty-five yards, without a

[1] *Gobardhan Bhuyan*, (1870) 4 Beng. L. R. App. 101; *Narain Das*, (1922) 3 Lah. 144.
[2] M. & M. 78.
[3] M. & M. 79.
[4] *Alingal Kunhinayan*, (1905) 28 Mad. 454.
[5] *Deana*, (1909) 73 J. P. 255.
[6] 1 East P. C. 272.
[7] *Ibid*, p. 273.
[8] *Hafiz Ali*, (1907) 10 O. C. 196.
[9] *Gobardhan Bhuyan*, sup.

reasonable apprehension of danger, and without any necessity for so doing, it was held that his act was not justifiable.[1]

When the right of private defence of property extends to causing death.

103. The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely :—

First.—Robbery[1];

Secondly.—House-breaking[2] by night;

Thirdly.—Mischief[3] by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly.—Theft,[4] mischief or house-trespass,[5] under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

COMMENT.

This section indicates when a person can be killed in defence of one's own property: s. 100 indicates when a person can be killed in defence of one's body.

A distinction is observed between such offences as are attended with force, or any extraordinary degree of atrocity, which in their nature betoken such urgent necessity as will not allow of any delay, and others of a different sort, if no resistance be made by the offender; and therefore a party would not be justified in killing another who was attempting to pick his pocket.[2]

1. '**Robbery.**'—See s. 390, *infra*. Robbery by violence may be resisted by violence sufficient to overcome the force employed by the attacker, and if, in the course of such resistance, death is caused, it may be justified if the right of self-defence was exercised reasonably and properly, but the measure of self-defence must always be proportionate to the *quantum* of force used by the attacker and which it is necessary to repel.[3]

2. '**House-breaking.**'—See s. 445, *infra*.

3. '**Mischief.**'—See s. 425, *infra*.

4. '**Theft.**'—See s. 378, *infra*.

5. '**House-trespass.**'—See s. 442, *infra*.

CASES.

'**Robbery.**'—The accused, in resisting a sudden attack made upon them by other persons for the purpose of cutting their crop, and when they had no time to complain to the Police, inflicted a wound on one of them with a bamboo from the effects of which the man died. It was held that the force used, or the injuries inflicted, by the accused were not such as to exceed the right of private defence of property.[4]

1 *Hussainuddy*, (1872) 17 W. R. (Cr.) 46.
2 1 East P. C. 273.
3 *Ram Prasad Mahton*, (1919) 4 P. L. J. 289.
4 *Guru Charan Chang*, (1876) 6 Beng. L. R. App. 9, 14 W. R. (Cr.) 69.

'House-breaking.'—The accused found two men close to an aperture made in his house for committing burglary. One of them made off but the other advanced to attack the accused, when the latter gave him a blow in the dark with a stick, which killed him. It was held that the accused was justified in his act.[1]

When such right extends to causing any harm other than death.

104. If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

COMMENT.

Section 101 and this section restrict the right of private defence in certain cases to voluntary causing hurt or grievous hurt. This section is connected with s. 103 just as s. 101 is with s. 100. Thus, where the offence which occasions the right of private defence of property is criminal trespass, the right of defence under this section only extends to the voluntarily causing to the wrong-doers some harm other than death.[2]

This section has no application by way of defence to a charge under s. 504 (insult to provoke breach of the peace). The accused was taking earth from a tank whereupon the complainant having objected, the accused filthily abused him. The accused was thereupon tried for an offence under s. 504 and his defence was that the tank was in his possession and belonged to him. The Magistrate held that, as the complainant had failed to prove his possession of the disputed tank, the accused was justified under this section in voluntarily using abusive language. He therefore acquitted the accused. On appeal, a re-trial was ordered on the ground that this section could have no application as found by the Magistrate.[3]

CASES.

In an affray respecting land one of the aggressive party was killed. The accused, who were exercising the right of private defence of property, were not found guilty of culpable homicide; but were convicted of rioting. It was held that the accused, not being legally guilty of culpable homicide, were not legally guilty of any other offence coupled with rioting, and not being rioters, or members of an unlawful assembly, could claim the benefit of this section.[4] Where a person assisted by a friend retaliated severely on another, who trespassed into his house with the object of having intercourse with his wife, they were held to have committed no offence.[5] Where A trespassed on the land of B, whose servant seized and confined A till the following day, when B gave information to the Police, it was held that the conduct of B and his servants in confining A could not be supported on the ground that they were exercising the right of private defence of property.[6] Where a police-officer entered into the house of a person of suspicious character at midnight to see whether he was in the house and he was pushed out of the house by that person, it was held that the act of the police-officer in entering into the house was house-trespass and that that person was justified in pushing him out.[7]

[1] *Pelkoo Nushyo*, (1865) 2 W. R. (Cr.) 43; *Ram Lall Singh*, (1874) 22 W. R. (Cr.) 51; 11 C. L. J. 113.

[2] [illegible]

[3] [illegible]

[4] *Mitto Sing*, (1865) 3 W. R. (Cr.) 41.

[5] *Dhaumun Teli*, (1873) 20 W. R. (Cr.) 36.

[6] *Shurufooddin* v. *Kassinath*, (1870) 13 W. R. (Cr.) 64.

[7] *Doraisamy Pillai*, (1903) 27 Mad. 52.

Commencement and continuance of the right of private defence of property.

105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences.[1]

The right of private defence of property against *theft* continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.[2]

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.[3]

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.[4]

COMMENT.

This section defines the commencement and continuance of the right of private defence of property just as s. 99 does in the case of defence of body. In both the cases the right commences with the reasonable apprehension of danger.

1. **First clause.**—The right of private defence of property commences when a reasonable apprehension of danger to the property commences. Before such apprehension commences the owner of the property is not called upon to apply for protection to the public authorities. Where the accused apprehending opposition went armed to appraise crops, and, on the arrival of the opposite party similarly armed, did not wait till the opposite party had actually attacked, but proceeded to meet them, and a fight took place, it was held that the accused had acted within the right of private defence, which commenced as soon as the opposite party appeared with arms and began to move towards them, which was a distinct threat to attack them.[1] See *Comment* on clause (3) under s. 99, *supra*.

2. **Second clause.**—'Till the offender has effected his retreat with the property.'—"We are not sure of the meaning intended by the expression 'till the offender has effected his retreat with the property.' We know not certainly when he is to be considered as having effected his retreat; probably it is when he has once got clear off, having escaped immediate pursuit, or pursuit not having been made;....We presume that the protection of parties pursuing robbers, etc., for the recovery of property which they have succeeded in carrying off, or for bringing them to justice, was thought not to be within the scope of the provisions, touching the right of private defence."[2] It was suggested that the privilege of this clause should operate till the offender is taken and delivered to an officer of justice.[3] The clause "or either the assistance of the public authorities is obtained" did not exist in the draft Code.

This provision only applies to stolen property and not to property acquired dishonestly within the meaning of ss. 403 and 411.[4]

[1] *Hag's Ali*, (1907) 10 O. C. 196.
[2] 1st Rep., s. 153.
[3] 1st Rep., s. 156.
[4] *Agra*, (1914) P. R. No. 37 of 1914.

'Or the property has been recovered.'—A recapture of the plundered property, while it is in course of being carried away, is authorized, for the taking and retaking is one transaction. But when the offence has been committed and the property removed, a recapture after an interval of time by the owner or by other person on his behalf, however justifiable, cannot be deemed an exercise of the right of defence of property. The recovery which the section contemplates seems to be a recovery either immediate or made before the offender has reached his final retreat; as where stolen cattle are tracked until ultimately overtaken in their retreat and recaptured.[1] But Mayne is of opinion that "resistance within justifiable limits may be continued as long as the wrongful act is going on But when the robber, for instance, has made his escape, the principle of self-defence would not extend to [illegible] the property were found in [illegible] ie purpose of its recovery." [illegible] "or the property has been recovered" has not much meaning in it. There is no decided case of any of the High Courts on this point.

It will, therefore, be observed that while in all other cases the right only exists for the purpose of prevention of the offences named, in the particular case of theft the right continues for the recovery of the property even after the theft has been accomplished. The extent of such right is that mentioned in s. 104. The right and its extent being thus found, every case must thereafter be judged on its own particular facts, to decide whether or not the exercise of the right in the recovery of stolen property has been exceeded. Here the exceptions contained in s. 99 come in. If A runs away with B's watch, B may chase him until he effects his escape, but the right of self-defence does not end with the escape. If B sees A in the street the next day, the next month, or the next year, wearing the stolen watch, B may forthwith seize A and recover his watch, using for the purpose as much force as the case allows. If a policeman should be at hand, B's proper course would be to hand A over to him and let him recover the watch. But B is not bound to put off the capture of A until he can find assistance from public authority. Again, suppose that on a day after the theft thereof, B sees his watch lying on a table in a house or garden, if he can get the assistance of a policeman without losing sight of it, no doubt he would be bound to do so. But he would be under no legal obligation to risk a further loss or removal of the stolen property for the purpose of having recourse to the public authorities. If the circumstances are such that immediate seizure seems to offer the only reasonable prospect of recovery, B is entitled to enter the house or garden and recover his watch. The capture of the thief would not be an assault in the one case, and the entry into the house or garden would not be criminal trespass in the other.

3. Fourth clause.—In the case of criminal trespass and mischief the right of private defence ceases to exist as soon as the commission of these offences ceases.

Where land in possession of A was encroached on by the servants of B, who committed mischief on the land, and the servants of A assembled after the alleged mischief had been completed, there being no suggestion that the mischief was likely to be renewed, it was held that the servants of A could not claim the right of private defence of property which had ceased under this clause.[2]

The complainant's party, consisting of twelve or thirteen persons, went with pickaxes to a *bund* erected on the land of the master of the accused in order to cut it, as it obstructed the flow of water from their lands and destroyed their crops. The accused hearing of this at once assembled to the number of 50 or 60, armed themselves with clubs and proceeded to the *bund*. At this time the complainant's party had either finished the cutting or ceased to do so, when they saw the accused approaching. The latter attacked the complainant's party and drove them to

[1] M. & M. 81.

[2] *Raj Kisto Doss*, (1869) 12 W. R. (Cr.) 43.

their village. One or more of the assailants also beat a man, who was present there, but was not connected with the cutting of the *bund*, both in the first attack and when they returned from the chase, and fractured his skull, in consequence of which he died shortly after. It was held that the accused were members of an unlawful assembly from the beginning, as they went armed with clubs and in large numbers to enforce their right at all hazards, that, if not so at the beginning, they became an unlawful assembly, and had no right of private defence, when the opposite party had ceased cutting the *bund*, and that, even if they had, they exceeded their right by attacking their opponents and chasing them and by beating the deceased.[1]

4. Fifth clause.—The right of private defence against house-breaking continues only so long as the house-trespass continues, hence where a person followed a thief and killed him in the open, after the house-trespass had ceased, it was held that he could not plead the right of private defence.[2]

Right of private defence against deadly assault when there is risk of harm to innocent person.

106. If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

ILLUSTRATION.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

COMMENT.

This section should be read in the light of s. 100. It provides for the risk which a person may have to run to defend himself against an assault reasonably causing the apprehension of his death.

[1] *Ambika Lal*, (1908) 35 Cal. 443.
[2] *Balakee Jolaked*, (1868) 10 W. R. (Cr.) 9; *Gulbadan*, (1885) P. R. No. 25 of 1885.

CHAPTER V.

OF ABETMENT.

THIS Chapter applies to offences punishable under ss. 121A, 124A, 225A, 225B, 294A and 304A.[1]

Abetment of a thing.

107. A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or,

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or,

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

ILLUSTRATION.

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

COMMENT.

When an offence is committed and several persons take part in the commission of it, each person may contribute in a manner and degree different from the others to the doing of the criminal act.

The act may be done by the hands of one person while another is present, or is close at hand ready to afford help; or the actual doer may be a guilty agent acting under the orders of an absent person: and besides these participators, there may be other persons who contribute less directly to the commission of the offence by advice, persuasion, incitement or aid. It is proper to mark the nature and degree of participation which is essential to criminal liability, but it will be seen that the several gradations of action above referred to are not always treated as denoting necessarily different measures of guilt with a view to distinction in respect of punishment.

We have seen that if several persons, combining both in intent and act, commit an offence jointly, each is guilty, as if he had done the whole alone; and that so it is, if each has his several part to do, all contributing to one result. When all

[1] Act XXVII of 1870, s. 13, as amended by Act XI of 1891.

combine, each does the act so far as his own part extends, and, as to the residue, may be regarded as procuring it to be done by means of guilty agents: all the parties, so concerned, stand in the mutual relation of principals and agents. The present Chapter treats of co-agency of a less direct and immediate kind: the agent being urged forward by a person who will not himself act, but who procures or instigates another to put in execution his criminal intention.[1] Under this Chapter persons rendering any kind of assistance to the criminal are punishable. Bentham[2] says: "The more these preparatory acts are distinguished, for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the criminal be not stopped at the first step of his career, he may at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoitres all the external posts of the enemy with the intention of stopping his enterprises. He places in all the defiles, in all the windings of his route, a chain of works, diversified according to circumstances, but connected among themselves, in such a manner that the enemy finds in each, new dangers and new obstacles."

Abetment under the Penal Code involves active complicity on the part of the abettor at a point of time prior to the actual commission of the offence, and it is of the essence of the crime of abetment that the abettor should substantially assist the principal culprit towards the commission of the offence. Nowhere concurrence in the criminal acts of another without such participation therein as helps to effect the criminal act or purpose is punishable under the Code.

Abetment is a separate and distinct offence provided the thing abetted is an offence.[3] Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart.[4]

As a general rule a charge of abetment fails if the substantive offence is not established against the principal. But there may be an exception where the substantive offence was undoubtedly committed, and there is evidence, such as a retracted confession by the abettor, on which the jury might have found, as against him, that the offence was committed by the principal, though, as against the latter, the confession would be insufficient for a conviction of murder.[5]

Scope.—The definition of 'abetment' given here applies to all Acts passed by the Government of India.[6]

Ingredients.—Abetment is constituted (1) by instigating a person to commit an offence; or (2) by engaging in a conspiracy to commit it; or (3) by intentionally aiding a person to commit it.[7]

(1) Abetment by instigation.—First clause.—A person is said to 'instigate' another to an act, when he actively suggests or stimulates him to the act, by any means or language, direct, or indirect, whether it take the form of express solicitation, or of hints, insinuation or encouragement.[8] The word 'instigate' means urge on, incite, bring about by persuasion, provoke.[9] Advice can become 'instigation' if it is meant actively to suggest or stimulate the commission of an offence. Advice *per se* cannot necessarily be instigation.[10] A mere acquiescence, or permission, does not amount to an instigation. Nor can deliberate absence from the scene of offence amount to instigation.[11] Instigation implies knowledge of the criminality of an act. Words which amount merely to a permission may perhaps

[1] M. & M. 83.

[2] Principles of Penal Laws, Vol. I, Part III, Ch. 15, p. 560.

[3] *Sesha Ayyar* v. *Venkatasubba Chetty*, (1923) 33 M. L. T. 263.

[4] *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 159, 52 Cal. 196, P. C.

[5] *Umadasi Dasi*, (1924) 52 Cal. 112.

[6] General Clauses Act (X of 1897), ss. 3 (1), 4 (2).

[7] *Imamdi Bhooyah*, (1873) 21 W. R. (Cr.) 8.

[8] 1 Russ 164; *Amiruddin Salebhoy*, (1922) 24 Bom. L. R. 534, 542.

[9] *Lashminarayana Aiyar*, [1917] M. W. N 831, 22 M. L. T. 373.

[10] *Raghunath Dass*, (1920) 5 P. L. J. 129.

[11] *Etim Ali Majumdar*, (1900) 4 C. W. N 500.

amount to an instigation, but this will depend on the position of the speaker and the occasion on which they are spoken.

The word 'instigation,' as used in this section, may be an instigation of an unknown person.[1]

Explanation 1 to this section says that a person who (1) by wilful misrepresentation, or (2) by wilful concealment of a material fact which he is bound to disclose, voluntarily causes, or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. The illustration is an example of instigation by 'wilful misrepresentation.' Instigation by 'wilful concealment' is where some duty exists which obliges a person to disclose a fact.

The offence is complete as soon as the abettor has incited another to commit a crime, whether the latter consents or not, or whether, having consented, he commits the crime or not. This form of abetment depends upon the intention of the person who abets, and not upon the act, which is actually done by the person whom he abets.[2]

Instigation through a third party.—It is immaterial whether the instigation be personal, or through the intervention of a third person.[3]

Cases.—Master's liability.—Where, of several persons constituting an unlawful assembly, some only were armed with sticks, and A, one of them, was not so armed, but picked up a stick, and used it, B (the master of A), who gave a general order to beat, was held guilty of abetting the assault by A.[4] The carrying off of certain buffaloes, belonging to the complainant, by order of the accused, and the retention of them in the custody of the latter's servant, were held to amount to an abetment of theft.[5]

Suppression of evidence.—Where a prisoner asked a witness to suppress certain facts in giving his evidence, it was held that this was an abetment of giving false evidence.[6]

Deliberate absence is no instigation.—Where persons of influence being aware of the objects of the members of an unlawful assembly deliberately absented themselves from the locality where such assembly was formed, it was held that that was not such sympathy as amounted to instigation.[7]

Instigation to commit an offence by letter or telephone.—Where one person [illegible]

the act is only an attempt to abet.[9] The accused telephoned to W asking if he could have two boys for immoral purposes. No particular boys were named or indicated. The accused was charged with inciting W "to procure the commission by certain male unknown persons of acts of gross indecency with him," the accused. It was held that as the accused was inciting W to commit what, if he had done the acts, would have been a criminal offence, it was immaterial that the male persons whom he was to procure were not at the time ascertained or that the accused was inciting W to incite another to commit an offence, and that the accused was rightly convicted.[10]

Consent to hold a stake.—Two men, having quarrelled, agreed to fight with their fists, and to bind themselves to fight, each put down £1, so that £2 might be paid to the winner. The accused consented to hold the £2, and pay it over to the winner. Otherwise, he had nothing to do with the fight, and he was not

[1] *Ganesh Damodar Savarkar*, (1909) 12 Bom. L. R. 105.
[2] *Tha La Aung*, (1906) 12 Burma L. R. 70.
[3] *Robert Car (Earl of Somerset)*, (1616) 2 St. Tr. 965.
[4] *Rasoolvollah*, (1869) 12 W. R. (Cr.) 51.
[5] *Tarinee Prosaud Banerjee*, (1872) 18 W.R. (Cr). 8.
[6] *Andy Chetty*, (1863) 2 M. H. C. 438.
[7] *Etim Ali Majumdar*, (1900) 4 C. W. N. 500.
[8] *Sheo Dial Mal*, (1894) 16 All. 359.
[9] *Ransford*, (1874) 13 Cox 9
[10] *Bentley*, [1923] 1 K. B. 403.

present at it. There was no reason to suppose that the life of either man would be endangered. The men fought, and one of them received injuries of which he afterwards died. The accused having been informed who was the winner, but not knowing of the other man's danger, paid over the £2 to the winner. It was held that the mere consent to hold the stakes could not be said to amount to a participation in the fight.[1]

(2) **Abetment by conspiracy.**—Second clause.—'Conspiracy' consists in a combination and agreement by persons to do some illegal act or to effect a legal purpose by illegal means. "So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as *Grose, J.*, said in *Rex* v. *Brisac*,[2] is generally 'matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.' The number and the compact give weight and cause danger."[3]

Conspiracy is now made a substantive offence in India. In order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy, and an act, or illegal omission, must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.[4] Where parties concert together, and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan is the act of the whole.[5]

A mere conspiracy would not amount to abetment, and it would appear that if conspirators were detected before they had done more than discussed plans, with a general intention to commit an offence, they would not be liable as abettors.[6]

Before the introduction of Chapter VA conspiracy except in cases provided for by ss. 311, 400, 401, 402, and 121A of the Code was a mere species of abetment where an act or an illegal omission took place in pursuance of that conspiracy, and amounted to a distinct offence for each distinct offence abetted by conspiracy.[7]

A conviction for conspiracy cannot stand when the charge against the other alleged conspirators has failed.[8] When a conspiracy between several persons is alleged, it is not necessary for the prosecution to prove, before it can be held established, that each conspirator knew and had personal communication with all the rest, because some of them might be intermediaries.[9]

Conspiracy to commit various acts amounting to distinct offences.—On this point the Madras High Court is equally divided in its opinion. Three judges hold that a conspiracy to commit various acts which are in themselves distinct offences is itself one offence under the Penal Code and not several abetments of those distinct offences.[10] Three others hold that conspiracy is a mere species of abetment when an act or illegal omission takes place in pursuance of the conspiracy and amounts to a distinct offence for each distinct offence abetted by conspiracy.[11]

[1] *Taylor*, (1875) L. R. 2 C. C. R. 147.
[2] (1803) 4 East 164, 171.
[3] Per Willes, J., in *Mulcahy*, (1868) L. R. 3 H. L. 306, 317. See *Quinn* v. *Leathem*, [1901] A. C. 495, 528.
[4] Expln. 5 to s. 108; *Kali Munda*, (1901) 28 Cal. 797; *Gobind Dobey*, (1874) 21 W. R. (Cr.) 35.
[5] *Ameer Khan*, (1871) 17 W. R. (Cr.) 15.
[6] *Sher Ali*, (1878) P. R. No. 18 of 1879.
[7] See *Tirumal Reddi*, (1901) 24 Mad. 523.
[8] *Jogjiban Ghose*, (1909) 9 C. L. J. 663. See *Plummer*, [1902] 2 K. B. 339.
[9] *Percy Henry Burn*, (1909) 11 Bom. L. R. 1163
[10] Per Sir Arnold White, C. J., Shephard and Boddam, JJ., (1900) 1 Weir 47.
[11] Per Davies, Benson and Moore, JJ., in *ibid.*

Cases.—**Suicide**—Evidence that a woman prepared herself to commit suicide in the presence of the accused, that they followed her to the pyre and stood by her, her step-sons crying "Ram, Ram," and one of the accused admitted that he told the woman to say "Ram, Ram," and she would become *suttee*, was held to prove active connivance and unequivocal countenance of the suicide by the accused, and to justify the inference that they had engaged with her in a conspiracy for the commission of the *suttee*.[1]

Forgery—To prepare, in conjunction with others, a copy of an intended false document, and to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such document, are facts which would support a conviction for abetment of forgery as being acts done to facilitate the commission of the offence.[2]

Abortion.—A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion.[3]

(3) **Abetment by aid.—Third clause.**—(*a*) **By an act.**—A person abets by aiding, when by any act done either prior to, or at the time of, the commission of an act, he intends to facilitate, and does in fact facilitate, the commission thereof (*vide* Expln. 2). For instance, the supplying of necessary food to a person known to be engaged in crime is not *per se* criminal; but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it.[4] "The intention should be to aid the commission of a crime. A mere giving of an aid will not make the act an abetment of an offence, if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to *facilitate the commission of an offence.* [illegible]

[illegible] an example. A, B and C are friends. A and B have fallen out, so much so that A is determined to shoot B. A goes to the house of C, and on some pretext or other induces C to call B to his house. C has not the least idea that A would shoot B on his arrival. B arrives and is murdered by A. A committed murder. Can it be said that C is guilty of abetment, because he 'intentionally aided' A? C did give his aid in calling B to his place. But he never knew why A wanted him to send for B. Whatever C did, he did intentionally, for his intention it certainly was that B should come. But it was not C's intention that a crime should be committed. C cannot be held guilty of abetment of murder."[5]

Presence does not amount to aiding.—Mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. To be present and aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encouragement, or unless some specific duty of prevention rests on him, which he leaves unfulfilled in such wise that he may be safely taken as having joined in conspiracy for the perpetration of the offence.[6] An offence of abetment by presence falls through, if the principal offence is not substantiated.[7] A priest

1 [illegible] All. 268, 275.
2 [illegible]
3 [illegible]
4 [illegible]
5 [illegible]
6 *Lakshmi*, (1886) Cr. R. No. 51 of 1886, Unrep. Cr. C. 303; *Shidlingappa*, (1896) Cr R. No. 13 of 1896, Unrep. Cr. C. 844.
7 *Raja Khan*, (1920) 32 C. L. J. 478.

who officiates at a bigamous marriage was held to have intentionally aided it, but not the persons who were merely present at the celebration or who permitted its celebration in their house, when such permission afforded no particular facility for the act.[1]

Cases.—Giving of a house to extort a confession.—A zemindar who had lodged a complaint of theft lent a house belonging to him to the police-officer who was conducting the investigation in the theft case for the purposes of such investigation. It was found that at the time of lending the house the zemindar knew that it was likely to be used for the purpose of putting illegal pressure upon persons suspected of complicity in or knowledge of the theft, and also that the zemindar was at times present while the police-officer was engaged in that house in torturing certain persons summoned there by him, though he did not actually take part in the torturing. It was held that the zemindar was, by virtue of explanation 2, guilty of doing an act in order to facilitate the commission of an offence under s. 330.[2]

Order to assault.—Where orders were given to assault a particular person, who died in consequence of the injuries inflicted, the person giving the orders was held guilty of abetting the commission of voluntarily causing grievous hurt.[3] But if no definite orders are given there will be no abetment.[4]

Giving of a weapon to a person to hurt another.—Where A gave a *dao* to B, who had given out his intention to coerce the party against whom he was acting, and who inflicted grievous hurt on such party with the *dao*, (an edged weapon), A was held guilty of abetment in the commission of that act.[5]

Acceptance of an unstamped receipt is not aiding.—Where a debtor paid a sum of money to his creditor, and asked for a stamped receipt from him, who had not at hand a stamp, and then accepted an unstamped receipt, saying he would affix a stamp thereto, which he did not do, it was held that this did not constitute abetment of the offence of giving an unstamped receipt because he had done or omitted nothing which it was in his power to effect.[6]

Attestation or writing of a document is not aiding.—G, a prostitute, purchased a child for purposes of prostitution: at her request the first accused wrote a document evidencing the transaction; the other three accused attested the document, and all the four accused were present when the child was handed over to G. G also put into the hands of the first accused the price of the child, which money he handed over to the child's mother. It was held that the accused could not be convicted for abetment by intentionally aiding the illegal disposal of the child under s 372.[7]

Act abetted is illegal but not an offence.—A guardian of a Mahomedan married female infant aged six years who caused a marriage ceremony to be gone through in her name with another man, during the lifetime of her husband, but in her absence and without her consent, was held not to have committed the offence of abetting bigamy.[8] Because to constitute abetment the accused must be proved either to have instigated or aided some person to commit an offence. This case has been distinguished in a subsequent case in which a Hindu having given his daughter, said to be eight years old, in marriage to a certain person, again gave her in marriage to another in the lifetime of her first husband. It was held that he was guilty of an offence under s. 109 read with s. 494, although his daughter had not the knowledge and intelligence necessary to enable her to commit an offence under s. 494.[9]

[1] *Umi*, (1882) 6 Bom. 126.
[2] *Faiyaz Husain*, (1896) 16 A. W. N. 194
[3] *Doorgessur Surmah*, (1867) 7 W.R. (Cr.) 61.
[4] *Luchmun Singh*, (1904) 31 Cal. 710.
[5] *Eshan Meah*, (1869) 12 W. R. (Cr.) 52.
[6] *Mitthu Lal* (1885) 8 All. 18; *Janki*, (1882) 7 Bom. 82; *Nga Shwe Bwin*, (1904) 11 Burma L. R. 34; *Madansing*, (1893) 7 C. P. L. R. 21.
[7] *Bondili Sankara Singh*, (1884) 1 Weir 47.
[8] *Abdool Kureem*, (1878) 4 Cal 10
[9] *Nand Lal, Singh*, (1902) 6 C. W. N. 343.

(*b*) **By illegal omission.**—To prove abetment by 'illegal omission,' it is necessary to show that the accused intentionally aided the commission of the offence by his non-interference[1]; and the omission involved a breach of a legal obligation.[2] Thus every police-officer is bound to shelter a person in custody and to arrest persons committing assaults likely to cause grievous bodily injury and if he omit to perform his duty, he is guilty of abetment.[3]

Cases.—Non-interference where there is duty to interfere.—A Village Magistrate who was present while certain police constables were wrongfully confining and causing hurt to a resident of the village to extort a confession and who did not interfere with nor stop the criminal act committed in his presence nor report them to a Magistrate was held guilty of abetment of offences under ss. 330 and 348 of the Penal Code.[4] But the mere fact that the offence of extortion was committed in the presence of a village *chowkidar* without eliciting any disapproval on his part was held not to render him liable as an abettor.[5] Where a Head Constable, who knew that certain persons were likely to be tortured for the purpose of extorting confession, purposely kept out of the way, it was held that he was guilty of abetment.[6]

Omission must be of legal obligation.—A motor car was driven by the chauffeur of the accused, on a road in Mahableshwar, driving over which was forbidden under s. 9 of the Motor Vehicles Act, 1904. The accused was at Poona then but was convicted of abetment of the offence under s. 13 of the Motor Vehicles Act on the ground that it was his duty to inform the driver of the existence of the prohibition. It was held on revision by the High Court that as no legal obligation was imposed on the accused to instruct his servant he was not liable.[7]

Attempt.—The abetment of an offence within the meaning of s. 40 being itself an offence punishable under this Chapter, an attempt to commit the offence of abetment is provided for in s. 511, and there is therefore no legal obstacle to punishing such offence.[8]

English law.—According to English law, criminals are divided into four classes. The distinction is based on the consideration whether a party was present or absent at the commission of the offence.

(1) *Principal in the first degree.*—One who is the actual perpetrator of the crime. It is not necessary that he should be actually present when the offence is consummated; thus one who lays poison or a trap for another is a principal in the first degree. Nor need the deed be done by the principal's own hands; for it will suffice if it is done through an innocent agent, as for instance, if one incites a child or a madman to murder. Even an animal may be employed as an innocent agent. For example, a person who sets a dog upon people is himself guilty of assaulting them.

(2) *Principal in the second degree.*—One by whom the actual perpetrator of the crime is aided and abetted at the very time when it is committed. He may or may not be actually present at the scene of the crime. It will suffice, if he has the [illegible] as when [illegible] the house; [illegible] y liable for [illegible] execution of their common purpose.

Both the above classes of principals are liable to the same punishment.

[1] *Khajah Noorul Hossein* v. *Fabre-Tonnerre*, (1875) 24 W. R. (Cr.) 26.

[2] *Khadim Sheik*, (1869) 4 Beng. L. R. (A. Cr. J.) 7; *Cooverji*, (1906) 9 Bom. L. R. 159, 161.

[3] *Latifkhan*, (1895) 20 Bom. 394.

[4] *Appanna Hegde*, (1899) 1 Weir 52; *Krishna Shetti*, (1891) 1 Weir 50.

[5] *Keli Churn Gangooly*, (1873) 21 W. R. (Cr.) 11.

[6] *Gopal Chunder Sirdar*, (1882) 8 Cal. 728, but see *Lakshmi*, (1886) Unrep. Cr. C. 303.

[7] *Cooverji*, sup.

[8] *Sper*, (1882) P. R. No. 49 of 1882. See *Lila*, (1899) 24 Bom. 257, 1 Bom. L. R. 678.

(3) *Accessory before the fact.*—One who being absent at the time when the felony is committed, yet procures, counsels, commands, or abets another to commit a felony. He is punishable in all respects as the principal felon. If present at the commission he would be a principal.

(4) *Accessory after the fact.*—One who, knowing a felony to have been committed by another, receives, relieves, comforts, assists, harbours, or maintains the felon.

A felony must be actually committed, or there cannot be any accessories.

Principals are dealt with in the Penal Code under ss. 34 to 38. There is no distinction between 'principals in the first degree' and 'principals in the second degree,' in the Code. Under English law this distinction is confined to felonies only. It does not exist in cases of misdemeanour or serious offences as high treason or forgery.

The offence of abetment corresponds as nearly as one word can be said to correspond to another to the offence which is known in England of being an 'accessory before the fact.' But mere concurrence—that kind of passive concurrence which is known in England as being an 'accessory after the fact'—is not abetment and is not to be treated as abetment.

'Accessory after the fact' is treated in scattered sections. See provisions relating to harbouring, ss. 212, 216; and, also, ss. 130, 136, 137, 410-414.

PRACTICE.

Evidence.—Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, or actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.[1] A conspiracy may be proved by other than oral evidence: it may be proved by the evidence of surrounding circumstances and the conduct of the accused both before and after the alleged commission of the crime.[2]

In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.[3] It is necessary to prove criminal intention against the accused. The finding that accused No. 1 could not have acted in the illegal way without the approval and connivance of accused No. 2 is not sufficient to prove abetment.[4]

Procedure.—It is not open to an appellate Court to find a man guilty of the abetment of an offence on a charge of the offence itself.[5] But if on facts the accused may be charged with the principal offence and abetment, he may be convicted of abetment though only charged with the principal offence.[6]

Abettor.

108. A person abets[1] an offence who abets either the commission of an offence, or the commission of an act[2] which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

[1] Indian Evidence Act, I of 1872, s. 10.

[2] *Annappa Bharamganda*, (1907) 9 Bom. L. R. 347.

[3] *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 61.

[4] *Ramnarayan Misra*, (1921) 2 P. L. T. 193.

[5] *Chand Nur*, (1874) 11 B. H. C. 240; *Padmanabha Panjikannaya*, (1909) 33 Mad. 264.

[6] *Yeditha Subbayya*, (1912) M. W. N. 72.5

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act[3].

Explanation 2.[4]—To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

ILLUSTRATIONS.

(*a*) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(*b*) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3.[5]—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

ILLUSTRATIONS.

(*a*) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(*b*) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(*c*) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(*d*) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4.[6]—The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

ILLUSTRATION.

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.[7]—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient

if he engage in the conspiracy in pursuance of which the offence is committed.

ILLUSTRATION.

A concerts with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C, mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section, and is liable to the punishment for murder.

COMMENT.

'Abettor' under this section means the person who abets (1) the commission of an offence, or (2) the commission of an act which would be an offence if committed by a person not suffering from any physical or mental incapacity. In the light of the preceding section he must be an instigator or a conspirator or an intentional helper. This section is in conformity with the English law except on one point. Under English law a person using an innocent agent as his tool is deemed to be a principal whereas under this section he is treated as an abettor. So far as the actual result is concerned this distinction has not much meaning.

1. **'Abets.'**—See s. 107, *supra*.

2. **'Commission of an act.'**—There must be abetment of the commission of an act. The section does not contemplate any acts of subsequent abetment. Thus, a person cannot be convicted of abetment of a false charge solely on the ground of his having given evidence in support of such charge.[1]

3. **Explanation 1.**—If a public servant is guilty of an illegal omission of duty made punishable by the Code, and a private person instigates him he abets the offence of which such public servant is guilty, although the abettor, being a private person, could not himself have been guilty of that offence.

4. **Explanation 2.**—The offence of abetment is complete notwithstanding that the person abetted refuses to do the thing, or fails involuntarily in doing it, or does it and the expected result does not follow. The offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act which is actually done by the person whom he abets.[2] If it was impossible to accomplish the commission of an offence in a way suggested by the abettor and no offence is committed then the abettor would not be liable.

therefore, the accused offered money for the killing or disabling of the deceased by means of charms and it was left to the persons who were to earn the money to decide whether their victim was to be killed or disabled, it was held that he was guilty of abetment of murder.[4] In a Bombay case a doubt has been expressed whether abetment of murder by sorcery or other impossible means is an offence under the Code.[5]

5. **Explanation 3.**—If a man does, by means of an innocent agent, an act which amounts to a crime, the employer, and not the agent, is accountable for

[1] *Ram Pandi*, (1872) 9 Bomb. L. R. App. 16; *Pirun Pandah*, (1872) 18 W. R. (Cr.) 29; *Jugut Mohini Dassee*, (1881) 10 C. L. R. 4.
[2] *Imamdi Bhongah*, (1873) 21 W. R. (Cr.) 8.
[3] *Sahib Ditta*, (1885) P. R. No. 20 of 1885.
[4] *Ibid.*
[5] *Peranji Dinsha*, (1873) 10 B. H. C. 75.

the act.[1] Illustrations (*b*), (*c*) and (*d*) exemplify this explanation. R sold to D certain trees which in fact and to the knowledge of R, though not to the knowledge of D, belonged to a third person. The trees were sold to D with the intention that they should be cut down and taken away. It was held that R had committed the offence of abetment of theft.[2]

'Guilty intention or knowledge.'—The offence of abetment depends upon the intention of the person who abets and not upon the knowledge or intention of the person he employs to act for him.

English law.—If the person abetted does not know that the act is illegal he is considered as an innocent agent only, and the abettor is held liable as a principal.

6. **Explanation 4.**—According to this explanation a person may make himself an abettor by the intervention of a third person, without any direct communication between himself and the person employed to do the thing.

'Abetment of an offence being an offence.'—These words do not mean "when an abetment of an offence is actually committed," but that, when the abetment of an offence is by definition or description an offence under the Penal Code, that is, when an abetment of an offence is punishable under s. 109 or s. 116 or other provision of the Code, then the abetment of such abetment is also an offence. Where S instigated K, a bench clerk, in the Court of M, a Presidency Magistrate, to instigate the latter to accept an illegal gratification for acquitting an accused [illegible] the case, and K received [illegible] arrested, and did not in [illegible] guilty of the abetment of [illegible]

Abetment of such an abetment—It is not necessary to an indictment for the offence of abetment of an offence to show that such offence was actually committed.[4]

A sought the aid of B with the intention of committing a theft of the property [illegible] consent of his master, and for the pur- [illegible] in carrying out his object. It was held [illegible] en committed yet A was liable for abetment of theft.[5] Where the accused asked a native doctor to supply her with medicine for the purpose of poisoning her son-in-law, it was held that the offence committed might be treated as an instigating of the doctor to abet the accused in the commission of the murder, and, with reference to this explanation, might have been punished under ss. 116 and 302.[6]

7. **Explanation 5.**—It is not necessary that all persons joining in any conspiracy must be aware of every secret or every minute detail. When the number of persons conspiring to do a particular act is very large there will be a few amongst them who will plot and plan, and though the others are not fully cognizant of all facts yet their liability is not at all lessened. Where two persons were indicted for making and engraving a plate for the purposes of forgery, and it was proved that one of them gave the order for the manufacture of the plate to an innocent agent, who never saw the other until it was completed, it was held that they were both correctly charged as principals.[7]

Mere knowledge.—Mere subsequent knowledge of the offence is insufficient to constitute abetment.[8] And mere knowledge of a design on the part of another to commit an offence and speaking to that other about it without evidence that the

[1] *Joan Bleasdale*, (1848) 2 C. & K. 765; *Dhaniram*, (1901) 14 C. P. L. R. 192.
[2] *Ram Charan*, (1898) 18 A. W. N. 147.
[3] *Srilal Chamaria*, (1918) 46 Cal. 607.
[4] *Troyluckho Nath Chowdhry*, (1878) 4 Cal. 366; *Dinonath Burooa*, (1872) 18 W. R. (Cr.) 32.
[5] *Troyluckho Nath Chowdhry*, sup.
[6] *Musst. Bakhtawar*, (1882) P. R. No. 24 of 1882.
[7] *Bull*, (1845) 1 Cox 281.
[8] *Shumeeruddeen*, (1865) 2 W. R. (Cr.) 40.

person aware of the design instigated the other by word or deed to commit the offence, does not constitute abetment.[1]

Principal cannot be abettor.—A person who has been convicted of an offence as principal cannot also be punished for abetting it.[2]

PRACTICE.

The offence of abetment is a substantive one, and the conviction of an abettor is, therefore, in no way dependent on the conviction of the principal.[3]

In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.[4]

Abetment in British India of offences outside it.

108A. A person abets an offence within the meaning of this Code who, in British India, abets the commission of any act without and beyond British India which would constitute an offence if committed in British India.

ILLUSTRATION.

A, in British India, instigates B, a foreigner in Goa, to commit a murder in Goa. A is guilty of abetting murder.

COMMENT.

Object.—This section was added by Act IV of 1898, s. 3. The Select Committee in their Report observed: "We have made it an offence for a person in British India to abet any act which would be an offence if committed in British India, but, as a fact, is committed outside. In short, to put it in popular language, we have extended the law of abetment of offences committed outside British India. It has been held by the Bombay High Court that if a person in British India abetted or incited a murder in Goa, he would not be guilty of any offence. We have come to the conclusion that he ought to be deemed guilty of an offence, and that India is not to be made an alsatia for instigators of crime."[5]

The section provides for the difficulty discussed in *Ganpatrao's case*[6] in which it was held that an abetment in British India by a British subject of an offence committed in a foreign territory was not an offence punishable under the Penal Code, and could not, therefore, be tried by a Court in British India.

The section contemplates that the abetment shall be completed in British India. If the act committed in British India amounts to preparation only it will not be punishable. The illustration is, however, not very clear. If A is in British India and B in Pondicherry, A can only abet an offence by him either by a letter or some other mode of communication. Even if the letter be written in British India yet until it reaches B it can hardly be said that B has been instigated. If the instigation, in fact, takes place when the letter reaches B, then the instigation has taken place in Pondicherry and not in British India.

PRACTICE.

Procedure.—No Court shall take cognizance of an offence punishable under this section unless upon complaint made by order of Government.[7]

[1] *Venkatasami*, (1886) Weir, 3rd Edn., 187.
[2] *Jeetoo Chowdhry*, (1865) 4 W. R. (Cr.) 23; [illegible]
[3] [illegible]
[4] *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41.
[5] G. I. 1897, Part VI, p. 238. See *Baku*, (1899) 1 Bom. L. R. 678, 24 Bom. 287.
[6] (1894) 19 Bom. 105.
[7] Criminal Procedure Code, s. 196.

Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.

109. Whoever abets any offence[1] shall, if the act abetted is committed[2] in consequence of the abetment and no express provision[3] is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

ILLUSTRATIONS.

(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in section 161.

(*b*) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(*c*) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

COMMENT.

Under this section the abettor is liable to any punishment which may be inflicted on the principal offender, (1) if the act of the latter is committed in consequence of the abetment, and (2) no express provision is made in the Code for the punishment of such an abetment. This section lays down nothing more than that if the Code has not separately provided for the punishment of an abetment as such then it is punishable with the punishment provided for the original offence.[1]

In order to abet under this section it is not necessary that the abettor must be absent.[2]

1. **'Offence.'**—See s. 40, *supra*. Abetment of an offence under a local law (*e.g.*, Madras Act V of 1920) is an offence falling within the purview of this section.[3]

2. **'Is committed.'**—Under this section the act abetted should be committed in consequence of the abetment,[4] or in pursuance of the conspiracy (See Explanation). Assisting in the preparation of an offence which leads to nothing does not amount to an abetment under this section.[5] Offering gratification as a reward or motive to withdraw a case against the accused under the Motor Car Act, which had already been dismissed, was held not to amount to an abetment of an offence under s. 161.[6]

3. **'No express provision.'**—This section only applies to those cases of abetment about which 'no express provision is made by this Code.' Hence it does not apply to abetting the waging of war, ss. 121, 122, 123, to abetting the escape of State prisoners, s. 130; to abetting mutiny, s. 132; to abetting an assault of a

[1] *Sesha Ayyar* v. *Venkatasubba Chetty*, (1923) 33 M. L. T. 263.
[2] *Nirmal Kanta Roy*, (1914) 41 Cal. 1072.
[3] *Sesha Ayyar* v. *Venkatasubba Chetty*, sup.
[4] *Bycoomar Banerjee*, (1862) 1 Ind. Jur. (O. S.) 105.
[5] *Surat Bahadur*, (1924) 1 O. W. N 362.
[6] *Shamsul Huq*, (1920) 33 C. L. J. 379.

soldier or sailor on his superior officer, s. 134; and to abetting insubordination by the same, s. 136.

CASES.

Forgery.—A person taking an active part in the preparation of a document, but no part in the forgery of the name of the executant, is held not to have committed forgery, but simply abetment of that offence.[1]

Homicide.—In a case of *suttee*, A ordered the pile to be lighted. B did not then assist but afterwards when the woman fled from the pile induced her to return. A was held guilty of abetment of culpable homicide, but B of abetment of suicide only.[2] The accused accompanied his brother who was taking a child to murder it: after accompanying him for a while he refused further to go along with his brother, but at the same time though knowing fully well that the child was being taken to be murdered, he made no attempt to take the child back with him and the child was subsequently murdered. It was held that the accused was guilty of murder.[3]

Marrying a girl during the lifetime of her husband.—Where a Hindu having given his daughter, eight years old, in marriage to a certain person, again gave her in marriage to another in the lifetime of her first husband, it was held that he was guilty of an offence under this section read with s. 494, although his daughter had not the knowledge and intelligence necessary to enable her to commit an offence under s. 494.[4]

Abetment of kidnapping.—Where a Hindu woman left her husband's house, taking with her infant daughter, and went to the house of A, and on the same day the daughter was married to B, the brother of A, without her father's consent, it was held that A was rightly convicted under this section and s. 363 of abetting the offence of kidnapping which was committed by the mother of the girl.[5] The Allahabad High Court has not approved of this view. One C by making certain false representations to the mother of J, a married girl of eleven years of age, induced her to part with the custody of her daughter. C took the girl away from her own village to a neighbouring village where she was joined by T. Thence C and T took the girl about with them from place to place making unsuccessful attempts to dispose of her in marriage, until they were arrested by a *chowkidar* of Tiabpur, on his being informed that an attempt was made to sell the girl in that village. Upon these findings C was convicted of the offence punishable under s. 366 and T of abetment of that offence, following the rule in *Samia Kaundan*.[6] On appeal to the High Court the appeal of C was summarily rejected. As to T it was held, dissenting from *Samia Kaundan* and agreeing with the view taken in *Ram Supdar*[7] and *Rakhal Naikari*,[8] that the offence of kidnapping having been completed as soon as the minor was actually taken out of the custody of her guardian, T could not properly be convicted of abetment on the hypothesis that the offence was a continuing one. But inasmuch as there was evidence on the record that the assist-

abetment of the offence of kidnapping after the person had once been taken out of

[1] *Kashi Nath Nask*, (1897) 25 Cal. 207. See *Chhotelal Babar*, No. (2), (1912) 14 Bom. L. R. 367, 1 Bom. Cr. C. 120.

[2] *Sikhlloll Rattlal*, (1863) 1 R. J. P. J. 174.

[3] *Sada*, (1884) Unrep. Cr. C. 297.

[4] *Nand Lal Singh*, (1902) 6 C. W. N. 343. See *Thandiscrayudu*, (1891) 14 Mad. 364; *Balambal*, (1902) 26 Mad. 463; *Moss*, (1893) 16 All. 88.

[5] *Prabrishna Surma*, (1882) 8 Cal. 969; *Samia Kaundan*, (1876) 1 Mad. 173.

[6] (1876) 1 Mad. 173.

[7] (1896) 19 All. 109.

[8] (1897) 2 C. W. N. 81.

[9] *Tika*, (1903) 23 A. W. N. 233.

the keeping of the lawful guardian.[1] A married woman cannot abet her own abduction under s. 498.[2]

PRACTICE.

Evidence.—To substantiate a charge under this section it is necessary to show intentional aid by some act or illegal omission.[3] It is necessary to prove abetment, and that the act abetted was committed in consequence of the abetment.

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It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property.[9]

Charge.—In a charge of abetment, the section of the principal offence, and the particular section of this Chapter under which the case falls should be mentioned [illegible] said section.[10]

[illegible] charge you——as follows :—

That X Y (*if the person is not known say that an unknown person*) on the——day of——, at——, committed the offence of——, and that you at——, abetted the said X Y (*or person unknown*) in the commission of the said offence of——, which was committed in consequence of your abetment, and you have thereby committed an offence punishable under ss. 109 and——of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session).

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soldier or sailor on his superior officer, s. 134; and to abetting insubordination by the same, s. 136.

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[1] Kali Nath Mitra, (1887) 23 Cal. 207. [illegible] Bahar, A. (2), (1912) 16 Bom. L. R. 207; 1 Bom. Cr. 152.

[2] [illegible] (1893) 1 B. J. R. J. 174.

[3] [illegible] Unny, (1[illegible]) [illegible]

[4] [illegible] (1[illegible]) 6 C. W. N. 242. [illegible] (1[illegible]) 16 Mad. 264; *Balambal*, (1902) 26 Mad. 463; *Moti*, (1892) 16 All. 84.

[5] *Prankrishna Burma*, (1842) 8 Cal. 969; *Samia Kaundan*, (1875) 1 Mad. 173.

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[7] (1896) 19 All. 109.

[8] (1897) 2 C. W. N. 81.

[9] Tiku, (1907) 27 A. W. N. 222.

the keeping of the lawful guardian.[1] A married woman cannot abet her own abduction under s. 498.[2]

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And I hereby direct that you be tried [by the said Court (*omit the words* " by the said Court " *in cases tried by Magistrate*)] on the said charge.

When the abettor is charged with the person committing the offence the charge should run thus:

That you——, on or about the——day of——, at——, abetted the commission of the offence of——by——which was committed in consequence of your abetment, and that you have thereby committed an offence punishable under ss. 109 and——of the Indian Penal Code, and within the cognizance of my Court [*or* the Court of Session].

Punishment of abetment if person abetted does act with different intention from that of abettor.

110. Whoever abets the commission of an offence[1] shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

COMMENT.

This section says that though the person abetted commits the offence with a different intention or knowledge yet the abettor will be punished with the punishment provided for the offence abetted. The liability of the person abetted is not affected by this section.

Explanation 3 to s. 108 bears relation to this section. See ill. (*d*).

1. '**Offence.**'—Offence under this section denotes a thing punishable under this Code, or under any special or local law (s. 40).

PRACTICE.

Procedure.—Same as for the offence abetted.

Liability of abettor when one act abetted and different act done.

111. When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:

Proviso.

Provided the act done was a probable consequence[1] of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

ILLUSTRATIONS.

(*a*) A instigates a child to put poison into the food of Z and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here, if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y.

(*b*) A instigates B to burn Z's house. B sets fire to the house and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft, for the theft was a distinct act, and not a probable consequence of the burning

(c) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

COMMENT:

Principle.—This section proceeds on the maxim "every man is presumed to intend the natural consequences of his act."

"If one man instigates another to perpetrate a particular crime, and that other, in pursuance of such instigation, not only perpetrates that crime, but, in the course of doing so, commits another crime in furtherance of it, the former is criminally responsible as an abettor in respect of such last mentioned crime, if it is one which, as a reasonable man, he must, at the time of the instigation, have known would, in the ordinary course of things, probably have to be committed in order to carry out the original crime. For example, if A says to B :—' You waylay C on such and such a road and rob him, and if he resists, use this sword, but not more than is absolutely necessary'; and B kills C, A is responsible as an abettor of the killing, for it was a probable consequence of the instigation. To put it in plain terms, the law virtually says to a man : ' If you choose to run the risk of putting another in motion to do an unlawful act, he, for the time being, represents you as much as he does himself ; and if, in order to effect the accomplishment of that act, he does another which you may fairly from the circumstances be presumed to have foreseen would be a probable consequence of your instigation, you are as much responsible for abetting the latter act as the former."[1]

Foster [2] says : " If the principal totally and substantially varies, if being solicited to commit a felony of one kind *he wilfully and knowingly* commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt But if the principal in substance complies with the temptation, varying only in circumstances of time or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, if present a principal...A commands B to murder C by poison, B does it by a sword, or other weapon, or by any other means. A is accessory to this murder : for the murder of C was the object principally in his contemplation, and that is effected. So where the principal goes beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such orders or advise will be an acces- [illegible] his servant to waylay [illegible] ; dies of this beating. [illegible] house of C ; he does it ; and the flames taking hold of the house of D that likewise is burnt. A is accessory to the burning of this latter house. These cases are all governed by one and the same principle. The advice, solicitation, or orders in substance were pursued and were extremly flagitious on the part of A. The events though possibly falling out beyond his original intention, were *in the ordinary course of things the probable consequences of what B did under the influence, and at the instigation of* A. And, therefore, *in the justice of the law, he is answerable for them.*"

1. ' **Probable consequence.**'—The test of guilt in charges of abetment must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable. But it is sufficient for a conviction if the act done was a probable consequence of the abetment. It is not necessary that the abettor should know it to be a probable consequence.[3]

[1] Per Straight, J., in *Mathura Das*, (1884) 6 All. 491, 494.

[2] Crown Cases, pp. 369, 370.

[3] M. & M. 91.

See illustrations to this section, but the act done must have been committed in pursuance of the conspiracy.[1]

CASES.

Where several persons turned out to beat a man, but one of them killed him, it was held that as the intention of all of them was to beat him only they would be liable for grievous hurt only and the causing death to the deceased went so far beyond the common purpose that it could not be said to have been a probable consequence of the abetment.[2] Where A ordered B and C to seize and forcibly take D in the contemplation of an assault upon D, and D was so beaten and tortured as to have died in consequence, it was held that A was guilty at least of abetting the omission of voluntarily causing grievous hurt.[3] B and C instigated A to rob the deceased on his return home after receiving a sum of money; whereupon A killed the deceased. A was convicted of murder and B and C of abetment of murder under this section and s. 302. But the High Court altered the convictions of B and C to those under ss. 109 and 392.[4]

PRACTICE.

Evidence.—(1) That the accused abetted the commission of a particular act.

(2) That the act actually committed was done under the influence of such abetment.

(3) That the act done was a probable consequence of the abetment.

Procedure.—Same as the offence abetted.[5]

Abettor when liable to cumulative punishment for act abetted and for act done.

112. If the act for which the abettor is liable under the last preceding section is committedin addition to the act abetted, and constitutes a distinct offence,[1] the abettor is liable to punishment for each of the offences.

ILLUSTRATION.

A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and, if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress, A will also be liable to punishment for each of the offences.

COMMENT.

This section is a further extension of the principle enunciated in the preceding section: it is much wider than the English law on the point. Under it the abettor is punished for the offence abetted as well as the offence committed.

1. **Offence.**—See s. 40, *supra*.

Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.

113. When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused in the same manner

[1] *Nilakanta*, (1912) 11 M. L. T. 1.
[2] *Goluck Chung*, (1866) 5 W. R. (Cr.) 75.
[3] *Doorgessur Surmah*, (1867) 7 W. R. (Cr.) 61.
[4] *Mathura Das*, (1884) 6 All. 491.
[5] See *Harnam Singh*, (1919) P. R. No. 21 of 1919.

and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

ILLUSTRATION.

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

COMMENT.

This section should be read in conjunction with s. 111. Section 111 provides for the doing of an act different from the one abetted, whereas this section deals with the case where the act done is the same as the act abetted but its effect is different. To make the abettor liable it must be shewn that he knew that the act abetted was likley to cause that effect. This can be done by shewing that a reasonable man would draw an inference that a particular effect was likley to ensue from a particular act.

Abetment of attempt to murder.—It is somewhat difficult to conceive circumstances which would constitute instigation to another to make merely an attempt to murder. *Prima facie* any incitement to use violence to another would fall under one of the two categories, *viz.*, to cause death, or to cause hurt, grievous or simple.[1]

PRACTICE.

Procedure.—Same as for the offence abetted.

Abettor present when offence is committed.

114. Whenever any person, who if absent would be liable to be punished as an abettor,[1] is present when the act or offence for which he would be punishable in consequence of the abetment is committed,[2] he shall be deemed to have committed such act or offence.[3]

COMMENT.

Principle.—The meaning of this section is that if the nature of the act done constitutes abetment, then, if present, the abettor is to be deemed to have committed the offence, though in point of fact another man actually committed it. The section says that the person present is deemed to have committed the offence, not that he has committed it. It simply provides for the punishment of what the English law calls 'principals in the second degree.' A person present abetting an offence is to be deemed to have committed the offence though he does not, in fact, do so any more than a 'principal in the second degree' does.[2] Where, for instance, a blow is struck by A, in the presence of and by the order of B, both are principals in the transaction. If two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was.[3] If A instigates B to murder Z, he commits abetment; if absent, he is punishable as an abettor, and if the offence is committed, then under s. 109; if present, he is by this section deemed to have committed the offence and is punishable as a principal.

Scope.—Section 109 and this section supersede the English law as to principals in the first and second degrees and accessories before the fact.

[1] *Nga Po Kya*, (1903) 9 Burma L. R. 190.
[2] (1869) 4 M. H. C. App. 37; 1 Weir 50; *Peer Mahomed*, (1872) 17 W. R. (Cr.) 52; *Chima*, (1871) 8 B. H. C. (Cr. C.) 164.
[3] *Mahomed Asger*, (1874) 23 W. R. (Cr.) 11.

This section deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat.[1] It only applies when an abettor has done something constituting abetment prior to the commission of the crime itself, and when he has also been present at the commitment of the crime, but has not actually committed it.[2] The abetment must have been completed before the actual offence is committed.[3]

Sections 34 and 114.—According to s. 34 where a criminal act is done by several persons, each is liable as if it were done by himself alone; so that if two or more persons are present aiding and abetting in the commission of a murder, each will be tried and convicted as a principal, though it might not be proved which of them actually committed the act. This section appears to refer to cases somewhat different, namely, where a person by abetment, previous to the commission of the act, renders himself liable as an abettor, is present when the act is committed, but takes no active part in the doing of it.[4]

1. **'Who if absent would be liable to be punished as an abettor.'**—To bring a person within this section it is necessary first to make out the circumstances which constitute abetment, so that, "if absent," he would have been "liable to be punished as an abettor" and then to show that he was present when the offence was committed.[5] Previous concert is an essential factor in the constitution of the offence of abetment under this section. Where both master and servant were present and the latter received money for selling *ganja* in contravention of the terms of the license, it was held that having regard to the provisions of s. 34 the servant was liable for the illegal sale, but that this section would not apply "unless the person present abetting the offence would, if absent, have been guilty of abetment."[6]

Where no conspiracy, instigation, or act, or illegal omission, is proved and the abetment consists only of participation in the actual commission of the offence, s. 109 is the section applicable.[7]

2. **'Is present when the act or offence ... is committed.'**—The mere presence as an abettor of any person will not render him liable for the offence committed.[8] He must be sufficiently near to give assistance,[9] and there must be a participation in the act.[10] Presence is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should occasion arise. Presence during the whole of the transaction is not necessary. For instance, if several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.[11] If a man is

[1] *Barendra Kumar Ghosh*, (1924) 27 Bom. L. R. 148, 159, 52 Cal 197, P.C.

[2] *Ghosh*, (1915) 8 L. B. R 275, F.B.

[3] *Annavi*, (1924) 21 L. W 19, *Ram Ranjan Roy*, (1914) 42 Cal. 422

[4] *Jan Mahomed*, (1864) 1 W. R. (Cr.) 49.

[5] *Mussamut Niruni*, (1867) 7 W.R. (Cr.) 49; *Abhi Misser v. Lachmi Narain*, (1900) 27 Cal. 566; *Hansa Pathak v. Bansi Lal Das*, (1901) 8 C. W N 519, *Barendra Kumar Ghosh*, sup.

[6] *Keshwar Lal Shaha v. Girish Chunder Dutt*, (1902) 29 Cal. 496, 498.

[7] *Abdulla Khan*, (1899) P. R. No. 15 of 1899.

[8] *Abhi Misser v. Lachmi Narain*, sup. *Dwalkar Singh*, (1899) 27 Cal. 144; *Chatradhari Goala*, (1897) 2 C. W. N. 49. A doubt has been expressed, whether there can be abetment of a riot. Holmwood, J., said: "We can see no reason why a riot should not be abetted as well as any other crime. The only difficulty arises from the presence of the accused at the riot which renders them liable under s. 147 in the first instance if they gave orders to the mob and thereby joined in the common object of the unlawful assembly." *Dadan Gazi*, (1906) 10 C. W. N. 890, 891, 892.

[9] *William Stewart*, (1818) R. & R. 363; *Patrick Kelly*, (1820) R. & R. 421; *Howell*, (1839) 9 C. & P. 437.

[10] *Muradi*, (1916) P. W. R. (Cr.) No. 6 of 1917 See *Suraj Pandey*, (1920) 1 P. L. T. 461.

[11] *John Bingley*, (1821) R. & R. 446.

simply present whilst an offence is committed, but does not take any part in it, he will not be liable merely because he takes no steps to prevent the offence.[1]

The mere presence of a person on the occasion of giving a bribe and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.[2]

The act at the doing of which the abettor is present must amount to an offence. Thus this section is not applicable to the case of a person abetting the pledging of a thing entrusted to a stranger.[3]

If an abettor of an offence is, on account of his presence at its commission, to be charged under this section as a principal, his abetment must continue down to the time of the commission of the offence If he distinctly withdraws at any moment before the final act is done, the offence cannot be held to have been committed with his continuing abetment.[4]

A conviction under this section cannot stand where the abetment charged necessarily requires the presence of the abettor. To come within the section, the abetment must be complete apart from the presence of the abettor.[5] One R was [illegible] betting [illegible] orders [illegible] Two persons who were admittedly eye-witnesses to the occurrence were not called as witnesses by the prosecution. It was held that the conviction of R under s. 302 and this section could not stand as the only abetment charged necessarily required the presence of R, while to come within this section the abetment must be complete apart from the presence of the abettor.[6]

Cases.—Where the accused came with a number of armed men and forcibly carried off a crop without the consent of the owner, it was held that even if they took [illegible] be considered as principals.[7] [illegible] with a knife, but there was no proof [illegible] e of A's urging him on, or that A knew in any other way that B would be likely to use a knife. It was held that A could not be convicted of abetting an offence under s 326, but only of abetting an assault.[8]

Person watching outside a house while an offence is committed inside.—Where a person watched the door of a house while a murder was being committed inside he was held guilty of murder. A conspirator, who stood outside of a house, while his friends entered inside and looted it, and watched out in pursuance of the common design, was held to be guilty under this section.[9]

English cases.—A person waiting outside of a house to receive goods which a confederate was stealing in the house was held to be the 'principal' in the theft.[10] Where several persons were acting together, some in the shop and some out, and the property was stolen by the hands of one of those who were in the shop, it was held that those who were outside were equally guilty as principals.[11] J had employed M to load sacks of oats, the property of J, from a vessel on to the trams of K, who was to carry them on the trams to the warehouse of T. By previous concert between M and K oats were taken by M from two of the sacks and put into a nose bag in the absence of K, and hidden under a tram. K returned in a few minutes and

[1] 1 Hale P. C. 439; Foster, 350.
[2] *Deodhar Singh*, (1899) 27 Cal. 144; *Chatradhari Goala*, (1897) 2 C. W. N. 49.
[3] *Yedutha Subbaya*, (1912) 23 M. L. J. 722, [1912] M. W. N. 725.
[4] *Amrita Govinda*, (1873) 10 B. H. C. 497
[5] *Ram Ranjan Roy*, (1914) 42 Cal. 422.
[6] *Ibid.*
[7] *Shib Chunder Mundle*, (1867) 8 W. R. (Cr) 59.
[8] *Tha Mya*, (1908) 4 L. B. R. 271.
[9] *Khandu Vishnu Sathe*, (1899) 1 Bom. L. R. 351.
[10] *Joseph Owen*, (1825) 1 Mood. Cr. C. 96.
[11] *Charles Gogerly*, (1818) R. & R. 343.

took the nose bag and its contents from under the tram and took them away, M being then within three or four yards of him. It was held that as both had been present at some parts of the transaction, both could be convicted as principals in the larceny.[1] S was a barman at a refreshment bar, and C went up to the bar, called for refreshments and put down a florin. S served C, took up the florin, and took from his employer's till some money, and gave C as his change 18*s.* 6*d.*, which C put in his pocket and went away with it. On leaving the place he took some silver from his pocket and was counting it when he was arrested. On entering the bar signs of recognition took place between S and C, and C was present when S took the money from the till. It was held that C was liable as principal in the second degree.[2]

3. **'He shall be deemed to have committed such act or offence.'**—These words are very important. Their effect is that the person present is to be treated in the same way as if he had committed the offence. This is not the same thing as saying 'he has committed the offence.' The person present is deemed to have committed the offence, not that he has committed it. It is upon this ground that the previous conviction of an accused for an offence cannot be taken into consideration at a subsequent conviction for abetment for the purpose of enhancing punishment under s. 75.[3]

When one thing is not the same as another thing, but the Legislature says that it "shall be deemed to be" the same thing, it creates a legal fiction, and in that case "the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."[4] And fictions created by law shall never be contradicted so as to defeat the ends for which they are invented, though for every other purpose they may be contradicted.[5]

PRACTICE.

Evidence.—Prove (1) the committing of the principal offence.

(2) That the accused was present whilst it was being committed.

(3) That the accused was an abettor of the offence (s. 108).

It is necessary to prove acts which would constitute abetment if the accused was absent and then to show that the accused was present.

Procedure.—Same as for the offence abetted.

Abetment of offence punishable with death or transportation for life—if offence not committed.

115. Whoever abets the commission of an offence[1] punishable with death or transportation for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if act causing harm be done in consequence.

and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt[2] to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

[1] *Martin Kelly*, (1847) 2 C & K. 379.
[2] *Coggins*, (1873) 12 Cox 517.
[3] *Kanhia Antoo*, (1907) 10 Bom. L. R. 26.
[4] *Ex parte Walton*, (1881) 17 Ch. D. 746, 756.
[5] *Mostyn v. Fabrigas*, (1774) 1 Cowp. 161, 177; *Atmaram*, (1907) 9 Bom L. R. 681, 31 Bom. 480.

ILLUSTRATION.

A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or transportation for life. Therefore A is liable to imprisonment for a term which may extend to seven years and also to a fine; and, if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

COMMENT.

This section punishes the abetment of certain offences which are either not committed at all, or not committed in consequence of abetment, or only in part committed.

Offence punishable with death only—see s. 303.

Offences punishable with death or transportation for life—see ss. 121, 132, 194, 302, 303, 305, 307 and 396.

Offences punishable with transportation for life—see ss. 121A, 122, 124A, 125, 128, 130, 131, 194, 222, 225, 226, 232, 238, 255, 304, 307, 311, 313, 314, 326, 329, 364, 371, 376, 377, 388, 389, 394, 400, 409, 412, 413, 436, 438, 449, 459, 467, 472, 474 and 477.

Three different states of fact may arise after an abetment:—

(1) No offence may be committed. In this case the offender is punishable under this section and s. 116 for the mere attempt to cause crime.

(2) The very act at which the abetment aims may be committed, and will be punishable under ss. 109 and 110.

(3) Some act different, but naturally flowing from the act abetted, may be perpetrated, in which case the instigator will fall under the penalties of ss. 111, 112 and 113.

1. '*Offence.*'—*This term here denotes a thing punishable under the Code* or any special or local law (s. 40).

2. 'Hurt.'—See s. 319, *infra*.

PRACTICE.

Evidence.—Prove that the offence abetted, though not committed in consequence, is one punishable with death, or transportation for life.

Procedure.—Not bailable; and see the offence abetted.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted the commission by one XY of an offence of——punishable with death or transportation for life, which said offence was not committed in consequence of the abetment, and thereby committed an offence punishable under s. 115 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Abetment of offence punishable with imprisonment—if offence be not committed;

116. Whoever abets an offence[1] punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the

longest term provided for that offence, or with such fine as is provided for that offence, or with both;

and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

If abettor or person abetted be a public servant whose duty it is to prevent offence.

ILLUSTRATIONS.

(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.

(*b*) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.

(*c*) A, a police-officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(*d*) B abets the commission of a robbery by A, a police-officer, whose duty it is to prevent that offence. Here, though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

COMMENT.

This section provides for the abetment of an offence punishable with imprisonment. There is no provision in the Code for punishing abetment of an offence punishable with fine only, *e.g.*, offences under ss. 137, 154, 156, 278, 283, 290, and 294A (second para.)

1. **'Offence.'**—This term here means a thing punishable under the Code or some local or special law (s. 40).

2. **'Public servant.'**—See s. 21, *supra*

The enhanced punishment provided in the second clause of this section only applies to those public servants whose duty it is to prevent the commission of such offence. Public servants not falling in this category will be dealt with under the first clause. Where the accused was charged with having abetted the commission of an offence punishable under s. 161 of the Penal Code, the person abetted having been a Civil Surgeon, it was held that the enhanced imprisonment prescribed by the latter part of this section could not be awarded, as the Civil Surgeon was not a public servant within the words of the section, 'whose duty it is to prevent the commission of such offence.'[1]

CASE.

A Vakil of the High Court signed and sent a letter to another Vakil of that Court, who practised in District Courts subordinate thereto. The purport of this letter, which was one of several printed forms prepared for circulation to Vakils practising in districts, was to the effect that the Vakil, to whom it was addressed, "could easily send his clients' cases, both civil and criminal," to the writer, who would conduct them in that Court. And 'as a remuneration' the fees paid by the

[1] *Ramnath Surma Biswas*, (1873) 21 W.R. (Cr.) 9. See *Rameshwar Singh*, (1924) 3 Pat. 647.

clients would be shared between the writer and the Vakil who had sent the cases. It was held that that was incitement within the meaning of this section.[1]

PRACTICE.

Evidence—Prove that the offence abetted, though not committed, in consequence, is one punishable with imprisonment, or that the accused, or the person abetted, is a public servant; and that it was his duty to prevent the commission of such offence.

Procedure.—Same as for the offence abetted.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted the commission by one XY of an offence of——punishable with imprisonment, which said offence was not committed in consequence of the abetment, and thereby committed an offence punishable under s. 116 of the Indian Penal Code and within my cognizance [illegible] *Magis-*

Abetting commission of offence by the public or by more than ten persons.

117. Whoever abets the commission of an offence[1] by the public[2] generally or by any number or class of persons exceeding ten,[3] shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

ILLUSTRATION.

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.

COMMENT.

Under this section it will be sufficient to shew any instigation or other mode of abetment, though neither the effect intended nor any effect follows from it. This section stood as clause 94 in the draft Code and contained another illustration as follows:—

"A inserts in a newspaper an article advising soldiers to shoot every commanding officer who uses them harshly. A has committed the offence defined in this clause."

1. **'Offence.'**—This term here denotes a thing punishable under the Code or some local or special law (s. 40).

2. **'Public.'**—This word includes any class of the public or any community (s. 12, *supra*).

3. **'Any number or class of persons exceeding ten.'**—The offence abetted must have been intended to be committed by the public or by any number of persons exceeding ten collectively and conjointly.[2] Where, therefore, a person abetted twelve coolies to break their contracts, it was held that as each breach of contract was a separate and distinct offence, the abettor abetted twelve offences by twelve persons, and not one offence by twelve persons, and so was not punishable under this section.[3] Where the accused instigated people to become members

[1] *Parbati Charan Chatterji*, (1895) 17 All. 498, F.C.

[2] *Mihan Singh*, (1923) 1 Lah. 1.

[3] (1865) 3 W. R. (Cr.) 24.

of a Jatha which would be unlawful association within the meaning of s. 16 of the Criminal Law Amendment Act, it was held that his act came within the purview of this section.[1]

PRACTICE.

Evidence.—Prove (1) abetment of the offence in question by the accused.

(2) That such offence was to be committed by the public; or by more than ten persons.

Procedure.—Same as for the offence abetted.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, abetted the commission of an offence of——by——numbering more than ten persons, by (*state the act done by the accused in instigation*), and thereby committed an offence punishable under s. 117 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Concealing design to commit offence punishable with death or transportation for life—

118. Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence[1] punishable with death or transportation for life, voluntarily[2] conceals,[3] by any act or illegal omission,[4] the existence of a design[5] to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description for a term which may extend to three years: and in either case shall also be liable to fine.

if offence be committed;

if offence be not committed.

ILLUSTRATION.

A, knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this section.

COMMENT.

Under s. 107 concealment of a design to commit an offence constitutes an abetment. There must be an obligation on the person concealing the offence to disclose it. The concealment to be criminal must be intentional or at least with knowledge that it will facilitate the commission of an offence.

This section and ss. 119 and 120, all contemplate the concealment of a design by persons other than the accused to commit the offence charged.[2] These sections apply to the concealment of all offences except those which are merely punishable with fine. They deal with concealment prior to the commission of an offence. Sections 202 and 203 deal with subsequent concealment

[1] *Kirpal Singh*, (1925) 2 L. C. 19.
[2] *Rajcoomar Banerjee*, (1862) 1 Ind. Jur. (O. S.) 105; *Khandu Vishnu Sathe*, (1899) 1 Bom. L. R. 251.

1. **'Offence.'**—See s. 40, *supra*.

2. **'Voluntarily.'**—See s. 39, *supra*.

3. **'Conceals.'**—A person cannot be punishable if he is not legally bound to inform of the existence of a design and where he has not concealed the existence of the design by any overt act.[1] By s. 44 of the Criminal Procedure Code[2] every person whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit any offence punishable under sections 121—126, 130, 143—145, 147, 148, 302—304, 382, 392—399, 402, 435, 436, 449, 450, 456—460 of the Indian Penal Code shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

4. **'Illegal omission.'**—See s. 43, *supra*. It must be shown that the omission was likely to facilitate the commission of an offence.[3] Concealment by illegal omission can be an offence only when the omission is by some person bound by law to make report of offences.

5. **'The existence of a design.'**—There must exist a design to commit at some future time an offence of the kind described, and no conviction should take place until the Court has sufficient proof that such a design existed.

PRACTICE.

Evidence.—Prove (1) the existence of the design to commit an offence.

(2) That such offence was one punishable with death, or transportation for life.

(3) That the accused concealed the existence of such design (*a*) by his act or illegal omission; or (*b*) by his knowingly false representation.

(4) That he did so voluntarily.

(5) That he thereby intended to facilitate or knew that he would thereby facilitate, the commission of such offence.

(6) That the offence concealed has been committed (if the case falls under the first clause).

Procedure.—Not bailable, if the concealment is of an offence punishable with death or transportation for life and the offence is committed. Bailable, if the offence is not committed.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, with the intention of facilitating, or with the knowledge that you will thereby facilitate the commission of the offence of——(*specify the act*) (or omit to do——*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under s. 118 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Public servant concealing design to commit offence which it is his duty to prevent—

119. Whoever,[1] being a public servant, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence[2] which it is his duty as such public servant to prevent,

[1] *Bahadur*, (1882) P. R. No. 34 of 1882. See *Jhugroo*, (1865) 4 W.R. (Cr.) 2, where it is held that the knowledge of a design to commit dacoity, and the voluntary concealment of the existence of that design with the knowledge that such concealment would facilitate the commission of dacoity do not amount to an abetment of dacoity.

[2] Act V of 1898.

[3] *Keene*, (1866) 1 Agra 37.

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

if offence be committed;

shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both;

if offence be punishable with death, etc.;

or, if the offence be punishable with death or transportation for life, with imprisonment of either description for a term which may extend to ten years; or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

if offence be not committed.

ILLUSTRATION.

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here A has by an illegal omission concealed the existence of B's design, and is liable to punishment according to the provision of this section.

COMMENT.

Section 118 deals with persons who are not public servants. In this section the same principle is extended to public servants but with severer penalty. Every omission on the part of a public servant to disclose a design to commit an offence which it is his duty to prevent will be punishable under this section.

1. **'Public servant.'**—See s. 21, *supra*. The section only applies to that class of public servants whose duty it is to prevent such offence.

2. **'Offence'**—See s. 40, *supra*.

PRACTICE.

Evidence.—Prove (1) the existence of the design to commit an offence.

(2) That the accused was a public servant.

(3) That it was the duty of the accused, as such public servant, to prevent the commission of that offence.

(4) That the accused concealed the existence of such design (*a*) by his act or illegal omission; or (*b*) by his knowingly false representation.

(5) That the accused did so voluntarily.

(6) That the accused thereby intended to facilitate, or knew that he would thereby facilitate, the commission of such offence.

(7) That the offence concealed has been committed (if the case falls under the first clause).

Procedure.—Not bailable, if the concealment is of an offence punishable with death or transportation for life. Otherwise, the procedure is the same as that for the offence abetted.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, being a public servant, to wit——whose duty it was to prevent the commission of the offence of——with the intention of facilitating, or with the knowledge that you will thereby facilitate, the commission of the offence of ——did (*specify the act*) (*or* omit to do——*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under s. 119 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Concealing design to commit offence punishable with imprisonment—

120. Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence[1] punishable with imprisonment,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

if offence be committed;

if the offence be not committed.

COMMENT.

Section 118 deals with offences punishable with death or transportation for life: this section deals with offences punishable with imprisonment. The basic principle in both the sections is one and the same. All offences except those punishable with a fine are included in these two sections.

The illegal concealment by act or omission contemplated by this section has reference to the existence of a design on the part of third persons to commit an offence.[1]

1. 'Offence.'—See s. 40, *supra*.

PRACTICE.

Evidence—Prove (1) the existence of the design to commit an offence.
(2) That such offence was punishable with imprisonment.
(3) That the accused concealed the existence of such design
(*a*) by his act or illegal omission, or
(*b*) by his knowingly false representation.
(4) That he did so voluntarily.
(5) That he thereby intended to facilitate, or knew that he would thereby facilitate, the commission of such offence.

If the case falls under the first clause, prove
(6) That the offence concealed has been committed.

Procedure.—Same as for the offence abetted.

Charge.—See s. 118, *supra*.

[1] *Rajcoomar Banerjee*, (1862) 1 Ind. Jur. (O. S.) 105.

CHAPTER V-A.

CRIMINAL CONSPIRACY.

Definition of criminal conspiracy.

120-A. When two or more persons agree[1] to do, or cause to be done,—

(1) an illegal act, [2] or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

COMMENT.

This chapter has introduced into the criminal law of India a new offence, namely, the offence of criminal conspiracy. It was introduced by the Criminal Law Amendment Act.[1]

To constitute a criminal conspiracy there must be an agreement of two or more persons, to do an act which is illegal or which is to be done by illegal means. The object in view or the methods employed should be illegal, as defined in s. 43, *supra*. A distinction is drawn between an agreement to commit an offence, and an agreement of which either the object or the methods employed are illegal but do not constitute an offence. In the case of the former, the criminal conspiracy is completed by the act of agreement; in the case of the latter, there must be some act done by one or more of the parties to the agreement to effect the object thereof, that is, there must be an overt act.

Conspiracy differs from other offences in this respect, that in other offences the intention to do a criminal act is not a crime of itself until something is done amounting to the doing or the attempting to do some act to carry out the intention; conspiracy, on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether it is done or not.[2]

Object.—The Statement of Objects and Reasons stated:—"The sections of the Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter V and s. 121A of that Code. Under the latter provision it is an offence to conspire to commit any of the offences punishable by s. 121 of the Indian Penal Code or to conspire to deprive the King of the sovereignty of British India or of any part thereof, or to overawe, by means of criminal force or the show of criminal force, the Government of India or any Local Government, and to constitute a conspiracy under this section it is not necessary that any act or illegal omission should take place in pursuance thereof. Under s. 107 abetment includes the engaging with one or more person or persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. In other

[1] VIII of 1913.

[2] *Amrita Lal Hazra*, (1914) 42 Cal. 957; *Gulab Singh*, (1916) 14 A. L. J. R. 638.

words, except in respect of the offences particularized in s. 121A, conspiracy *per se* is not an offence under the Indian Penal Code.

"On the other hand, by the common law of England if two or more persons agree together to do anything contrary to law, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons, who so agree, commit the offence of conspiracy. In other words, conspiracy in England may be defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the parties to such a conspiracy are liable to indictment.

"Experience has shown that dangerous conspiracies are entered into in India which have for their object aims other than the commission of the offences specified in s. 121A of the Indian Penal Code, and that the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence, and when such a conspiracy is to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, and no express provision is made in the Code, provides a punishment of the same nature as that which might be awarded for the abetment of such an offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment of either description for a term not exceeding six months or with fine or with both."[1]

Scope.—The section is not applicable to offences committed before it came into force.[2]

1. **'Agree.'**—The gist of the offence is an agreement between the accused persons. When one of the two accused is acquitted of the charge under ss. 120 B and 302, the other cannot be convicted of the charge.[3]

2. **'Illegal act.'**—The word "illegal" is defined by s. 43.

Punishment of criminal conspiracy.

120B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

COMMENT.

Under this section the punishment for a criminal conspiracy is more severe if the agreement is one to commit a serious offence; it is less severe if the agreement is to commit an act which, although illegal, is not an offence punishable with death, transportation, or rigorous imprisonment for more than two years.

PRACTICE.

Evidence.—Prove (1) that the accused agreed to do or caused to be done an act.

(2) That such act was illegal or was done by illegal means.

[1] Gazette of India, 1913, Part V, p. 44.
[2] *Monmohan Roy*, (1915) 20 C. W. N. 292.
[3] *Osman Sardar*, (1923) 39 C. L. J. 264.

Where the act itself is not illegal prove further

(3) That some overt act was done by one of the accused in pursuance of the agreement.

On a charge of conspiracy general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the accused took part in it. Before evidence is let in under s. 10 of the Evidence Act, the defence is entitled to insist upon proof of reasonable ground for belief that the persons named in the charge have conspired together.[1]

In cases of conspiracy the agreement between the conspirators cannot generally be directly proved, but only inferred from other facts proved in the case.[2]

Where two persons took a house in which a considerable number of pieces of fire-arms was found with tools and implements, and work had been actually done to some of the parts of fire-arms, it was held that the Court ought to infer a conspiracy to manufacture arms.[3]

Where the proof of a conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence, the proper course is to put the accused on their trial for that offence.[4]

Procedure.—If the offence falls under clause (1)—Cognizable, if the offence which is the object of the conspiracy is cognizable, but not otherwise—Warrant or Summons, as the offence for which conspiracy is entered into—Bailable, if the offence which is the object of the conspiracy is bailable, otherwise not—Not compoundable—Court of Session if the offence which is the object of the conspiracy is triable exclusively by such Court: in the case of all other offences, Court of Session, Presidency Magistrate or Magistrate of the First Class.

If the offence falls under clause (2)—Warrant—Summons—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the First Class.

In cases of indictment for conspiracy, when two persons are indicted and are tried together either both must be convicted or both must be acquitted. Where, therefore, three persons were charged with having entered into a conspiracy, and two of them were acquitted, the third person could not be convicted of conspiracy, whether the conviction be upon the verdict of a jury or upon his own confession.[5]

Once a charge of conspiracy is framed, anything done in pursuance of the conspiracy can be tried at the trial for conspiracy. It is not an irregularity or an improper exercise of discretion in putting in the form of charges specific acts specially relied on as against each individual accused to show that they joined in the conspiracy. Where the accused is charged with an offence of conspiracy and acts of cheating in pursuance of conspiracy, the charge is not bad and it is open to the prosecution to prove such acts in order that from them the existence of the conspiracy may be proved.[6]

Sanction.—Sanction of the Local Government is necessary before instituting proceedings under this section.[7]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, agreed to do (*or caused to be done*) [an illegal act, to wit——] [an act, viz.,——by illegal means, to wit——and that same act, viz.,——, was done in pursuance of the agreement] and thereby

[1] *Amrita Lal Hazra*, (1914) 42 Cal. 957.

[2] *Khagendra Nath Chaudhuri*, (1914) 19 C. W. N. 766.

[3] *Harsha Nath Chatterjee*, (1914) 42 Cal. 1153.

[4] *Kali Das Basu*, (1915) 39 C. L. J. 151.

[5] *Gulab Singh*, (1916) 14 A. L. J. R. 680; *Babnokand*, (1915) P. R. No. 17 of 1915; *Osman Sardar*, (1922) 39 C. L. J. 231.

[6] *Abdul Salim*, (1921) 35 C. L. J. 279, 26 C. W. N. 680; *Billinghurst* v. *Blackburn*, (1923) 27 C. W. N. 821.

[7] Criminal Procedure Code, s. 196-A.

committed an offence punishable under s. 120 B of the Indian Penal Code and within my cognizance [*or* the cognizance of the Court of Session (*or* High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

The charge of conspiracy must not be indefinite. The counts must state the illegal purpose and design of the agreement entered into between the accused with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law.[1]

When two or more persons have conspired together for committing some offence, and one or more of them have committed that offence in pursuance of the conspiracy but others have not, it is permissible to charge and try them together for the conspiracy as also for the substantive offence.[2]

A charge under this section is not bad because it states no definite date on which the accused agreed, or the names of persons in respect of whom the conspirators agreed to commit an offence.[3]

Punishment.—The punishment awardable under this section varies according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed, the punishment is that provided by s. 109 of the Code, though, strictly speaking, there should not be a conviction in such cases of conspiracy but of abetment. If it has not been committed, the punishment is governed by s. 116 of the Code.[4] Where, for instance, there is only a conspiracy to manufacture arms, without an actual manufacture, the sentence should be imposed under this section read with s. 19 (*a*) of the Arms Act and s. 116 of the Code, and the maximum term of imprisonment awardable under these sections is nine months' rigorous imprisonment.[5]

[1] *Amrita Lal Hazra*, (1914) 42 Cal. 957
[2] *Ibid*
[3] *Balmokand*, (1915) P. R. No. 17 of 1915
[4] *Harsha Nath Chatterjee*, (1914) 42 Cal. 1153; *Khagendra Nath Chaudhuri*, (1914) 19 C. W. N. 706; *Balmokand*, sup
[5] *Ibid*

CHAPTER VI.

OF OFFENCES AGAINST THE STATE.

Waging or attempting to wage war, or abetting waging of war, against the Queen.

121. Whoever[1] wages war[2] against the Queen,[3] or attempts to wage such war, or abets the waging of such war,[4] shall be punished with death, or transportation for life, and shall also be liable to fine.

ILLUSTRATIONS.

(*a*) A joins an insurrection against the Queen. A has committed the offence defined in this section.

(*b*) A in India abets an insurrection against the Queen's Government of Ceylon by sending arms to the insurgents. A is guilty of abetting the waging of war against the Queen.

COMMENT.

Principle.—The section embraces every description of war, whether by insurrection or invasion, or war beyond our territories; and complicity in an abetment of insurrection, invasion, or foreign war; and further a British subject residing in British territory, who abets the waging of war against the British Government outside British territory, is guilty, no matter whether the British Government takes the initiative and invades the hostile territory or awaits the attack of the enemy, or whether the persons waging war are foreigners or persons owing allegiance to the Queen.[1]

To constitute this offence no specified number of persons is necessary.[2] "There is no difference," says Foster,[3] "between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours, etc., and those other disorderly tumultuous assemblies which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary shew and apparatus of war before men- [illegible] the other circumstances of swords, guns, drums, colours, etc., have been added. But I think the merits of the case have never turned singly on any of these circumstances. In the cases of *Damaree* and *Purchase*, . . . there was nothing *given in evidence* of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to the rising; and yet the want of these circumstances weighed nothing with the court, though the prisoners' counsel insisted much on that matter. The number of the insurgents supplied the want of military weapons; and they were provided with axes, crows and other tools of the like nature, proper for the mischief they intended to effect.

"The true criterion therefore in all these cases is, *quo animo* did the parties assemble? For if the assembly be upon account of some *private* quarrel, or to take revenge on *particular* persons, the statute of treasons hath already determined that point in favour of the subject. . .Upon the same principle and within the reason and equity of the statute, risings to maintain a *private* claim of right, or to destroy

[1] *Mahomed Shuffee*, All. Unrep.
[2] 3 Coke's Inst. 9.
[3] Crown Cases, 208, 209, 210.

particular inclosures, or to remove nuisances, which affected or were thought to affect in point *of interest the parties assembled for these purposes*, or to break prisons in order to release *particular* persons without any other circumstance of aggravation, have not been holden to amount to levying war within the statute."

The offence of engaging in a conspiracy to wage war, and that of abetting the waging of war against the King, under this section, are offences against the Penal Code only, and are not treason or misprison of treason.[1]

1. 'Whoever.'—The authors of the Code say :—" The laws of a particular nation or country cannot be applied to any persons but such as owe allegiance to the Government of the country, which allegiance is either perpetual, as in the case of a subject by birth or naturalization, etc., or temporary as in the case of a foreigner residing in the country. They are applicable of course to all such as thus owe allegiance to the Government, whether as subjects or foreigners, excepting as excepted by reservations or limitations which are parts of the laws in question."[2]

2. 'Wages war.'—These words " seem naturally to import a levying of war by one who throwing off the duty of allegiance arrays himself in open defiance of his sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the realm."[3] There must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature.[4]

The word " wages " has the same meaning as " levying " used in the English statute. In *Gordon's case*[5] Lord Mansfield said : " There are two kinds of levying war :—one against the person of the King ; to imprison, to dethrone, or to kill him ; or to make him change measures, or remove counsellors :—the other, which is said to be levied against the Majesty of the King, or, in other words, against him in his regal capacity ; as when a multitude rise and assemble to attain by force and violence any object of a general public nature ; that is levying war against the Majesty of the King ; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn Government , and by force of arms, to restrain [illegible]

" Every insurrection [illegible] person of the king, be it to dethro[illegible] easures of government, or to rem[illegible] ings all amount to levying war within the statute, whether attended with the pomp and circumstances of open war or not. And every conspiracy to levy war for these purposes, though not treason within the clause of levying war, is yet an overt act within the other clause of compassing the King's death.

" Insurrections in order to throw down *all* inclosures, to alter the established [illegible]

they are not levelled at the person of the king, they are against *his royal majesty* ; and, besides, they have a direct tendency to dissolve all the bonds of society, and to [illegible]

the insurgents have no special interest,—rising to effect these ends by force and numbers, are, by construction of law, within the clause of levying war. For they are levelled at the king's Crown and royal dignity."[6]

[1] *Amiruddin*, (1871) 7 Beng. L R 63.
[2] 2nd Rep., s. 13.
[3] *Ibid*, s. 10
[4] *Frost*, (1839) 9 C. & P. 129, 4 St Tr. (N. S.) 85.
[5] (1784) 21 St. Tr. 486, 644.
[6] Foster on Crown Cases, pp. 210, 211 ; *Gordon Trials*, (1784) 21 St. Tr. 486, 490 ; *Kunhi Kadir*, (1921) 15 L. W. 311, 30 M. L. T. 123

An assembly armed and arrayed in a warlike manner for any treasonable purpose is *bellum levatum* though not *bellum percussum*. Lifting and marching are sufficient overt acts without coming to a battle or action.[1]

No amount of violence, however great, and with whatever circumstances of a warlike kind it may be attended, will make an attack of one subject on another high treason. On the other hand, any amount of violence, however insignificant, directed against the King will be high treason, and as soon as violence has any political object, it is impossible to say that it is not directed against the King, in the sense of being armed opposition to the lawful exercise of his power.[2] When the object of a mob is not mere resistance to the District Magistrate but the total subversion of the British power and the establishment of the Khilafat Government, a person forming part of it and taking part in its actions is guilty of waging war.[3]

"There is a diversity between levying of war and committing of a great riot, a rout or an unlawful assembly. For example, as if three or four or more do rise to burn or put down an enclosure in Dale, which the lord of the Manor in Dale hath made there in that particular place; this or the like is a riot, a rout, or an unlawful assembly, and no treason. But if they had risen of purpose to alter religion established within the realm or laws, or to go from town to town generally, and to cast down enclosures, this is levying of war, (though there be no great number of the conspirators within the purview of this Statute), because the pretence is public and general and not private in particular."[4]

The Calcutta High Court has held that the expression 'wages war' in this section must be construed in its ordinary sense, and a conspiracy to wage war, or the collection of men, arms and ammunition for that purpose is not waging war.[5]

3. **'Against the Queen.'**—The word 'Queen' denotes the sovereign for the time being of the United Kingdom of Great Britain and Ireland (s. 13).

4. **'Abets the waging of such a war.'**—It is not essential that as a result of the abetment the war should be waged in fact. But the main purpose of the [illegible] ly a remote and [illegible] nstigator. The [illegible] manner would not be sufficient to save him from the operation of the section; but the Court ought to be satisfied that he has instigated the waging of war, *i.e.*, the use of violence for the purpose of effecting innovations of a general and public nature.[6]

The authors of the Code say: 'We have made the abetting of hostilities against the Government in certain cases, a separate offence, instead of leaving it to the operation of the general law laid down in the chapter on abetment. We have done so for two reasons. *In the first place, war may be waged against the Government* by persons in whom it is no offence to wage such war, by foreign princes and their subjects. Our general rules on the subject of abetment would apply to the case of a person residing in the British territories who should abet a subject of the British Government in waging war against that Government; but they would not reach the case of a person who, while residing in the British territories, should abet the waging of war by any foreign prince against the British Government. In the second place, we agree with the great body of legislators in thinking, that though in general [illegible] been carried into [illegible] been carried into [illegible] high offences against the state; for state-crimes, and especially the most heinous

[1] Foster, 218.

[2] Stephen's History of Criminal Law of England, Vol. II, p. 2[illegible], Foster, 208, 211.

[3] *Kunki Kadir*, (1921), 30 M. L. T. 125, 15 L.W. 311.

[4] *Stroke*, 3 Inst., 9.

[5] *Barindra Kumar Ghose*, (1909) 37 Cal. 467.

[6] *Hasrat Mohani*, (1922) 24 Bom. L. R. 855, 6 Bom. Cr. C. 235.

and formidable state-crimes, have this peculiarity, that if they are successfully committed, the criminal is almost always secure from punishment. The murderer is in greater danger after his victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the Government As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations. We have therefore not thought it expedient to leave such plots and preparations to the ordinary law of abetment...Under that general law, a conspiracy for the subversion of the Government would not be punished at all if the conspirators were detected before they had done more than discuss plans, adopt resolutions and interchange promises of fidelity. A conspiracy for the subversion of the Government, which should be carried as far as the gunpowder treason or the assassination plot against William the Third, would be punished very much less severely than the counterfeiting of a rupee, or the presenting of a forged cheque. We have, therefore, thought it absolutely necessary to make separate provision for the previous abetting of great state offences. The subsequent abetting of such offences may, we think, without inconvenience, be left to be dealt with according to the general law."[1] It may be noted in view of the last sentence that s. 121A which deals with conspiracies was added to the Code subsequently.

Under the English law, mere words spoken or written, however wicked and abominable, if they do not relate to any act or design then actually on foot against the life of the King or the levying of a war against him and in the contemplation of the speaker, do not amount to treason. Under the Penal Code, the waging or levying of a war and the abetting of it are put upon the same footing by this section. That is, the abetting of the waging of war is under the Code as much an offence of treason as the waging of war itself.

According to the general law as to abetment (s 108, Expln. 2), to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused. This applies to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded, and abetment which has failed, this section does away with that distinction so far as the offence of waging war is concerned and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever.[2]

The word "abets" in this section does not mean something less than that word as used in s. 107. The abetment contemplated under the former section need not be abetment of some war in progress; there may be and usually is instiga- [illegible] instigation of this kind is abetting [illegible] as a man only tries to inflame [illegible] of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore of abetting the waging of war.[3]

The accused published a book of poems where in a spirit of blood-thirstiness and murderous eagerness directed against the Government and "White" rulers ran through the poems; the urgency of taking up the sword was conveyed in unambiguous language; and an appeal of blood-thirsty incitement was made to the people to take up the sword, form secret societies, and adopt guerrilla warfare for the purpose of rooting out "the demon" of foreign rule. It was held that the

[1] Note C, pp. 236, 237. Bom L. R 105, 116.
[2] *Ganesh Damodar Savarkar*, (1909) 12 [3] *Ibid*, pp. 119, 120.

poems conveyed to readers an instigation to wage war; and that the offence of abetting the waging of war was committed.[1]

Inducing or assisting subjects of a State at war to return to their own country after declaration of war will amount to abetment.[2]

If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, or which weakens or tends to weaken the power of the King and of the country to resist or attack the enemies of the King and country, he gives aid and comfort to the King's enemies within the meaning of the Treason Act.[3] The United Kingdom being at war with Germany, a British subject went to Germany and there endeavoured to persuade other British subjects, who were prisoners of war in Germany, to join the armed forces of the enemy, and took part in an attempt to land, arms and ammunition in Ireland for the use of the enemy, it was held that he was guilty of high treason.[4] Such conduct will amount to abetment under this section.

Constructive levying of war.—"Constructive levying of war is in truth more directed against the Government than the person of the King; though in legal construction it is a levying of war against the King himself. This is when an insurrection is raised to reform some national grievance, to alter the established law or religion, to punish Magistrates, to introduce innovation of a public concern, to obstruct the execution of some general law by an armed force, or for any other purpose which usurps the Government in matters of a public and general nature. On the trial of Lord George Gordon the Court of King's Bench declared their unanimous opinion that an attempt, by intimidation and violence to force the repeal of a law, was a levying war against the King. The [illegible] stion was the 18 Geo. III, c. 60, for relieving Roman C[illegible] and the treasonable act given in evidence [illegible] the assembling a great multitude of people, and encourag[illegible] to surround the two Houses of Parliament and commit different acts of violence there and elsewhere, with a view to intimidate them to a repeal of the Statute. Insurrections of this nature, though not levelled directly against the person of the King, are yet an attack upon his regal office, and tend to dissolve all Government, society, and order. The King is bound in duty to enforce the Acts of the Legislature and uphold their authority: any resistance, therefore, to these, must, in its consequences, extend to the endangering of his person and Government, by involving the State in a general distraction; on which account this species of treason falls properly within the clause of levying war against the King...Of the same nature is an assembling together for the purpose of destroying all meeting houses or all bawdy houses, under colour of reforming a public grievance; or an insurrection to reduce by force the general price of victuals, to enhance the common rate of wages, to level all enclosures, to expel all foreigners, to release all prisoners, or to reform by numbers or an armed force any real or imaginary grievance, of a public and general nature, in which the insurgents have no peculiar interest. Against such insurrections Magistrates, Sheriffs, and indeed all private persons, may use force to suppress them without any special commission, in the same manner as they may oppose foreign enemies coming hostilely into the kingdom."[5]

As to the meaning of the word 'abets' see also s. 107, *supra*.

Foreigners.—All persons owing allegiance to the Sovereign may be guilty of this offence, but not foreigners, who owe no allegiance and for whom the Indian Legislature has no power to make laws. Therefore, a prince or subject of a foreign State by which war is lawfully waged against our Government, is not within the

[1] *Ganesh Jaimaldar Sarkarkar*, (1909) 12 Bom. L. R. 103.
[2] *Sue Akbar*, (1915) 1 K. B. 616.
[3] *Casement*, (1917) 1 K. B. 98.
[4] *Ibid.*
[5] 1 East P. C. Chap. 2, s. 17. To the same effect is Foster, Cr. C., 208, 211 cited in *Lord Gordon's case*, (1784) 21 St. Tr. 486, 490.

meaning of the section. But foreigners owing local allegiance are within the section.[1]

Jurisdiction.—Where the prisoner was charged with having, at Calcutta, abetted the waging of war against the Queen, and was tried at the Sessions Court of Patna, it was held that the Court of Session at Patna had jurisdiction to try him, because he was a member of a conspiracy, other members of which had done acts within the district of Patna in pursuance of the original concerted plan, and with reference to the common object. The Court of Patna had jurisdiction also, because the prisoner had sent money from Calcutta to Patna by hundis, and, until that money reached its destination, the sending continued on the part of the prisoner.[2]

Amendment.—The words "also be liable to fine" were substituted for the words "forfeit all his property" by Act XVI of 1921, s. 2.

CASES.

The accused was seen in the front rank of a crowd of two or three thousand persons which attacked a force of police and military with swords, knives and bludgeons. The police had to fire in self-defence and it was only after nine persons were killed and three wounded that the mob retreated. The accused was then arrested and at his direction the mob dispersed. The accused had for some time previously been engaged in a propaganda to the effect that no revenue should be [illegible]

Railways and telegraphs must be destroyed. In the crowd there was carried by the side of the accused a flag in the front of the mob in which there was the following inscription: "God the greatest. The Khilafat go to work light-mindedly and you will certainly succeed and God will be with you." It was held that the accus [illegible]

ing o [illegible]

by the people of India by all peaceful and legitimate means," by substituting the words "possible and proper" for the words "peaceful and legitimate." In the course of the speech, he advocated the immediate starting of a parallel Government independent of all British control, by setting up on a separate and permanent foundation Courts, schools, art, industry, commerce, army, police and national parliament, with a view to obtain Swaraj. The speaker contemplated the present establishment of the above by peaceful and non-violent means; but he dipped into the future and foresaw that if the British Government resorted to [illegible] Mahomedans at least would [illegible] "kill them whenever you find [illegible] "So long as the Government confines to the use of chains and fetters non-co-operation can remain peaceful as it is [illegible] to gallows or machine [illegible] violent." It was held [illegible] the aims and objects [illegible] vernment, the accused [illegible] d a clear and direct incitement to action as distinguished from a state of mind.[4]

[1] M. & M. See *R.* v. *Lynch*, (1903) 1 K. B. 444, where a British subject joined the Boers to fight against the British.

[2] *Amir Khan*, (1871) 9 Beng. L. R. 36.

[3] *In re Umayyathantagath Puthen*, (1922) 15 L. W. 311.

[4] *Hasrat Mohani*, (1922) 24 Bom. L. R 885.

The District Magistrate of a district marched to a place called Tirarangadi with a posse of soldiers and reserve police to arrest certain Khilafat leaders. Next morning after arrests had been effected a large body of Moppillas were marching from the west. The District Magistrate and the Deputy Inspector-General took a column of 120 police and 60 soldiers to meet them. One and a half miles from Tirarangadi they saw a big mob fifty yards away. The Deputy Superintendent went forward and ordered the mob to disperse but it came straight on in regular formation with two flags and a number of men in front. There were twenty-four swords. The police charged them with the bayonet and some of the police fired their guns. The mob then retired about thirty yards and those who had weapons dropped them. The accused was seen in front of the mob with a stick. It was held that it was doubtful whether the part taken by the accused could be said to be waging war under this section.[1]

PRACTICE.

Evidence.—Prove (1) that the accused waged war, or attempted to do so, or abetted the same.

(2) That such war was against the King-Emperor.

It is not incumbent on the prisoner to shew what the object and meaning of the acts done was, but it is the duty of the prosecutors to make out their case against the prisoner.[2] In a case in which the accused was charged with abetting the waging of war against the Queen it was held that the Calcutta Gazette and the Gazette of India were admissible in evidence to prove the proclamation and official communications of the Government relating to the war.[3]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Sanction.—Sanction of Government is necessary before prosecution could be instituted under this section.[4]

Where an order under s. 196 of the Criminal Procedure Code authorized a particular police officer to prefer a complaint of offences under ss. 121A, 122, 123 and 124 of the Penal Code, "*or under any other section of the said Code which may be found applicable to the case,*" and the examination of the complainant also referred to the same sections, it was held that no complaint under this section was thereby authorized by the Local Government or in fact preferred, that the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court, authorizing a complaint under the section which was not in fact made thereafter; nor did s. 532 of the Criminal Procedure Code apply in such a case.[5]

The Local Government cannot delegate to any other body or person the controlling power and discretion of determining whether cognizance shall be taken by the Court of an offence mentioned in s. 196 of the Criminal Procedure Code, and its judgment must be specifically directed to the particular section, and no other, under which the prosecution is to be carried on, and the order or authority should be preceded by a deliberate determination in this respect. An order authorizing a complaint under certain specified section "*or under any other section found applicable,*" if it means found by any one other than Government, involves a delegation which cannot be sustained.[6]

The sanction of the Local Government must be strictly proved in the manner laid down in s. 78 of the Evidence Act, and the identity of the prisoner with the person named in the section must be established.[7]

[1] *Palathingal Valia Peedikakkal,* [1924] M. W. N. 548.
[2] *Frost,* (1839) 9 C. & P. 129.
[3] *Ameeroddeen,* (1871) 15 W. R. (Cr.) 25.
[4] Criminal Procedure Code, s. 196.
[5] *Barindra Kumar Ghose,* (1909) 37 Cal. 467; *Bal Gangadhar Tilak,* (1897) 22 Bom. 112, dissented from.
[6] *Barindra Kumar Ghose,* sup
[7] *Aung Do,* (1886) S. J. L. B. 389.

In enacting this section, the Legislature has not thought fit to limit in any way the period within which a prosecution for an offence against it may be commenced as in the case of the English statute.[1]

Joinder of charges.—Charges under ss. 121A, 122 and 123 can be joined together.[2]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused person*) as follows :—

That you, on or about the——day of——, at——, waged war (*or* attempted to wage war, *or* abetted the waging of war) against His Majesty the King, Emperor of India, and thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Session (*when the charge is framed by a Presidency Magistrate, for* Court of Session *substitute* High Court).

And I hereby direct that you be tried by the said Court on the said charge.[3]

121-A. Whoever[1] within or without British India[2] conspires[3] to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India,[4] or of any part thereof, or conspires to overawe, by means of criminal force[5] or the show of criminal force, the Government of India[6] or any Local Government,[7] shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years and shall also be liable to fine.

Conspiracy to commit offences punishable by section 121.

Explanation.—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

COMMENT.

Object.—This section provides for the offence of conspiring to wage war against the King. Before this section was introduced[4] such a conspiracy was punishable only when it amounted to an abetment, that is, when an act or illegal omission took place in pursuance of that conspiracy. The present section immensely tightens the grip of the law on treasonable combinations. It is similiar to the Treason-Felony Act[5] passed in 1848.

It was thought right to make the offence of conspiring by criminal force, or by show of criminal force, more severely penal than the offence of actually taking part in an unlawful assembly, having for its object the overawing of the Government. The reason was this, that persons who, by conspiring to bring about such a result, set the whole matter in motion, seemed more criminal and far more deserving of punishment than those who were their mere tools, and only took part in such an assembly.

The essence of an offence under this section is the agreement to do all or any of the unlawful acts mentioned in the section.[6]

The provisions of the section are comprehensive and no formidable elements either in men or means are required to satisfy the definition of a conspiracy to wage war. No act or illegal omission is necessary for such a conspiracy, the mere agreement of two or more being sufficient. The determination of the Court in any case that a conspiracy to wage war has been established may not therefore necessarily imply the existence of a serious menace to the constitution or the stability of constituted authority in India.

[1] *Ameeroddeen*, (1871) 15 W. R. (Cr.) 25, 27.
[2] *Barindra Kumar Ghose*, (1909) 37 Cal. 467.
[3] Criminal Procedure Code, Sch. V. No xxviii (1).
[4] Act XXVII of 1870, s. 4.
[5] 11 & 12 Vic., c. 12, s. 3.
[6] *Nilalanta*, [1912] M W. N. 207.

Chapters IV, V and XXIII apply to this offence.[1]

[illegible] with two kinds of conspiracies.—

[illegible] out British India (*a*) to commit any of the offen[illegible] (*b*) to deprive the King of the sovereignty of British India or any part thereof.

2. Conspiring to overawe by means of criminal force, or the show of criminal force, the Government.

1. **'Whoever.'**—See s. 121. When people take part, however little, in committing this offence, the fact that they were foolish or ignorant does not mitigate the offence.[2]

2. **'British India.'**—See s. 15, *supra*.

3. **'Conspires.'**—See s. 107, *supra*. A conspiracy is a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.[3] The explanation to this section says that to constitute a conspiracy under this section it is not necessary that any act or illegal omission should take place in pursuance thereof.[4]

Where several persons are charged with the same conspiracy it is a legal impossibility that some should be found guilty of one conspiracy and some of another. An accused not shewn to be a member of the conspiracy charged is entitled to demand an acquittal however bad his record may be and however much he may be suspected of this or that offence.

Association for music, gymnastic exercises and fencing with sticks amongst young men living in the same village or attending the same school are ordinary incidents of village or school life, and could hardly with propriety be proved as forming elements in any alleged scheme or conspiracy to wage war against the King-Emperor, and all the more so when they are shewn to have been accompanied by a complete absence of secrecy and rather by a courting of publicity.[5]

4. **'To deprive the Queen of the sovereignty of India.'**—This expression corresponds to the clause "to deprive or depose him (King) or them (his successors) from the style, honour or the King's name of the Imperial Crown of this realm, or of any other of His Majesty's dominions or countries," existing in the English Statute against conspiracies.[6]

5. **'Criminal force.'**—See s. 350, *infra*.

6. **'Government of India.'**—See s. 16, *infra*.

7. **'Local Government.'**—See s. 3 (29) of the General Clauses Act (X of 1897).

Amendment.—The words "and shall also be liable to fine" were added by Act XVI of 1921, s. 3.

PRACTICE.

An indictment or information for conspiracy must contain a statement of the facts relied upon as constituting the offence, in ordinary and concise language, with as much certainty as the nature of the case will admit.[7]

Evidence.—Prove (1) that the accused had entered into a conspiracy. Though to establish a charge of conspiracy there must be an agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each

[1] Act XXVII of 1870, s. 13.

[2] *Nga Chow*, (1907) 1 B. L. T. 27.

[3] *Barindra Kumar Ghose*, (1909) 37 Cal. 467.

[4] *Lalit Mohan Chuckerbutty*, (1911) 38 Cal. 559; *Nilakanta*, [1912] M. W. N. 207.

[5] *Nons Gopal Gupta*, (1911) 15 C. W. N. 593, 594.

[6] 36 Geo. III., c. 7.

[7] *Pulin Behary Das*, [1912] 15 C. L. J. 517, 16 C. W. N. 1105.

other's presence. The agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. Nor is it necessary that all should have joined in the scheme from the first; those who come in at a later stage are equally guilty, provided the agreement be proved.[1]

(2) That the conspiracy was to commit an offence punishable under s. 121 *or* to deprive the King-Emperor of the sovereignty of British India *or* to overawe by means of criminal force or show of criminal force the Government of India or any Local Government.

With reference to evidence admissible as part of the *res gestæ* in prosecutions for conspiracy, or generally of an offence committed by confederates, it is an established rule that any act done by one of the party in pursuance of the original concerted plan and with reference to this common object is, in the contemplation of the law, the act of the whole party.[2]

If it be intended to give in evidence against the accused the acts of any other person it must be shewn that such person was also a member of the same conspiracy, and that the act done was in furtherance of the common design. The prosecutor may either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different parties and so prove the conspiracy.

When persons have been taken into custody and are in a condition which makes it impossible for them to act in aid or furtherance of the conspiracy, that is, when, so far as they are concerned, the conspiracy has come to an end, the acts of persons who were members of the conspiracy and who are still free to act in pursuance thereof, are not admissible as against them; these acts can no longer be deemed the acts of co-conspirators.

There is a distinction between persons who enter into a conspiracy for the sole [illegible] in the criminal [illegible] or from some [illegible] nation against them. These latter persons may be truly called accomplices. There is not on the part of such persons an original purpose of discovering the secret designs of the conspirators and of disclosing them for the benefit of the public, which is the vital element in this class of cases.

The prosecution is not obliged to prove that the persons accused actually met and laid their heads together and after a formal consultation came to an express agreement to do evil. On the contrary, if the facts as proved are such that the Jury as reasonable men can say there was a common design and the prisoners were acting in concert to do what is wrong, that is evidence from which the Jury may suppose that a conspiracy was actually formed.

It is from this point of view that overt acts may properly be looked to as evidence of the existence of a concerted intention; indeed, the conspiracy is usually closely bound up with the overt acts, because, in many cases, it is only by means of the overt acts that the existence of the conspiracy can be made out. But the criminality of the conspiracy is independent of the criminality of the overt acts.

It is not necessary to establish by direct evidence that the accused persons did enter into an agreement to conspire.

The criminality of the conspiracy lies in the concerted intention, and once reasonable grounds are made out for belief in the existence of the conspiracy amongst the accused, the acts of each conspirator in furtherance of its object are evidence against each of the others; and this, whether such acts were done before or after his entry into the combination, in his presence, or in his absence.[3]

[1] *Barindra Kumar Ghose*, (1909) 37 Cal. 467.

[2] See Indian Evidence Act, s. 10.

[3] *Pulin Behary Das*, (1912) 15 C. L. J. 517, 16 C. W. N. 1105.

(2) That the accused knew of such design.

(3) That he concealed the same.

(4) That he intended thereby to facilitate the waging of such war; or that he knew that it was likely that such concealment would facilitate the same.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of Government is necessary for prosecution under this section.[1]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you——knowing that on or about the——day of——, at——, certain persons had designed to wage war against the King-Emperor, concealed the existence of such design by (*mention the act or omission*) intending by such concealment to facilitate (*or* knowing it to be likely that such concealment would facilitate) the waging of such war, and thereby committed an offence punishable under s. 123 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Assaulting Governor General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.

124. Whoever, with the intention of inducing or compelling the Governor General of India,[1] or the Governor of any Presidency,[2] or a Lieutenant-Governor, or a Member of the Council of the Governor General of India, or of the Council of any Presidency, to exercise or refrain from exercising in any manner any of the lawful powers of such Governor General, Governor, Lieutenant-Governor or Member of Council,

assaults[3] or wrongfully restrains,[4] or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such Governor General, Governor, Lieutenant-Governor or Member of Council,

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section is an amplification of the third clause of s. 121-A. It punishes severely assaults, etc., made on high officers of Government.

1. '**Governor General of India.**'—See s. 16, *supra.*
2. '**Presidency.**'—See s. 18, *supra.*
3. '**Assault.**'—See s. 351, *infra.*
4. '**Wrongful restraint.**'—See s. 339, *infra.*

PRACTICE.

Evidence—Prove (1) that the person assaulted, etc., was one of the persons described in this section.

(2) That the accused assaulted such person, or attempted to do so; or that the accused wrongfully restrained him or attempted to do so; or that the accused used criminal force or show thereof.

(3) That the accused did as mentioned in (2) in order to overawe that person, or in the attempt to do so (*see* Assault, Criminal force, Wrongful restraint].

[1] Criminal Procedure Code, s. 196.

(4) That the accused did as above with the intention of inducing or compelling that person to exercise, or to refrain from exercising, any of his lawful powers.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of Government is necessary for prosecution under this section.[1]

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused person*) as follows:—

That you, on or about the——day of——, at——, with the intention of inducing the Hon'ble A. B., Member of the Council of the Governor General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under section 124 of the Indian Penal Code, and *within the cognizance of the Court of Session [or High Court]*.

And I hereby direct that you be tried by the said Court on the said charge. (*Vide* Criminal Procedure Code, Sch. V. xxviii, 2).

Sedition.

124-A. Whoever[1] by words, either spoken or written,[2] or by signs, or by visible representation,[3] or otherwise, brings or attempts[4] to bring into hatred or contempt,[5] or excites or attempts to excite disaffection[6] towards, Her Majesty[7] or the Government established by law in British India,[8] shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.[9]—The expression "disaffection" include disloyalty and all feelings of enmity.

Explanation 2.—Comments expressing disapprobation[10] of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

COMMENT.

Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and laws of the Empire. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitutions of the realm, and generally all endeavours to promote public disorder.[2]

[1] Criminal Procedure Code, s. 196

[2] *Sullivan* and *Pigott*, (1888) 11 Cox 44, 45.

By Act IV of 1898 the present section was substituted for the former section which stood thus:—

"Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

"*Explanation.*—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause."

The above section together with s. 121-A was avowedly inserted in this Chapter relating to offences against the State, with a view to fill up an inadvertent omission of a special provision for the punishment of the offence of abetment of rebellion. In the words of Sir Fitz James Stephen, it was felt that as the causes which produce rebellion are wide, and spread over a longer period, a wider definition of abetment in the case of rebellion was necessary than sufficed in the case of theft or murder. In giving effect to this view, the pr[illegible] were followed, and the section, as [illegible] sioners in 1837, was finally incorp[illegible] representing the law of England of the present day "though much more compressed, and more distinctly expressed."[2]

The present section differs from the repealed section in four ways:

(1) In the repealed section, the offence consisted in exciting or attempting to excite feelings of "disaffection," in the present section, in addition to this, the feeling of "hatred" or "contempt" is made punishable.

(2) In the old section the object of the feeling was "the Government established by law in British India," in the new section, in addition to this "Her Majesty" [illegible]

(3) [illegible] "Exciting disaffection," under th[illegible]

(4) The old section had one Explanation, the new has three, and they differ from the former.

Principle.—The offence of sedition consists in exciting or attempting to excite in others certain bad feelings towards (*a*) the King-Emperor, or (*b*) towards the Government. Defamatory statements concerning the Sovereign will be punished under this section.

The offence does not consist in "exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within s. 124-A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section."[3] A direct incitement to stir up disorder or rebellion is not necessary.[4]

Scope.—This section places absolutely on the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them.

[1] Act XXVII of 1870, s. 5.

[2] Per Ranade, J., in *Ramchandra Narayan*, (1897) 22 Bom. 152, 160, F.B.

[3] Per Strachey, J., in *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 135.

[4] *Burns*, (1886) 16 Cox 355, 365.

The offence consists in the making use of any means for the purpose of bringing the Government into hatred or contempt.

Intention essential.—The essence of the crime of sedition consists in the intention with which the language is used. But this intention must be judged primarily by the language itself. Intention for this purpose is really no more than meaning. When a man is charged in respect of anything he has written or said, the meaning of what he said or wrote must be taken to be his meaning, [illegible] mean by the people [illegible] ged as seditious, due [illegible] expression and for high-flown or classical language.[1]

"The intention of a speaker, writer or publisher may be inferred from the particular speech, article or letter, or it may be proved from that speech, article or letter considered in conjunction with what such speaker, writer or publisher has said, written or published on another or other occasions. Where it is ascertained that the intention of the speaker, writer or publisher was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written or published, could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did in fact excite such feelings of disaffection."[2]

Strachey, J., has elaborately discussed the circumstances which should be taken into account in judging the intention of the accused. In his charge to the jury in *Tilak's case*[3] he said: "You will thus see that the whole question is one of the intention of the accused in publishing these articles. Did they intend to excite in the minds of their readers feelings of disaffection or enmity to the Government? Or did they intend merely to excite disapprobation of certain [illegible]

These are the questions which you have to consider. But you may ask, how are we to ascertain whether the intention of the accused was this, that, or the other? How can we tell whether his intention was simply to publish a historical discussion about Shivaji and Afzul Khan, or whether it was to stir up, under that guise, hatred against the Government? There are various ways in which you must approach the question of intention. You must gather the intention as best you can from the language of the articles; and you may also take into consideration, under certain conditions, the other articles that have been put in evidence, such as the articles about the plague and the Diamond Jubilee and so forth. But the first and most important index of the intention of the writer or publisher of a newspaper article is the language of the article itself. What is the intention which the articles themselves convey to your minds? In considering this, you must first ask yourselves what would be the natural and probable effect of reading such articles in the minds of the readers of the *Kesari*, to whom they were addressed? Read these articles, and ask yourselves how the ordinary readers of the *Kesari* would probably feel when reading them. Would the feeling produced be one of hatred to the Government, or would it be simply one of interest in a poem and a historical discussion about Shivaji and Afzul Khan and so forth? If you think that the only feelings which such readers would be excited to are feelings of interest in a poem of a historical or ethical discussion, then you may presume that that is all the accused

[1] [illegible]

[2] Per Edge, C. J., in *Amba Prasad*, (1897) 20 All. 55, 69, F.B.

[3] *Bal Gangadhar Tilak*, (1897) 22 Bom. 122, 139, 142.

by evidence which in most cases would be impracticable. The law will presume the intention—whether good or bad—from the language and conduct of the accused, and it will be then for him to show that his words were harmless and his motive innocent.[1] The Bombay High Court has laid down that it is impossible to convict the accused under this section unless it was found that he had an intention of exciting disaffection. In this case the accused had made a declaration, under s. 4 of the Press Act, XXV of 1867, that he was the owner of a certain press called the "Atmaram Press." The management of the press was carried on by another person who looked after the whole concern. At this press was printed a bulky book which purported to be one devoted to metaphysics and philosophy and was styled "Ekashloki Gita." It also contained seditious matter at long and varied intervals and interspersed with discussions of religious matters. The accused took no part in the management of the press; nor did it appear that he had read the book or acquainted himself with the nature of it. He was charged with sedition and convicted of the same. On appeal it was held by Chandavarkar, J., that the cumulative effect of the surrounding circumstances was such as to make it as probable that the accused had not read the book or that he had known its seditious object; and that the evidence having thus been evenly balanced and equivocal, a reasonable doubt arose as to the guilt of the accused, the benefit of which must be given to him. Heaton, J., held that it was impossible to convict the accused under this section unless it was found that he had an intention of exciting disaffection, and that the evidence fell very far short of proving the intention; that, attempt to do a thing must necessarily involve some intention; for a man cannot be said to attempt to do that which he has absolutely no knowledge of doing and no intention to do.[2] The question of intention is one of fact.[3]

Innuendo.—If a particular article is charged as being seditious on the ground that it says more than appears on the face of it, it is the duty of the prosecution to show that it has in fact the guilty meaning or intent attributed to it.[4]

1. **'Whoever.'**—Not only the writer of seditious articles but whoever uses in any way words or printed matter for the purpose of exciting feelings of disaffection to the Government is liable under the section, whether he is the actual author or not.[5]

"It is . . . not sufficient for a person who has published matter calculated to excite hatred, contempt or disaffection, to say: 'This is not my own work,' because the adoption of the means, the publishing thereof was in itself his work, and therefore it is, that the printer or publisher of an article, which is open to these objections is always to be held liable . . . For everything that appears in his paper, the editor, printer, or publisher is as responsible as if he had written the article himself.' No doubt the question of his liability to punishment is a matter which has to be seriously considered, and circumstances may considerably mitigate the penalty which has to be imposed. But his liability to conviction under the section is not affected by the circumstance that the publisher who used the words did not originate them. The result of his using the words in his publication is the same whether he had written the article himself, or made use of it in other ways. Whoever the composer might be, whoever wrote or caused it to be written, the person who used it for purposes of exciting disaffection is guilty of an offence under s. 124-A."[6] The registered printer of a paper is liable to b[illegible]cted for a seditious article which appears in it and cannot escape [illegible] a plea of temporary absence, want of actual [illegible] consent [illegible] even if proved.[7] Section 7 of Act XXV of 18[illegible] printer r[illegible] [illegible]ever may be the writer of the

[1] *Jiwan Singh* [illegible] 379. [illegible] *adhar Tilak*, (1897) 22 Bom.
[2] *Shankar Sh*[illegible] (1910) [illegible] *Bose*, (1891) 19 Bom. L. R. 675.
[3] *Ganesh Balva*[illegible] 12 [illegible] J., [illegible] *Bhopat*- L. R. 21.
[4] *Joy Chandra S*[illegible] 1 of 1905.

articles in the paper, unless he can prove absence from the office of the paper in good faith and without knowledge that during his absence seditious matter would be published. It is not absence in good faith for the printer to go away, but with full knowledge of what is going to happen in his absence and for the purpose of shirking his liability.[1] Where the editor of a newspaper was convicted and sentenced under this section and the accused made his declaration as printer and publisher thereafter, and continued so to act after the editor had resumed work on release from jail, and further allowed his name to appear as such, though he was absent from the town of publication of the paper when certain seditious articles appeared therein, and engaged *during the period* in his own private business *without taking any interest in* the paper, it was held that he had not made out the *bona fides* of his absence, and was, therefore, legally responsible for the articles.[2]

A person, making a statutory declaration under Act XXV of 1867, that he is the printer and publisher of a newspaper, is presumably liable as such printer or publisher but may rebut such presumption. The liability of a proprietor is not governed by the Act and depends upon different considerations. The ground of liability in his case is that he authorized the publication of the incriminating article. The authority may be established by direct proof or as a reasonable inference from all the facts of the case. Under s. 14 of the Evidence Act, it is open to the Court to presume that the proprietor, having the control of the paper, authorizes the publication of the matter which appears in it. Such a presumption may be improper in the case of a large paper, with a separate editor responsible for the selection and publication of the literary matter, but in the case of a petty paper, with no responsible editor and published under the eye of the [illegible] originally given, such authority may be inferred from the conduct of the parties, such as the publication of other libellous matter without any remonstrance or interference from the proprietor when it has come to his knowledge. Other issues of the same paper containing libellous matter are relevant as evidence to prove such authority. Mere absence of the proprietor at the time of the publication of the libel will not rebut such presumption if during such absence he exercises complete control over the paper.[3] In a Bombay case Chandavarkar, J., said that "a declara- [illegible] the Court performing the functions of a jury may presume that the owner had a hand in the printing and was aware of the contents and character of the book. But whether such a presumption is warranted in any individual case must depend upon its own facts and circumstances. The presumption...is not conclusive; it is not one of law but of fact and it is open to the accused to rebut it...The object is to create a sense of responsibility, so that if any public mischief occurs owing to any action or conduct of the press, the law can at once know who must *prima facie* be held responsible for it...the Courts should be careful to draw no inference of guilt against the declarant from the mere fact of declaration but must consider the surrounding circumstances and probabilities to enable them to arrive at a conclusion whether the declarant had a hand in the printing and publishing so as to bring him within the operation of s. 124-A...where the charge is under that section."[4]

[1] *Phanendra Nath Mitter*, (1908) 35 Cal. 945.

[2] *Surendra Prasad Lahiri*, (1910) 38 Cal. 227.

[3] *Gadicherla Harisarvothama Rao*, (1909) 32 Mad. 338.

[4] *Shankar Shrikrishna Dev*, (1910) 12 Bom. L. R. 675, 678, 679.

It is not sufficient for an accused person to say that what was put into his paper of a seditious character was put in during his absence and without his authority. If he did not authorize it, it is for him to prove that as a fact, because it must be within his knowledge whether any such authority was given.[1]

Every man must be taken to intend the natural consequences of his own deliberate act, and therefore the law will not excuse a journalist or newspaper writer on the ground that he writes for hire merely, as that the commercial interests c[illegible] question.[2]

[illegible]er of the *Indian Sociologist* the Court, in convicting the printer, said: "If the accused published the libel, there is no distinction in law between what he wrote in it and what any other person wrote in it."[3]

2. 'Written.'—Disaffection may be excited in a thousand different ways. A poem, an allegory, a drama, a philosophical or historical discussion may be used for the purpose of exciting disaffection, just as much as direct attacks upon the Government. Seditious writing, while it remains in the hands of the author unpublished, will not make him liable. Publication of some kind is necessary.[4]

Sending a seditious matter by post addressed to a private individual not by name but by designation as the representative of a large body of students amounts to publication if it is opened by anybody.[5]

The sending through the post office of a packet containing a manuscript copy of a seditious publication with a covering letter requesting the addressee to circulate it to others, when the same was intercepted by another person and never reached the addressee, was held to amount to an attempt to commit sedition.[6]

3. 'Visible representations.'—"A seditious libel does not necessarily consist of written matter, and it may be evidenced by a woodcut or engraving of any kind,"[7] or by [illegible]

The accuse[illegible] tion Personified." The photo port[illegible] (*rashtra purusha*) standing on the lotus of self-reliance (*svavalambana*) wearing bracelets labelled self-rule (*svarajya*) and hail motherland (*vande mataram*) and holding in his right [illegible]

In the left-hand bottom corner of the photo there were two dogs barking at the *rashtra purusha* labelled as "Dependents on others" (*paravalambee*) and near them stood two persons called "Effeminate" (*janani*). In the left-hand top corner there were portraits of Shivaji, Ramdas, Goddess of India's Independence (*Shri Bharat Svatantrata*) and Swami Vivekanand. Beneath these portraits were two texts: (1) "He who depended upon others, lost his cause," and (2) "Will the force of injustice (immorality) or physical force prevail"? In the top right-hand corner there were portraits of Chaphekar brothers, Ranade, Chiplunkar, Phadke, Khudi-[illegible] Bose, Prabhulla Chaki, Tatya Tope, Rani of Jhansi and Nana Sahab, some of [illegible] [illegible]rder [illegible] [illegible]ots."

The Sessions Judge in convicting the accused of sedition observed: "From the above description of the picture and its meaning it is clear that it is of a seditious nature and would be likely to excite hatred and disaffection to Government in the

[1] *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421; *Luxman Narayana Joshi*, (1899) 2 Bom. L. R. 286.

[2] *Sullivan*, (1868) 11 Cox 44.

[3] *Aldred*, (1909) 22 Cox 1.

[4] *Bal Gangadhar Tilak*, (1897) 22 Bom. 122, 139; Foster, 198.

[5] *Suresh Chandra Sanyal*, (1912) 39 Cal. 606.

[6] *Surendra Narayan Adhicary*, (1911) 39 Cal. 522.

[7] Per Fitzgerald, J., in *Sullivan*, sup. p. 51.

[8] *2nd Rep.*, s. 24.

minds of persons who look at it." The High Court in confirming the conviction said: "The main evidence is really the evidence of the photograph itself, and although some of the photographs therein contained are photographs of gentlemen against whom there is nothing whatever to be said, yet, we think, we must take the photograph as a whole. And so considering it we are clear that its symbolism plainly exhorts to hatred of the established Government. That is made plain throughout the picture, and particularly by the selection as models for imitation of persons who have rebelled against the existing Government or have been executed for murder or convicted of sedition."[1]

The writer of an article may be guilty of sedition, no matter how guardedly he attempts to conceal his real object, but the registered printer and publisher cannot be punished if the concealed object is not established by the evidence on the record.[2]

4. **'Attempts, etc.'**—An attempt is an intentional preparatory action which fails in object—which so fails through circumstances independent of the person who seeks its accomplishment.[3] When a man does an intentional act with a view to attain a certain end, and fails in his object through some circumstances independent of his own will, then that man has attempted to effect the object at which he aimed.[4] To constitute an attempt all that is necessary is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted.[5] It is not necessary in order to bring the case within this section that it should be shewn that the attempt was successful. Attempt does not imply success. It is merely trying Whoever tries to excite, attempts to excite, etc., is held to come within this section. Whether the intention has achieved the result is immaterial If the accused tried to excite hatred and contempt, the fact that he failed to do so will be no justification for him. That will be a matter to be decided in determining the sentence [6] If the attempt is made, the accused cannot shelter himself behind the fact that those to whom he may have addressed himself have either been too discreet or too temperate to act upon the obvious meaning of his teaching[7]; or that the peaceful circumstances and conditions of the Empire render his act innocuous.[8]

To determine whether an attempt to commit the offence of sedition is committed by the publication of certain articles, it is necessary to determine what is their true meaning, what is the *innuendo* they convey, and what is the covert meaning, if any, they have. The probable, or natural effect of the words used must then be decided, that is whether they are calculated to bring into hatred or contempt the Government, or excite against it feelings of disloyalty or enmity. If they are so, then it should be considered whether that was not the intention with which the words were used or published. For the purpose of determining whether or not that was the intention, the principle, that a man must be taken *prima facie* to intend that which is the natural result of his acts under the circumstances and in the particular case in which that act has taken place or occurs, should be applied. In determining whether the intention with which any document is published is or

[1] *Devising Mohansing*, Criminal Appeal No. 334 of 1910, decided on 3rd November, 1910, by Batchelor and Rao, JJ. Unrep (Bom.). See to the same effect *Shridhar Waman Nagarkar*, Criminal Appeal No. 395 of 1910, decided on 1st December 1910, by Batchelor and Rao, JJ.

[2] *Manomohan Ghose*, (1910) 38 Cal. 253.

[3] *Luxman Narayan Joshi*, (1899) 2 Bom. L. R. 286. See discussion of 'attempt' in *In re The Amrita Bazar Patrika*, (1919) 30 C. L. J. 289.

[4] *Vinayek Narayen Bhatye*, (1899) 2 Bom L. R 304

[5] *Ganesh Bikant Modak*, (1909) 12 Bom L. R. 21

[6] *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421, 439; *Bal Gangadhar Tilak*, (1908) 10 Bom. L. R. 848.

[7] *Luxman Narayan Joshi*, sup; *Bhaskar Balvant Bhopatkar*, sup., *Burns*, (1886) 16 Cox 355, 365.

[8] *Bhaskar Balvant Bhopatkar*, sup., p 449.

is not seditious, the writer must be deemed to intend the consequence which would naturally follow from his work taking into consideration the time and circumstances of the case.[1]

In order to decide whether or not a speech constitutes an attempt to excite hatred, contempt, or disaffection, it should be viewed from the standpoint of the types of persons to whom it was primarily addressed. On the one hand, their limitations, if any, have to be taken into account: on the other, the fact that the words may convey to them a literal meaning must not be lost sight of. The time and the place are also factors which should be considered.[2]

Existence of a grievance, real or supposed, is no excuse or answer to an attempt to arouse towards Government feelings of hatred, contempt or disaffection.[3]

An attempt to publish sedition is complete as soon as a copy of the newspaper containing it is sold. It is none the less an attempt because something external to the accused happened which prevented a perusal of the article by the buyers or any other member of the public.[4]

In cases decided under the old section the expression "attempts to excite, etc.," is explained as follows:—

"If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling."[5]

An attempt to excite feelings of disaffection to the Government is equivalent to an attempt to produce hatred of Government as established by law, to excite political discontent and alienate the people from their allegiance.[6]

5. **'Hatred or contempt.'**—"With the feeling of hatred the law can do nothing because it cannot see into the heart and cannot reform it, but law does step in when any attempt is made to excite that feeling in others."[7]

'Hatred' and 'contempt' towards Government may be created by writings imputing to the Government base, dishonourable, corrupt or malicious motives in the discharge of its duties or by writings unjustly accusing the Government of hostility or indifference to the welfare of the people.[8]

The amount or intensity of disaffection is absolutely immaterial except perhaps in dealing with the question of punishment.[9]

6. **'Disaffection.'**—Explanation 1 says that the word 'disaffection' "includes disloyalty and all feelings of enmity."

The following judicial interpretations given to this word should be noted:

1. 'Disaffection' means a feeling contrary to affection, in other words, dislike or hatred.[10]

[1] *Vinayek Narayen Bhatye*, (1899) 2 Bom. L. R. 394.

[2] *U. Damadaya*, (1923) 1 Rang. 211.

[3] *Vinayek Narayen Bhatye*, sup.

[4] *Ganesh Balvant Modak*, (1909) 12 Bom. L. R. 21.

[5] Per Petheram, C. J., in *Jogendra Chunder Bose*, (1891) 19 Cal. 35, 44.

[6] *Ramachandra Narayan*, (1897) 22 Bom. 152, 156, F.B.

[7] Per Batty, J., in *Bhaskar Balwant Bhopatkar*, (1906) 8 Bom. L. R. 421, 437.

[8] *Besant*, (1916) 39 Mad. 1085.

[9] *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 134.

[10] Per Petheram, C. J., in *Jogendra Chunder Bose*, sup., p. 44.

2. It means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government.[1]

3. It means political alienation or discontent, a spirit of disloyalty to the Government or existing authority.[2]

4. It signifies political alienation or discontent, that is to say, a feeling of disloyalty to the Government or existing power, which tends to a disposition not to obey but to resist and attempt to subvert that Government or power. It cannot be construed to mean an absence of or the contrary of affection, or love, that is to say, dislike or hatred.[3]

5. It is a positive political distemper, and not a mere absence or negation of love or good-will. It is a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, it secretly seeks to alienate the people, and weaken the bond of allegiance, and prepossesses the minds of the people with avowed or secret animosity to Government, a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motives to it, makes men indisposed to obey or support the laws of the realm, and promotes discontent and public disorder.[4]

6. It means 'disloyalty.' Anyone who excites or attempts to excite feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites or attempts to excite feelings of 'disaffection.'[5]

7. Disaffection is a feeling and not the want of a feeling. It is not the absence of affection. It is not indifference, but a positive emotion not necessarily prompting the action, but with a tendency to influence conduct just as all our feelings do. It is not necessarily limited to "feelings of enmity." It is intended to express a feeling which can only exist between the ruler and the ruled. Feelings of personal affection in such a connection are not demanded but only such feelings as the relation of the subject to the Government necessarily implies. This relation implies the recognition, on the part of the ruled, of the Government as a Government. The ruler must be accepted as a ruler, and disaffection which is the opposite of that feeling, is the repudiation of that spirit of acceptance of a particular Government as ruler.[6]

When the Bill for amending this section was introduced it was proposed to add the words "or ill-will" at the conclusion of Explanation 1. But the Select Committee thought that the expression "all feelings of ill-will" was too wide and vague. They said: "It is only when feelings of ill-will amount to disloyalty or enmity that they constitute such disaffection as is contemplated by the clause. A certain amount of ill-will may be compatible with genuine loyalty."[7] In view of this opinion some of the interpretations given above, notably those of Strachey, J., and Edge, C. J., are not of any authority.

7. **'Her Majesty.'**—'Her Majesty' means the sovereign for the time being of the United Kingdom of Great Britain and Ireland (s. 13).

8. **'Government established by law in British India.'**—This means British rule and its representatives as such,—the existing political system as distinguished from any particular set of administrators.[8] In this sense the 'Government' includes not only the Government of India but also Local Government.[9] 'Government' does not mean the person or persons for the time being. It means

[1] Per Strachey, J., in *Bal Gangadhar Tilak*, (1897) 22 Bom 112, 134

[2] Per Farran, C J., in *Ramachandra Narayan*, (1897) 22 Bom. 152, 156, F.B.

[3] Per Parsons, J., in *ibid*, p. 159.

[4] Per Ranade, J., in *ibid*, p. 162.

[5] Per Edge, C J., in *Amba Prasad*, (1897) 20 All. 55, 68, F.B.

[6] Per Batty, J., in *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421, 437, 438.

[7] G I, 1898, Part V, p 14.

[8] Per Strachey, J., in *Bal Gangadhar Tilak*, sup., p. 135.

[9] *Besant*, (1916) 39 Mad. 1085.

the person or persons collectively, in succession, who are authorized to administer Government for the time being. One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government because they are only individuals, and not representatives of that abstract conception which is Government.[1] There is a clear distinction between the Government and the individual officers employed under the Government. Words bringing the former into hatred or contempt constitute sedition, but similar words directed against the latter can only infringe the law of libel.[2]

The expression 'Government established by law in British India' means "the various Governments constituted by the statutes relating to the Government of India now consolidated into the Government of India Act of 1915 (5 & 6 Geo. V., c. 61) and would denote the person or persons authorized by law to administer Executive Government in any part of British India. The feelings, which it is the object of s. 124-A to prohibit, may be excited towards the Government in a variety of ways;...it is possible to excite such feelings towards the Government by an unfair condemnation of any of its services. Whether in a particular case the condemnation of any service is sufficient to excite any feeling of hatred or contempt or disaffection towards Government by law established in British India, must depend upon the nature of the criticism, the position of the service in the administration and all the other circumstances of that case. It would be a question of fact to be determined in each case with reference to its circumstances."[3] The phrase "Government established by law in British India" means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of Government is entrusted.[4]

"The Government established by law acts through human agency, and admittedly the Civil Service is its principal agency for the administration of the country in times of peace. Therefore, where,...you criticise the Civil Service *en bloc*, the question whether you excite dissatisfaction against the Government or not seems to me a pure question of fact. You do so if the natural effect of your words, infusing hatred of the Civil Service, is also to infuse hatred or contempt of the established Government whose accredited agent the Civil Service is. You avoid doing so if, preferring appropriate language of moderation, you use words which do not naturally excite such hatred of Government. It is...a mere question of fact."[5]

As to the definition of 'Government,' see s. 17, *supra*. The expression 'established by law in British India' restricts the meaning which this word otherwise has.

As to the definition of 'British India', see s. 15, *supra*.

Incitement to secure 'Swaraj.'—'Swaraj' does not necessarily mean Government of the country to the exclusion of the present Government, but its ordinary acceptance is 'home-rule' under the Government. The incitement of the members of a public meeting to exert themselves to secure 'Swaraj' does not amount to sedition.[6] This case draws a sharp line between change of Government and change of form of Government. Advocating 'home-rule' for India is not *per se* objectionable. But such advocacy must not offend against existing laws.[7]

9. Explanations 2 and 3.—Both these explanations have a strictly defined and limited scope. They have no application whatever unless the article in question criticises "the measures of Government" or "administrative or other action of the

[1] Per Batty, J., in *Bhaskar Balvant Bhopatkar*, (1906) 8 Bom. L. R. 421, 441.
[2] *Raj Pal*, (1922) 3 Lah. 405.
[3] Per Shah, J., in *Bal Gangadhar Tilak*, (1916) 19 Bom. L. R. 211, 270.
[4] *Sundar Lal*, (1919) 42 All. 233, F.B.
[5] Per Batchelor, J., in *Bal Gangadhar Tilak*, *sup.*, p. 264.
[6] *Beni Bhushan Roy*, (1907) 34 Cal. 991.
[7] *Besant*, (1915) 39 Mad. 1035.

Government" and that too "without exciting or attempting to excite hatred, contempt, or disaffection." The object of the Explanations is to protect *bona fide* criticism of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers.

The Select Committee to which the Bill to amend this section was referred, in their Report say: "We have added explanation 3 to make it clear that criticism on the action of Government is not confined to cases in which it is sought to bring [illegible]

. . . . . .

the appointment. We have made consequential amendments in explanation 2 to make the language of the two explanations uniform."

Explanations 2 and 3 give a perfect freedom to journalists, to publicists, to orators and public speakers to discuss the measures and administrative acts of Government, to disapprove of them, to attack them, and to use forcible and strong language if necessary, and to do everything legitimate and honest in bringing before the public or the Government the fact that their measures or their actions are disapproved by a section of the public or by that particular speaker or journalist. But a publicist, a journalist, or a speaker, has no right to attribute dishonest or immoral motives to Government. Criticism, though harsh and uncompromising, must be free from the taint of language which is likely to arouse or calculated to engender feelings of enmity, hatred, or disloyalty against Government.[1]

The limits to which a public speaker or writer can go in criticising the acts of Government are well summarized by Strachey, J.—"A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income-tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers.—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section."[2]

Liberty of the press means complete freedom to write and publish without censorship and without restriction, save such as is absolutely necessary for the preservation of society. It might be the province of the press to call attention to the weakness or imbecility of a Government when it was done for the public good. It would also be its duty to complain of a grievance which the public good required to be removed, though the very assertion of a grievance creates discontent to a certain extent. Such writings, though trenching closely upon sedition, should receive the protection of a jury.

Every man is free to write as he thinks fit, but he is responsible to the law for what he writes; he is not, under the pretence of freedom, to invade the rights of the community, or to violate the constitution, or to promote insurrection, or endanger the public peace, or create discontent, or bring justice into contempt, or embarrass its functions...Political writing, when confined within proper and lawful limits, is not only justifiable, but is protected for the public good, and such

[1] *Bal Gangadhar Tilak*, (1908) 10 Bom L. R. 848, *Phanendra Nath Mitter*, (1908) 35 Cal. 945.

[2] *Bal Gangadhar Tilal*, (1897) 22 Bom. 112, 137, approved of in *Manomohan Ghose*, (1910) 38 Cal. 253.

writings are to be regarded in a free and liberal spirit. A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government—he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives; with the same motives a writer may freely criticise the proceedings of courts of justice and of individual judges—nay, he is invited to do, and to do so in a free and fair and liberal spirit. The law does not seek to put any narrow construction on the expressions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion.[1]

Changes in policy and changes in measures are liable to criticism, and to criticise and urge objections to them is a special right of a free press in a free country. Every liberty is given to all men to express their opinions, so long as they do not misuse or abuse that power to the injury of others, including among injuries to others, injury to the State.[2] Where the object of the speaker was to obtain for Indians an increased and gradually increasing share of political authority and to subject the administration of the country to the control of the people (*svarajya*) and there was a distinct pleading that the political changes thus advocated should be obtained by lawful and constitutional means, it was held that there was no infringement of the provisions of this section.[3]

An article imputing wholesale bribery to the ministerial officers of the law Courts and to the lower officers of the police force, and expressing grave doubts as to whether the Government ever inquire into such abuses, so much is it occupied with investigations of boycott, dacoity and sedition, published when sedition is rife and the minds of people excited, may have the effect of creating a feeling that the Government is not doing its duty, and exceeds the limits of fair comment and is seditious, irrespective of the question of the truth of the allegations.[4]

10. **'Disapprobation.'**—This means simply disapproval. It is quite possible to disapprove of a man's sentiments or actions and yet to like him.[5] It is quite possible to like or to be loyal to any one, whether an individual or a Government, and at the same time to disapprove strongly of his or its measures. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly.[6]

It is not sedition for a writer to describe the Reform scheme as being monstrous and misbegotten, because it is not founded on democratic principles and not a genuine reform or a genuine initiation of constitutional progress, or to assert that some of the police officials and the judiciary are corrupt, unscrupulous and partial, or to state that if an organisation which he believes to be lawful is suppressed by proclamation it is arbitrary, and that in such case the responsibility will not rest on him for the madness which crushes down open and legal political activity in order to give a desperate and sullen notion into the hands of fiercely enthusiastic and unscrupulous forces, or to inculcate the doctrine of passive resistance or refusal of co-operation with the Government within legal limits, or to describe the British Courts in India as ruinously expensive.[7]

Dramatic performances.—Under the Dramatic Performances Act the Local Government may prohibit any dramatic performance of a nature likely to excite feelings of disaffection to the Government[8] and authorize seizure of all its

[1] *Sullivan*, (1868) 11 Cox 44, 49, 50; *Collins*, (1839) 9 C. & P. 456. See also *Lambert & Perry*, (1910) 2 Camp. 398.

[2] Per Batty, J. in *Bhaskar Balvant Bhopatkar*, (1906) 6 Bom. L. R. 421, 441. See the observation of Sadasiva Aiyar, J., in *P. Varadarajulu Nayudu*, (1919) 37 M. L. J. 81, 88.

[3] *Bal Gangadhar Tilak*, (1916) 19 Bom. L. R. 211.

[4] *Joy Chandra Sarkar*, (1910) 38 Cal. 214.

[5] Per Petheram, C. J. in, *Jogendra Chunder Bose*, (1891) 19 Cal. 35, 44.

[6] Per Strachey, J., in *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 137.

[7] *Manomohan Ghose*, (1910) 38 Cal. 253.

[8] Act XIX of 1876, s. 9.

paraphernalia.[1] Persons taking part in any such prohibited performance may be prosecuted and convicted.[2] A conviction under this Act is no bar to a prosecution under this section.

Liability for letters of correspondents.—The editor of a paper is liable for unsigned seditious letters appearing in the paper.[4]

Dissemination of seditious matter.—Section 108 of the Criminal Procedure Code can be brought into operation when any person is found to be disseminating seditious matter. It runs as follows:—

"Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate or Magistrate of the first class specially empowered by the Local Government in this behalf, has information that there is within the limits of his jurisdiction any person who, within or without such limits, either orally or in writing, or in any other manner intentionally disseminates or attempts to disseminate, or in anywise abets the dissemination of,—

(*a*) any seditious matter, that is to say, any matter the publication of which is punishable under s. 124-A of the Indian Penal Code, or

(*b*) any matter the publication of which is punishable under s. 153-A of the Indian Penal Code, or

(*c*) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

such Magistrate, if in his opinion there is sufficient ground for proceeding, may (in manner hereinafter provided), require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year [illegible]

No proceedings shall be taken [illegible] proprietor, printer or publisher of any publ[illegible] printed and published in conformity with, [illegible] Registration of Books Act, 1867, with reference to any matter contained in such publication except by the order or under the authority of the Governor General in Council or the Local Government or some officer empowered by the Governor General in Council in this behalf."

Liability for publishing seditious extracts.—The law does not excuse the publication in newspapers of writings which are in themselves seditious libels, merely because they are copied from foreign newspapers as items of news. This will be a matter for the jury in considering the criminal intent; but they must also consider the circumstances under which the writings were copied, the state of the country at the time, the class of persons to whom the newspaper is addressed, the nature of [illegible] their absence, if none, the [illegible] intent of the publisher is [illegible]

Republication of seditious articles from another newspaper, one of which only was filed as an exhibit by the prosecution and used in the case against the editor of that paper on his trial for sedition, is held to be not a report of the proceedings of a Court of Justice, and not justifiable.[6]

Where the compiler of certain Hindi Readers, meant for the use of children, collected together seditious utterances and sentiments which had already been published and the cumulative effect of which was to bring into hatred and contempt the Government, it was held that the books could be proscribed even though the originals were not proscribed. A compilation consisting of extracts from various sources may be seditious and a fit subject for an order of proscription, though the extracts considered in relation to their own proper contexts may not be in themselves of a seditious nature.[7]

[1] Act XIX of 1876 s 8.
[2] *Ibid*, s. 6.
[3] *Ibid*, s 9.
[4] *Apurba Krishna Bose*, (1907) 35 Cal 141, 153.
[5] *Sullivan*, (1868) 11 Cox 44.
[6] *Apurba Krishna Bose*, sup.
[7] *Baijnath Kedia*, (1924) 47 All. 298.

Seditious meeting.—Stephen[1] says: "If a meeting is held for the purpose of speaking seditious words to those who may attend it, those who take part in that design are guilty of a seditious conspiracy, of which the seditious words spoken are an overt act, and their meeting is an unlawful assembly. If at a meeting lawfully convened seditious words are spoken of such a nature as to be likely to produce a breach of the peace, the meeting may become unlawful in all those who speak the words or do anything to help those who speak to produce upon the hearers their natural effect. The speaking of the seditious words is in itself an offence in the speaker, but a mere meeting for the purpose of political discussion is not in itself illegal unless the circumstances under which it is convened or its behaviour when it is convened, is such as to produce reasonable fear of a breach of the peace, nor do I think that bare presence at such a meeting as a hearer or spectator makes a man guilty of any offence, though it may expose him to serious consequences if the meeting becomes disorderly and has to be dispersed, for in such a case force may be used against all persons who are present, whether they take part in the unlawful object of the meeting or not."

"If one man uses seditious words at a meeting those who stand by and do nothing, although they do not reprobate them, are not guilty of uttering the seditious words. Those even who make a speech themselves are not guilty of uttering seditious words unless you can gather from the language they use that they are endeavouring to assist the other man in carrying out that portion of his speech, and by that course endeavouring to assist him in causing his words which excite to disorder to produce their natural effect upon the people."[2]

To prevent meetings of a seditious character the Prevention of Seditious Meetings Act is passed. It is set out in full in the Appendix.

PRACTICE.

Evidence.—Prove (1) that the accused spoke or wrote the words, or made the signs or representations, or did some other acts, in question.

(2) That he thereby brought or attempted to bring into hatred or contempt; or excited or attempted to excite disaffection.

(3) That such disaffection was towards His Majesty, or the Government of British India.

Evidence of publication.—If the manuscript of a seditious writing be proved to be in the handwriting of the accused, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the accused, although there was no evidence given to show that the printing and publication were by the direction of the accused.[3]

In order to establish the fact of publication of seditious matter transmitted through the Post Office it is not necessary to prove the actual posting, nor that it was printed and published under the directions of the accused. If the seditious writing is shown to be in the handwriting of the accused, and it is further proved that the contents were in fact printed and published, there is sufficient evidence of publication by him.[4]

An indictment for sedition alleged "that the defendant, amongst other words and matter, uttered the words and matter following," and then set out several sentences as though they had been uttered continuously. The evidence showed that they had not been so uttered, but that the sentences had been selected from different parts of the speech, other matter intervening between them. It was held that there was no variance, and that if any portions of the speech omitted, varied, or controlled the sense of those parts that were set out, the onus was upon the defendant to show it.[5]

[1] History of Criminal Law, Vol. II, p. 386.

[2] Per Cave, J., in *Burns*, (1886) 16 Cox 355, 366

[3] *Lovett*, (1839) 9 C. & P. 462.

[4] *Surendra Narayan Adhicary*, (1911) 38 Cal. 522.

[5] *Crowe*, (1848) 3 Cox 123.

Upon an indictment against A B and others, for unlawfully meeting together with persons unknown, for the p [illegible] was held (A B having presided at [illegible] assembling and attending the meeting in question.[1]

Intention as gathered from other articles.—Seditious articles published in the same newspaper, not forming the subject of the charges, on which the prisoner is being tried at the time, are admissible to show the intention of the person, who printed or published the latter.[2]

Articles not forming the subject of the charge and appearing in other issues of the same paper are not admissible to show the intention of the writer in the article complained of in the absence of proof of his identity.[3]

Intention as gathered from speeches not charged as seditious—Where certain speeches form the subject-matter of a charge for sedition and when such speeches form part of a series of speeches or lectures on one topic, delivered within a short period of time, any of such speeches or lectures will be admissible, under s. 14 of the Indian Evidence Act, as evidence to prove the intention of the speaker in respect of the speeches which form the subject-matter of the charge.[4]

P: [illegible] Not bailable—Not compoundable—
C District Magistrate or Magistrate
o

Chapters IV and V of the Code apply to offences punishable under this section.[5]

Sanction.—Sanction of Government is necessary for prosecution under this section.[6] A commitment of the accused upon the evidence recorded before such sanction has been given is illegal.[7] Orders under s 196 of the Criminal Procedure Code should be expressed with sufficient particularity and with strict adherence to the language of the section. An order purported to accord sanction to prosecute the editor, manager and the printer of a newspaper without specifying their names, and containing a misdescription of the seditious article. On the day of the trial an amended order correcting the errors in the previous order was filed. It was held that the prosecution was rightly instituted.[8] Section 196 only requires that the complaint should be made upon authority from the Local Government and not that the actual complaint must be expressly authorized by the Local Government. A complaint is not defective because it does not set out the speeches or alleged seditious words which form the subject-matter of the charge.[9] If the accused is charged under this section and also under s. 153-A the charge does not become defective merely because it does not set out what portions of the speech of the accused are within the provisions of this section and what are within those of s. 153-A.

Jurisdiction.—The offence is complete either in the district where the author hands over the document for the purpose of being communicated to the public or in the district where it is sent by post for publication and is published.[10] Sending newspapers by post from the office where they are published to other places constitutes in law publication at the places where they are sent.[11]

Confiscation.—A Magistrate can order forfeiture of a newspaper or book containing seditious matter under s. 99-A of the Criminal Procedure Code.

[1] *Henry Hunt*, (1820) 3 B. & A. 566.
[2] *Phanendra Nath Mutter*, (1908) 35 Cal. 945.
[3] *Manomohan Ghose*, (1910) 38 Cal. 253.
[4] *Chidambaram Pillai*, (1908) 32 Mad. 3.
[5] Act XXVII of 1870, s. 13.
[6] Criminal Procedure Code, s. 196.
[7] *Mulla Abdul Rahim*, (1882) P. R. No 28 of 1882.
[8] *Apurba Krishna Bose*, (1907) 35 Cal. 141; *Bal Gangadhar Tilak*, (1897) 22 Bom. 112.
[9] *Chidambaram Pillai*, sup.
[10] *Burdett*, (1820) 4 B. & Ald. 717.
[11] *Bal Gangadhar Tilak*, sup., p. 129.

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Upon an indictment against A B and others, for unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, it was held (A B having presided at this meeting) that resolutions passed at a former meeting assembled a short time before, in a distant place, and at which A B also presided, and the avowed object of which meeting was that of the meeting mentioned in the indictment, were admissible in evidence to show the intention of A B in assembling and attending the meeting in question.[1]

Intention as gathered from other articles.—Seditious articles published in the same newspaper, not forming the subject of the charges, on which the prisoner is being tried at the time, are admissible to show the intention of the person, who printed or published the latter.[2]

Articles not forming the subject of the charge and appearing in other issues of the same paper are not admissible to show the intention of the writer in the article complained of in the absence of proof of his identity.[3]

Intention as gathered from speeches not charged as seditious—Where certain speeches form the subject-matter of a charge for sedition and when such speeches form part of a series of speeches or lectures on one topic, delivered within a short period of time, any of such speeches or lectures will be admissible, under s. 14 of the Indian Evidence Act, as evidence to prove the intention of the speaker in respect of the speeches which form the subject-matter of the charge.[4]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session, Chief Presidency Magistrate or District Magistrate or Magistrate of the first class specially empowered.

Chapters IV and V of the Code apply to offences punishable under this section.[5]

Sanction.—Sanction of Government is necessary for prosecution under this section.[6] A commitment of the accused upon the evidence recorded before such sanction has been given is illegal.[7] Orders under s. 196 of the Criminal Procedure Code should be expressed with sufficient particularity and with strict adherence to the language of the section. An order purported to accord sanction to prosecute the editor, manager and the printer of a newspaper without specifying their names, and containing a misdescription of the seditious article. On the day of the trial an amended order correcting the errors in the previous order was filed. It was held that the prosecution was rightly instituted.[8] Section 196 only requires that the complaint should be made upon authority from the Local Government and not that the actual complaint must be expressly authorized by the Local Government. A complaint is not defective because it does not set out the speeches or alleged seditious words which form the subject-matter of the charge.[9] If the accused is charged under this section and also under s. 153-A the charge does not become defective merely because it does not set out what portions of the speech of the accused are within the provisions of this section and what are within those of s. 153-A.

Jurisdiction.—The offence is complete either in the district where the author hands over the document for the purpose of being communicated to the public or in the district where it is sent by post for publication and is published.[10] Sending newspapers by post from the office where they are published to other places constitutes in law publication at the places where they are sent.[11]

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[5] Act XXVII of 1870, s. 13.
[6] Criminal Procedure Code, s. 196.
[7] *Mulla Abdul Rahim*, (1882) P. R. No. 28 of 1882.

Appeal to Privy Council.—Once it appears that the principles of the law of sedition have been rightly understood by the local tribunal, the question whether those principles have been properly applied is so much in the nature of a question of fact and depends so largely upon local conditions that it is difficult for the Board *to interfere on this ground with the conclusions arrived at by the Courts in India.*[1]

Charge.—In a Madras case Sir Arnold White ruled that a charge of an offence under this section is defective if it does not set out the speeches or passages in speeches alleged to be seditious, but such defect does not vitiate the proceedings in virtue of ss. 225 and 537 of the Code of Criminal Procedure.[2] But in a subsequent case two other Judges of the same High Court hold that if an offence under this section is committed by words spoken, the requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged, *i.e.*, if the charge states the words used with substantial, though not absolute, accuracy; and it is enough if the substance of the words proved to have been used is the same as that of the words set out in the charge. Even if the words or the substance of the words used, are not entered at all in the charge, this will be only an irregularity which, under s. 225 of the Code of Criminal Procedure, will not vitiate a conviction unless such omission has misled the accused and occasioned a failure of justice.[3]

Charges under this section and s. 153-A could be joined together.[4]

The charge should run as follows :—

I (*name and office of Magistrate, etc.*,) hereby charge you (*name of accused person*) as follows :—

That you, on or about the——day of——, at——, by writing (*or* speaking) the words (*mention them*) (*or* by signs *or* by visible representation, *or* otherwise) brought (*or* attempted to bring) into *hatred* or *contempt* (*or excited or* attempted to excite disaffection towards) His Majesty, the King-Emperor (*or* the Government established by law in British India), and thereby committed an offence punishable under s. 124-A and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—The framers of the Code wished to draw a marked distinction between minor offences and those of a very serious character where transportation would be the only appropriate punishment. The sentence of *transportation* is not an alternative for imprisonment as in ss. 121-A and 122.[5]

Waging war against any Asiatic Power in alliance with the Queen.

125. Whoever wages war against the Government of any Asiatic Power in alliance or at peace with the Queen or *attempts to wage such war, or* abets[1] the waging of such war, shall be punished with transportation for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

COMMENT.

Object.—This section restrains a person from making British India the focus of intrigues and *enterprise for* the restoration of deposed rulers or other

[1] *Kali Nath Roy*, (1920) 23 Bom. L. R. 709, 6 Bom. Cr. C. 62, P. C.

[2] *Chidambaram Pillai*, (1908) 32 Mad. 3.

[3] *Mylapore Krishnasami*, (1909) 32 Mad. 384, per Benson and Wallis, JJ., Sankaran Nair, J., *dissentiente*

[4] *Tribhuvandas P. Mangrolevala*, (1908) 10 Bom. L. R. 801.

[5] See G. I., 1898, Part V, p. 13.

like purposes. And the fulfilment of the obligations of the State to allies and friendly powers requires that the abetment of such schemes by its subjects whether by furnishing supplies or otherwise should be forbidden.[1] The principle of this section is based upon international comity and a desire of the State to remain friendly with its neighbours.[2]

Where a person dwelling in British territory waged war with the Raja of Manipore, a country lying beyond British India, he was punished under this section.[3]

The offences defined in this section and ss. 126 and 127 are similar to those made punishable under the Foreign Enlistment Act,[4] which applies to India. Sections 11 and 12 of that Act are as follows :—

"11. If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue :—

(1) Every person engaged in such preparation or fitting out or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour;

(2) All ships and their equipments and all arms and ammunitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be fined and punished as a principal offender".

1. 'Abets.'—See s. 107, *supra*

PRACTICE.

Evidence.—Prove (1) that the Power in question is Asiatic, and in alliance, or at peace, with the King

(2) That the accused waged war against the Government of such Power; or that the accused abetted or attempted the same.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Sanction.—Sanction of Government is necessary for prosecution under this section.[5]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, waged (*or* attempted to wage *or* abetted the waging of) war against the Government of——an Asiatic Power in alliance (*or* at peace) with the King-Emperor and thereby committed an offence punishable under s. 125 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Committing depredation on territories of Power at peace with the Queen.

126. Whoever commits depredation,[1] or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the Queen, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any

[1] M. & M. 105.
[2] *Jameson*, [1896] 2 Q. B. 425, 430.
[3] *Keifa Singh*, (1865) 3 W. R. (Cr.) 16.
[4] 33 & 34 Vic., c. 90.
[5] Criminal Procedure Code, s. 196.

Sanction.—Sanction of Government is necessary for prosecution under this section.[1]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, being a public servant (*mention the office*), and as such having the custody of——, a State prisoner (*or* prisoner of war), on or about the——day of——, at——, voluntarily allowed such prisoner to escape from——, the place in which such prisoner was confined, and thereby committed an offence punishable under s. 128 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Public servant negligently suffering such prisoner to escape.

129. Whoever, being a public servant[1] and having the custody of any State prisoner or prisoner of war,[2] negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

The offence under this section is like the one under s. 128, with the mitigating circumstance that the escape of the prisoner was not allowed voluntarily but suffered negligently. This section is similar to s. 223 which punishes the escape of an ordinary prisoner under similar circumstances.

1. '**Public servant.**'—See s. 21, *supra*.
2. '**State prisoner or prisoner of war.**'—See s. 128, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he had the person in question in his custody.

(3) That such person was a State prisoner or prisoner of war.

(4) That the accused suffered such prisoner to escape from the place of confinement.

(5) That the accused did so negligently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Sanction.—Sanction of Government is required for prosecution under this section.[2]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, being a public servant (*mention his office*), and as such having the custody of——, a State prisoner (*or* prisoner of war), on or about the——day of——, at——, negligently suffered such prisoner to escape from any place of confinement in which such prisoner was confined, and thereby committed an offence punishable under s. 129 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

[1] Criminal Procedure Code, s. 196. [2] *Ibid.*

Aiding escape or rescuing or harbouring such prisoner.

130. Whoever knowingly aids or assists[1] any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody or, offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in British India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

COMMENT.

This section uses words more extensive than those in the two preceding ones which contemplate an escape only from some prison or actual place of custody. Again, under the last two sections the offender is a public servant; under this section, he may be any person.

This section is somewhat narrower in scope than s. 129. It requires that the rescue or assistance should be given 'knowingly.'

1. **'Knowingly aids or assists.'**—It is essential to show that the accused had a knowledge of the character in which the prisoner is confined, *i.e.*, that he is a prisoner of State or of war.

PRACTICE.

Evidence.—Prove (1) that the person in question was a prisoner of State, or of war

(2) That such prisoner was at the time in lawful custody; or

That such prisoner has escaped from lawful custody.

(3) That the accused knew that such person was in lawful custody as a prisoner of State or of war, or

That he knew that such prisoner had escaped therefrom.

(4) That he aided or assisted such prisoner to escape, or that he rescued such prisoner, or attempted to do so; or

That he harboured or concealed such prisoner; or

That such prisoner was about to be recaptured, but the accused offered or attempted to offer resistance to such recapture.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, knowingly aided (*or* assisted, *or* offered to rescue, *or* attempted to rescue)——, a State prisoner (*or* prisoner of war), in escaping from lawful custody (*or* knowingly harboured *or* concealed)——, a State prisoner (*or* prisoner of war) who had escaped from lawful custody [*or* knowingly offered *or* attempted to offer resistance to the recapture of——, a State prisoner (*or* prisoner of war) who had escaped from lawful custody], and thereby committed an offence punishable under s. 130 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

CHAPTER VII.

OF OFFENCES RELATING TO THE ARMY AND NAVY.

The authors of the Code say: "A few words will explain the necessity of having some provisions of the nature of those which are contained in this Chapter.

"It is obvious that a person who, not being himself subject to military law, exhorts or assists those who are subject to military law to commit gross breaches of discipline, is a proper subject of punishment. But the general law respecting the abetting of offences will not reach such a person; nor, framed as it is, would it be desirable that it should reach him. It would *not* reach him, because the military delinquency which he has abetted is not punishable by this Code, and therefore is not, in our legal nomenclature, an offence. Nor is it desirable that the punishment of a person *not* military, who has abetted a breach of military discipline, should be fixed according to the principles on which we have proceeded in framing the law of abetment. We have provided that the punishment of the abettor of an offence shall be equal or proportional to the punishment of the person who commits that offence; and this seems to us a sound principle when applied only to the punishments provided by this Code. But the military penal law is, and must necessarily be, far more severe than that under which the body of the people live. The severity of the military penal law can be justified only by reasons drawn from the peculiar habits and duties of soldiers, and from the peculiar relation in which they stand to the Government. The extension of such severity to persons not members of the military professions appears to us altogether unwarrantable. If a person, not military, who abets a breach of military discipline, should be made liable to a punishment regulated, according to our general rules, by the punishment to which such a breach of discipline renders a soldier liable, the whole symmetry of the penal law would be destroyed. He who should induce a soldier to disobey any order of a commanding officer would be liable to be punished more severely than a dacoit, a professional thug, an incendiary, a ravisher or a kidnapper. We have attempted in this Chapter to provide, in a manner more consistent with the general character of the Code, for the punishment of persons who, not being military, abet military crimes."[1]

Calcutta Rule.—Sessions Judges and Magistrates will forward to the Military Department of the Government of India a copy of the conviction and sentence in all cases in which persons serving under the Government of India in that Department are convicted in a Criminal Court.[2]

It has been brought to the notice of the High Court that Magistrates, in awarding penalties for offences committed by native military pensioners, not infrequently recite their belief that such pensioners will (on conviction) be subjected to an additional penalty, in the shape of loss of pension, and that they take this circumstance into account in deciding on the severity of the sentence passed by them on the offenders. This procedure on the part of Magistrates is incorrect, in so far as it proceeds on the assumption that the pensioners thus convicted must necessarily forfeit their pensions. The attention of all Magistrates is invited to the terms of Article 496, Army Regulations, India, Volume I, Part II, Native Troops, which governs the subject. Under that Article, the Government of India are the sole arbiters on the point whether, in each case, the pension shall or shall not be reduced, or wholly withdrawn, and in considering this point, due weight is given by Government to the sentence actually awarded by the Court in each case. Magistrates

[1] Note D, p. 120.

[2] C. H. C. R. & O., Vol. I, Ch. I., s. 102, p. 36.

should, therefore, not assume that in such cases forfeiture of pension is an invariable consequence of a conviction.[1]

The attention of all Sessions Judges and Magistrates of the first and second classes in Bengal and Eastern Bengal and Assam is invited to the following order of the Government of India :—

"In the case of a reservist of the Native Army who may be sentenced by a Criminal Court to transportation or imprisonment for any term exceeding three months, a report should be made to the Adjutant-General in India."[2]

The Punjab Rule.—Criminal cases against military officers and soldiers should only be taken up by District Magistrates or Magistrates of the First Class, and this direction should be strictly observed.

2. Cases falling under ss. 154 and 156 of the Army Act, 1881, should be dealt with by District Magistrates or Magistrates of the First Class who are European British subjects and Justices of the Peace, and by no other class or description of Magistrate.

3. In every case in which a military officer or a soldier is sentenced by a Criminal Court to a fine of Rs. 200 or upwards, or to imprisonment otherwise than in default of paying a fine not amounting to Rs. 200, the Court shall send a copy of its final order *proprio motu* to the immediate superior of the person convicted.

4. Whenever a soldier is committed to jail, whether for trial or under sentence, his military rank shall always be stated in the warrant of commitment, in order that due notice may be given to the military authorities of the day on which, and the hour at which, the imprisonment of such person will expire.

5. When a person amenable to Military law is convicted of any offence by a Cantonment Magistrate, information in the form given below shall be furnished by such Cantonment Magistrate to the superior officer of the person so convicted :—

FORM OF INFORMATION.

Name and Military rank of person convicted	Offence of which convicted.	Sentence.	Date.

6. On all occasions on which a British soldier may have to be conveyed in custody from one place to another, whether before or after sentence, application should be made to the local military authorities for a military escort to accompany such prisoners to the jail. The employment of Indian policemen on such duties is strictly prohibited.

7. The annexed extract from a letter from the Secretary to Government, Punjab, pointing out the consequences resulting from a sentence of rigorous imprisonment being passed upon a soldier in His Majesty's service, is published for information and guidance :

Extract (paragraph 2) from a letter No. 3565, dated 30th October 1876, from the Secretary to Government, Punjab, to the Registrar, Chief Court, Punjab.—

"(2) The Lieutenant Governor would be obliged if the Judges of the Chief Court would point out to Magistrates that a sentence of rigorous imprisonment or hard labour, when passed upon a soldier in His Majesty's service, involves his discharge under Military Regulations and that, consequently, though uninten- [illegible] e, give a far higher punishment than [illegible] ieutenant-Governor thinks, should be borne in mind by Magistrates when trying soldiers for petty offences."

8. Whenever a Military pensioner is convicted and sentenced to imprisonment by a Criminal Court, a report, containing information regarding the nature and circumstances of the offence and the amount of imprisonment to which the offender has been sentenced, shall be made at once direct to the Controller of Military Accounts of the Circle within which the conviction takes place. A

[1] C. H. R & O., Vol. I, Ch. I, s. 103, p. 36. [2] *Ibid*, s. 104, p. 37.

similar report should also be made to the Postmaster-General, Punjab and North-West Frontier Province, as Military pensioners in the Punjab are paid through the agency of the Post Office.

Criminal Courts subordinate to the District Magistrate will report such case to the District Magistrate, who will forward all such reports of convictions, in his own or subordinate Courts, to the Controller, and to the Postmaster-General, Punjab and North-West Frontier Province.

9. Whenever a reservist of the Indian Army is sentenced by a Criminal Court to transportation or imprisonment for any term exceeding three months, the facts are to be reported, in the manner described in the last preceding paragraph, without delay to the Adjutant-General in India.

10. The annexed letter from the Government of India in the Military Department, No. 1205 C., dated the 23rd June 1893, prescribing rules for the defence of soldiers charged with criminal offences and prosecuted by Government, is published for information and guidance :—

"With reference to the correspondence ending with your letter No. 5—Camp, dated the 15th December 1892, I am directed to state, for the information of the Commander-in-Chief that the Government of India sanction the adoption of the following rules for the defence of soldiers charged with criminal offences and prosecuted by Government in Civil Courts :—

(1) When soldiers are to be tried by a Civil Court (*i.e.*, a Court which is not a Military Court) upon any criminal charge, the local military authorities (general officers commanding districts) should consult the District Magistrate and arrange with him for the selection and remuneration of a pleader, advocate or barrister, as the importance and necessities of the case may require.

(2) The fee to be paid to the pleader, advocate or barrister must not exceed Rs. 100 per diem, when the trial is before a High Court, and Rs. 50 per diem in all other cases.

(3) It is to be clearly understood that the local authorities are only to appoint a pleader in cases where they think it desirable, and are to fix the fee beforehand (subject to the maximum amounts stated above) at whatever sum may be reasonable with reference to the customary rates of the localities concerned.

(4) The expenditure incurred will be a military charge, and will be adjusted under Grant 14 of the Budget Estimates, minor head 'Contingencies.' "

11. When counsel is rightly provided for the defence of a soldier at the first trial in the Civil Court, counsel can also be provided, when considered necessary, on appeal, subject to the limitations laid down in clauses (2) and (3) of the rules sanctioned in Military Department letter No. 1205 C., dated 23rd June 1893.

Indian soldiers on leave and reservists not under training are at their homes and among their friends and free from military control; they are therefore in the same position as the ordinary civil population in this matter, and as such have no claim on Government for legal assistance if they happen to get into difficulties. Reservists of the Indian Army when called out for training or service are in the same position as soldiers serving with the colours, and the rules above should therefore be held to be applicable to them.

These rules do not apply to Native Officers.[1]

Abetting mutiny, or attempting to seduce a soldier or sailor from his duty.

131. Whoever[1] abets the committing of mutiny[2] by an officer, soldier or sailor, in the Army or Navy[3] of the Queen,[4] or attempts to seduce any such officer, soldier or sailor from his allegiance or his duty, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[1] P. C. C. R. & O., Vol. II, No. 25, p. 183.

Explanation.—In this section the words "officer" and "soldier" include any person subject to the Articles of War, for the better government of Her Majesty's Army,[5] or to the Articles of War contained in Act No. V of 1869.

COMMENT.

The first part of this section relates to the offence of abetting mutiny. The offence contemplated is an abetment which is not followed by actual mutiny, or which, supposing actual mutiny follows, is not the cause of that mutiny.

1. **'Whoever.'**—See s. 139, *infra*. The offender must be a person not subject to Articles of War.

2. **'Mutiny.'**—The offence of mutiny consists in extreme insubordination, as if a soldier resists by force, or if a nun [illegible] military superiors, such acts proceedi[illegible] of a military nature. Acts of a riotous [illegible] or civil authorities rather than against [illegible] mutiny.[1] Where P published an article in his newspaper purporting to be a letter from a sympathiser of native soldiers to their address and calculated to seduce soldiers of the Indian Army from their allegiance and their duty to the King-Emperor, and D abetted the same by printing the articles in his press, it was held that P and D were guilty of an offence under this section, and that publishing broadcast some 3,000 copies of the letter was an act amounting to an attempt.[2]

3. **'Navy.'**—This includes Indian Marine service (s. 138).

4. **'The Queen.'**—See s. 13, *supra*.

5 **'Army.'**—The Indian Army Act of 1911 is a consolidated statute relating to the Government of His Majesty's Indian Forces

Explanation—The explanation was added by Act XXVII of 1870, s. 6. The section is thus extended to non-combatants attached to and serving with the Army. The Army Act,[3] 1881, applies to the English Army. Act V of 1869 is repealed by the Indian Army Act (VIII of 1911). The substantive offences of which the abetment is punishable under the Code are punishable under the Indian Army Act.

PRACTICE.

Evidence—Prove (1) that the person abetted is an officer, etc., of the King's Army or Navy.

(2) That the accused abetted him to commit mutiny; or attempted to seduce him from his allegiance.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted the commission of mutiny by——, an officer (*or* soldier, *or* sailor), in the Army (*or* Navy) of the King-Emperor [*or* attempted to seduce—an officer (*or* soldier, *or* sailor) in the Army (*or* Navy) of the King-Emperor from his allegiance (*or* duty)], and thereby committed an offence punishable under s. 131 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

[1] M. & M. 112.

[2] *Pindi Das*, (1907) P. W. R. (Cr.) No. 37 of 1907.

[3] 44 & 45 Vic., c 58.

132. Whoever[1] abets[2] the committing of mutiny by an officer, soldier or sailor, in the Army or Navy of the Queen, shall, if mutiny be committed in consequence of that abetment,[3] be punished with death or with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetment of mutiny, if mutiny is committed in consequence thereof.

COMMENT.

This section punishes the abetment of mutiny when mutiny is committed in consequence of that abetment. It therefore prescribes enhanced penalty.

1. **'Whoever.'**—See s. 139, *infra.*

2. **'Abets.'**—See s. 107, *supra.*

3. **'Committed in consequence of that abetment.'**—An act or offence is committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.[1]

PRACTICE.

Evidence.—Prove (1) the abetment of mutiny as in s. 131.
(2) That mutiny was committed in consequence of such abetment.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted the commission of mutiny by——, an officer (*or* soldier *or* sailor) in the Army (*or* Navy) of the King-Emperor and mutiny was committed in consequence of that abetment, and thereby committed an offence punishable under s. 132 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

133. Whoever[1] abets[2] an assault[3] by an officer, soldier or sailor, in the Army or Navy of the Queen,[4] on any superior officer[5] being in the execution of his office,[6] shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Abetment of assault by soldier or sailor on his superior officer, when in execution of his office.

COMMENT.

This section punishes abetment of assault which is not committed. The next section punishes similar abetment where the offence is committed.

1. **'Whoever.'**—See s. 139, *infra.*

2. **'Abets.'**—See s. 107, *supra.*

3. **'Assault'**—The assault here meant may probably be that which the Mutiny Acts and Articles of War provide against, namely, the striking a superior officer, or using or offering any violence against him when he is on duty. As to the definition of 'assault,' see s. 351, *infra.*

4. **'The Queen.'**—See s. 13, *supra.*

[1] See Expln. to s. 109, *supra.*

5. **'Superior officer.'**—These words of course exclude from this provision such assaults as one private soldier may commit on another. But they clearly comprehend all officers whether commissioned or non-commissioned—for a non-commissioned officer is a superior officer in relation to a private soldier, as a Captain is to Subaltern, and the Commanding Officer of a Regiment to all the officers and men under his command.[1]

6. **'Execution of his office.'**—It is an inseparable part of this offence that the officer should be assaulted while in the execution of his office. An officer is in the execution of his office not only when he is performing a prescribed duty, but also when he is discharging a duty arising out of the exigency of the moment. Thus an officer seeing a soldier out of quarters after hours, or improperly dressed or drunk in the streets of a town, or transgressing any order or usage of the service, would at all times be in the execution of his duty and therefore of his office, in ordering the soldier to his barracks or directing such other measures as might be necessary. It must, however, be remembered that an important ingredient in the soldier's offence is, that he offers violence knowingly to his officer. If he strikes a person whom he or his abettor really does not know to be an officer, the offence of abetment which is here made punishable so severely, has not been committed by the person who abets the blow.[2]

PRACTICE.

Evidence.—Prove (1) [illegible]
(2) That the person [illegible]
(3) That the assault [illegible]
(4) That such officer was at the time in the execution of his duty.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted an assault by——an officer (*or* soldier, *or* sailor) in the Army (*or* Navy) of the King-Emperor on——a superior officer being in the execution of his office, and thereby committed an offence punishable under s. 133 of the Indian Penal Code and within my cognizance) *or* within the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Abetment of such assault if the assault is committed.

134. Whoever[1] abets[2] an assault by an officer, soldier or sailor, in the Army or Navy of the Queen,[3] on any superior officer being in the execution of his office, shall, if such assault[4] be committed in consequence of that abetment,[5] be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT:

This section punishes the abetment of an assault when such assault is committed in consequence of that abetment. It stands in the same ralation to s. 133 just as s. 132 does to s. 131.

1. **'Whoever.'**—See s. 139, *infra.*

2. **'Abets.'**—See s. 107, *supra.*

[1] M. & M. 113. [2] *Ibid.*

3. **'Queen.'**—See s. 13, *supra*.

4. **'Assault.'**—See s. 351, *infra*.

5. **'In consequence of that abetment.'**—See Explanation to s. 109.

PRACTICE.

Evidence.—Prove (1) that the accused was guilty of acts of abetment.

(2) That the assault was committed.

(3) That it was committed in consequence of the abetment.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Court of Session.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted an assault which was committed by——, an officer (*or* soldier, *or* sailor) in the Army (*or* Navy) of the King-Emperor on—a superior officer being in the execution of his office, and thereby committed an offence punishable under s. 134 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Abetment of desertion of soldier or sailor.

135. Whoever[1] abets[2] the desertion[3] of any officer, soldier or sailor,[4] in the Army or Navy of the Queen,[5] shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Offences referred to in this and the next section are also punishable under the Army Act. The section is somewhat ambiguous. It does not say whether the desertion abetted under it must take place or not.

1. **'Whoever.'**—See s. 139, *infra*.

2. **'Abets.'**—See s. 107, *supra*.

3. **'Desertion.'**—The offence of desertion from the Army or Navy consists in this, that the officer, soldier, or sailor is unlawfully absent from his duty, and has no intention of returning to it Whether he departs without leave from his regiment, or, whether, having leave of absence, he overstays his leave, if his intention is not to return to his duty and his regiment, he is a deserter This intention not to return is essential to desertion, and, without it, the offence becomes one which is known in Military Law as "absence without leave," an offence of a much lighter kind.[1]

4. **'Soldier.'**—The word 'soldier' must be interpreted as in the Explanation to s. 131, *infra*. The definition of the word 'soldier' given in the Indian Articles of War is expressly confined to those Articles and is a very limited one.[2]

5. **'The Queen.'**—See s. 13, *supra*.

PRACTICE.

Evidence.—Prove (1) that the person instigated was an officer, etc., in the King's Army or Navy.

(2) That the accused instigated such person to desert.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class.

[1] See the Army Act (VIII of 1911), ss. 29 and 114.

[2] *Sri Nawas*, (1919) P. L. R. No. 102 of 1920.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, abetted the desertion of——, an officer (*or* soldier, *or* sailor) in the Army (*or* Navy) of the King-Emperor, and thereby committed an offence punishable under s. 135 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Harbouring deserter.

136. Whoever,[1] except as hereinafter excepted, knowing or having reason to believe that an officer, soldier or sailor, in the Army or Navy of the Queen,[2] has deserted, harbours[3] such officer, soldier or sailor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

COMMENT:

A person harbouring a deserter is an 'accessory after the fact.' The gist of the offence is concealment of a deserter to prevent his apprehension. Exception is made only in the case of a wife. The word 'harbour' is defined in s. 216-B, but that definition is only applicable to ss. 212, 216 and 216-A.

The offence under this section is also punished by the Indian Army Act, 1911, s. 30.

1. **'Whoever.'**—See s. 139, *infra.*

2. **'The Queen.'**—See s. 13, *supra.*

3. **'Harbours.'**—That is, conceals such deserter; or aids or assists him in concealing himself, or aids or assists in his rescue.[1]

PRACTICE.

Evidence.—Prove (1) that the person in question was an officer, etc., in the King's Army or Navy.

(2) That such person had deserted.

(3) That the accused harboured such person.

(4) That the accused when he so harboured knew or had reason to believe that such person was a deserter.

(5) That the accused is not the wife of such person.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, knowing, or having reason to believe that——, an officer (*or* soldier, *or* sailor) in the Army (*or* Navy) of the King-Emperor had deserted, harboured such officer (*or* soldier, *or* sailor), and thereby committed an offence punishable under s. 136 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Deserter concealed on board merchant vessel through negligence of master.

137. The master or person in charge of a merchant vessel, on board of which any deserter from the Army or Navy of the Queen is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he

[1] See the Army Act, 1950 (53 Vic., c. 4), s. 153 (2).

might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

COMMENT.

Under this section the captain of a merchant vessel in which a deserter has concealed himself is punished for his criminal negligence in allowing the deserter to be on board.

PRACTICE.

Evidence.—Prove (1) that the person in question is a deserter from the King's Army or Navy.

(2) That such deserter was concealed in a merchant vessel.

(3) That the accused was, at the time of such concealment, the master or person in charge of such vessel.

(4) That the accused was guilty of neglect of duty, as such master or person in charge; or was guilty of want of discipline on board.

(5) That such neglect of duty, or want of discipline, was the cause of such concealment.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That——, a deserter from the Army (*or* Navy) of the King-Emperor, had concealed himself on or about the——day of——, at——, on board——a merchant-vessel of which you are the master (*or* person in charge) through your neglect of duty as such master (*or* person in charge) [*or* through your want of discipline on board the said vessel] and that you have thereby committed an offence punishable under s. 137 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Abetment of act of insubordination by soldier or sailor.

138. Whoever[1] abets[2] what he knows to be an act of insubordination by an officer, soldier or sailor, in the Army or Navy of the Queen,[3] shall, if such act of insubordination[4] be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENT.

This section punishes the master or person in charge of a merchant ship on board of which a deserter has concealed himself. The master is liable even though he is ignorant of such concealment.

In this section it is expressed as part of the definition of the offence that the abettor knows the quality of the act abetted, that is, he knows it to be an act of insubordination.

1. **'Whoever.'**—See s. 139, *infra.*

2. **'Abets.'**—See s. 107, *supra.*

3. **'The Queen.'**—See s. 13, *supra.*

4. **'Act of insubordination.'**—Any wilful breach of discipline on the part of a soldier or sailor will constitute an act of insubordination. The Army Act of 1890, s. 10, defines what insubordination is. It says:—

"Every person subject to Military Law who commits any of the following offences; that is to say:—

(1) Being concerned in any quarrel, fray or disorder refuses to obey any officer (though of inferior rank) who orders him into arrest, strives or uses or offers violence to any such officer; or

(2) Strives or uses or offers violence to any person, whether subject to Military Law or not, in whose custody he is placed, and whether he is or is not his superior officer; or

(3) Resists an escort whose duty it is to apprehend him or leave him in charge; or

(4) Being a soldier, breaks out of barracks, camp, or quarters, shall on conviction by Court-martial be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned."

The Indian Army Act, 1911, s. 28, also specifies the cases of insubordination.

PRACTICE.

Evidence.—Prove (1) that the act was one of insubordination.

(2) That the person guilty of such act was an officer, etc., in the King's Army or Navy.

(3) That the accused abetted such officer in doing such act.

(4) That the accused at the time knew the same to be an act of insubordination.

(5) That such act of insubordination was committed in consequence of such abetment.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, abetted what you knew to be an act of insubordination by——, an officer (*or* soldier, *or* sailor) in the Army (*or* Navy) of the King-Emperor and such act of insubordination was committed in consequence of the said abetment, and thereby committed an offence punishable under s. 138 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Application of foregoing sections to the Indian Marine Service.

138-A. The foregoing sections of this Chapter shall apply as if Her Majesty's Indian Marine Service were comprised in the Navy of the Queen.

COMMENT.

This section was inserted by the Indian Marine Act, 1887.[1] It merely extends the significance of the expression "Navy of the Queen."

Persons subject to Articles of War.

139. No person subject to any Articles of War for the Army or Navy of the Queen, or for any part of such Army or Navy, is subject to punishment under this Code for any of the offences defined in this Chapter.

COMMENT.

The object of this section is to specify definitely that persons subject to Military Law will not be dealt with under the Code for offences defined in this Chapter.

[1] Act XIV of 1887, s. 79.

Wearing garb or carrying token used by soldier.

140. Whoever, not being a soldier in the Military or Naval service of the Queen,[1] wears any garb or carries any token resembling any garb or token used by such a soldier,[2] with the intention that it may be believed that he is such a soldier, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENT.

The gist of the offence herein made penal is the intention of the accused wearing the dress of a soldier for the purpose of inducing others to believe that he is in service at the present time. Merely wearing a soldier's garb without the specific intention is no offence. Otherwise actors putting on every kind and shade of uniform will be hauled up under this section. Similarly persons using cast-off uniforms of soldiers will not be liable.

No fraudulent intention is made a part of the definition.

1. **'The Queen.'**—See s. 13, *supra*.

2. **'Soldier.'**—This section, assuming that soldiers only and not sailors wear a distinguishing dress, accoutrements, etc., provides a punishment for those who personate soldiers.

PRACTICE.

Evidence.—Prove (1) that the accused wore the garb or carried the token in question.

(2) That such garb or token resembled that used by soldiers.

(3) That the accused was not a soldier.

(4) That the accused wore the garb or carried the token with the intention that it might be believed that he was a soldier, etc.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, not being a soldier in the Military (*or* Naval) service of the King-Emperor, on or about the——day of——, at——, wore (*specify the garb*) [*or* carried ——, a token resembling (*specify it*) (*or* used by such soldier)] with the intention that it might be believed that you were such a soldier, and thereby committed an offence punishable under s. 140 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

CHAPTER VIII.

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

THESE offences hold a middle place between State offences on the one hand, and crimes against person and property on the other. Many of the offences made [illegible] blies of persons who, whether they assemble tumultuously or otherwise, have a common unlawful purpose in their minds, the execution of which will disturb public order and excite alarm.[1]

This Chapter deals with assemblies as a menace to the public peace, in a simple [illegible] persistence in such menace [illegible] by rioting in a simple form [illegible] so deals (s. 149) with the [illegible] y for any offence committed by the members comprising it. The remaining sections deal with connected offences and with offences connected with affrays.[2]

As to the duty to give information of offences punishable under ss. 143, 144, 145, 147 or 148, see the Code of Criminal Procedure, ss. 44 and 45.

As to dispersion of unlawful assemblies, see the Code of Criminal Procedure, Chapter IX.

Unlawful assembly.

141. An assembly of five or more[1] persons is designated an "unlawful assembly," if the common object[2] of the persons composing that assembly is—

First.[3]—To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any public servant in the exercise of the lawful power of such public servant; or

Second.[4]—To resist the execution of any law, or of any legal process; or

Third.[5]—To commit any mischief or criminal trespass, or other offence; or

Fourth.[6]—By means of criminal force, or show of criminal force to any person, to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.[7]—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.[8]—An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly.

[1] M. & M. 118.

[2] *Rasul*, (1888) P. R. No. 4 of 1889.

Wearing garb or carrying token used by soldier.

140. Whoever, not being a soldier in the Military or Naval service of the Queen,[1] wears any garb or carries any token resembling any garb or token used by such a soldier,[2] with the intention that it may be believed that he is such a soldier, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENT.

The gist of the offence herein made penal is the intention of the accused wearing the dress of a soldier for the purpose of inducing others to believe that he is in service at the present time. Merely wearing a soldier's garb without the specific intention is no offence. Otherwise actors putting on every kind and shade of uniform will be hauled up under this section. Similarly persons using cast-off uniforms of soldiers will not be liable.

No fraudulent intention is made a *part* of the definition.

1. **'The Queen.'**—See s. 13, *supra*.

2. **'Soldier.'**—This section, assuming that soldiers only and not sailors wear a distinguishing dress, accoutrements, etc., provides a punishment for those who personate soldiers.

PRACTICE.

Evidence.—Prove (1) that the accused wore the garb or carried the token in question.

(2) That such garb or token resembled that used by soldiers.

(3) That the accused was not a soldier.

(4) That the accused wore the garb or carried the token with the intention that it might be believed that he was a soldier, etc.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, not being a soldier in the Military (or Naval) service of the King-Emperor, on or about the——day of——, at——, wore (*specify the garb*) [or carried ——, a token resembling (*specify it*) (or used by such soldier)] with the intention that it might be believed that you were such a soldier, and thereby committed an offence punishable under s. 140 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

No one is a member of an unlawful assembly unless he is aware of the facts that render that assembly an unlawful one and intentionally joins or continues in it.[1]

In order to find the common object of an unlawful assembly at the beginning, it is not a legitimate method merely to take all the actual offences committed by it in the course of the riot, and to infer that all these were originally part of its common object, but must normally be based on more evidence than the mere acts themselves.[2]

3. **First clause.**—The third clause of s. 121-A provides for a conspiracy to overawe Government of India.

'**To overawe.**'—A person kept by superior influence in awe, so that he fears to do that which he has a mind and will to do, and which the law empowers him to do, is overawed. But the common object which makes an assembly 'unlawful' is an intent to overawe by criminal force, or by show of criminal force. To carry a conviction under this head the common object of the persons composing the assembly must have been to overawe a public servant; the mere fact that their action did overawe such public servant is not in itself sufficient. A crowd of persons, assembling to see what the police officers were doing in arresting a person who had escaped from lawful arrest, who do not use force or show of force, does not form an unlawful assembly.[3]

As to the definition of 'criminal force' see. s. 350; of 'Government of India,' s. 16; of 'Government,' s. 17; of 'Presidency,' s. 18; of 'public servant,' s. 21.

4. **Second clause.**—Resistance to some law or legal process connotes some overt act, and mere words, when there is no intention of carrying them into effect, are not sufficient to prove an intention to resist. The conduct of an assembly and refusal of the members of it to disperse after being ordered to do so will constitute an overt act and establish a common object to resist within the meaning of this clause.[4]

'**Law.**'—A notification issued by an executive authority in exercise of a [illegible] conferred by statute is as much a part of the law as if it had been inc[illegible] within the body of the statute at the time of its enactment.[5]

[illegible]

one.[6]

Cases.—**Resistance to an unlawful search.**—Where a number of persons [illegible] an attempt to search a house which was being made by officers, who had [illegible], it was held that the [illegible] convicted under s. 143.[7] [illegible] of their property and of [illegible] rights, real or supposed, resisted the execution of an order which was made [illegible] authority by a Collector, and in so resisting did not use more force than was [illegible] for the purpose.[8]

Resistance to an order under Police Act.—Where the S[illegible] Police issued a notice under s. 30 of the Police Act, prohi[illegible] associations, or assemblies started or formed by any class [illegible]

[1] *Ganapathi Sarma*, (1922) M. W. N. 104.
[2] *Ibid.*
[3] *Lalji*, (1924) 23 A. L. J., R. 32.
[4] Per Mullick, J., in *Abdul Hamid*, (1922) 2 Pat. 134.
[5] Per Mullick and Coutts, JJ., in *ibid.*; Das, J. *contra*.
[6] *Uma Charan Singh*, [illegible]
[7] *Narain*, (1875) 7 N. W. [illegible]
[8] *Nilka Jogi*, (1883) 1 [illegible] *Charan Singh*, sup.

142. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues[9] in it, is said to be a member of an unlwaful assembly.

Being member of unlawful assembly.

143. Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Punishment.

COMMENT.

The essence of an offence under s. 143 is the combination of several persons, united in the purpose of committing a criminal offence, and that consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit.[1]

The intention indicated by the heading of this Chapter is to constitute certain acts, which endanger the public peace, into offences against public tranquillity.

Scope of s. 141. "In construing s. 141, regard must be had not only to the [illegible] to the specific [illegible] [2] The common object of the assembly must be one of the five objects mentioned in the section. Thus, an assembly for the purpose of gambling does not constitute an unlawful assembly.[3]

1. **'Five or more.'**—The assembly must consist of five or more persons, having one of the five specified objects as their 'common object.[4]' Where, of five persons convicted, it was found as regards two of them that there had been no common object it was held that the conviction of the others could not be maintained as there must have been five persons who had a common object before there could be an unlawful assembly.[5]

An unlawful assembly according to common law in England is an assembly of three or more persons for purposes forbidden by law.

2. **'Common object.'**—The essence of the offence is the common object of the persons forming the assembly. Whether the object is in their minds when they come together, or whether it occurs to them afterwards, is not material. But it is necessary that the object should be common to the persons who compose the assembly, that is, that they should all be aware of it and concur in it. It seems [illegible] ng into effect [illegible] d to arrange [illegible] a difference between object and intention, for, though the object of an assembly is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful.[7] Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object.[8]

[1] *Matti Venkanna*, (1922) 46 Mad. 257.

[2] Per Muttusami Ayyar, J., in *Tirakadu*, (1890) 14 Mad. 126, 130.

[3] (1880) 1 Weir 66.

[4] *Koura Khan*, (1868) P. R. No. 34 of 1868; *Koylash Chunder Dass*, (1873) 20 W. R. (Cr.) 78; *Gholam Mahomed*, (1874) 22 W. R. (Cr.) 17; *Sumeshar Rai*, (1893) 12 A. W. N 169.

[5] [illegible] 285.

[illegible] Bom. [illegible]

No one is a member of an unlawful assembly unless he is aware of the facts that render that assembly an unlawful one and intentionally joins or continues in it.[1]

In order to find the common object of an unlawful assembly at the beginning, it is not a legitimate method merely to take all the actual offences committed by it in the course of the riot, and to infer that all these were originally part of its common object, but must normally be based on more evidence than the mere acts themselves.[2]

3. **First clause.**—The third clause of s. 121-A provides for a conspiracy to overawe Government of India.

'To overawe.'—A person kept by superior influence in awe, so that he fears to do that which he has a mind and will to do, and which the law empowers him to do, is overawed. But the common object which makes an assembly 'unlawful' is an intent to overawe by criminal force, or by show of criminal force. To carry a conviction under this head the common object of the persons composing the assembly must have been to overawe a public servant; the mere fact that their action did overawe such public servant is not in itself sufficient. A crowd of persons, assembling to see what the police officers were doing in arresting a person who had escaped from lawful arrest, who do not use force or show of force, does not form an unlawful assembly.[3]

As to the definition of 'criminal force' see. s. 350; of 'Government of India,' s. 16; of 'Government,' s. 17; of 'Presidency,' s. 18; of 'public servant,' s. 21.

4. **Second clause.**—Resistance to some law or legal process connotes some overt act, and mere words, when there is no intention of carrying them into effect, are not sufficient to prove an intention to resist. The conduct of an assembly and refusal of the members of it to disperse after being ordered to do so will constitute an overt act and establish a common object to resist within the meaning of this clause.[4]

'Law.' —A notification issued by an executive authority in exercise of a power conferred by statute is as much a part of the law as if it had been incorporated within the body of the statute at the time of its enactment.[5]

[illegible]

one.[6]

Cases.—Resistance to an unlawful search.—Where a number of persons resisted an attempt to search a house which was being made by officers, who had not the [illegible], it was held that the persons [illegible] convicted under s. 143.[7] It [illegible] of their property and of their rights, real or supposed, resisted the execution of an order which was made without authority by a Collector, and in so resisting did not use more force than was necessary for the purpose.[8]

Resistance to an order under Police Act.—Where the Superintendent of Police issued a notice under s. 30 of the Police Act, prohibiting any processions, associations, or assemblies started or formed by any class of persons within a certain

[1] *Ganapathi Sarma*, [1923] M. W. N. 104.
[2] *Ibid.*
[3] *Lalji*, (1924) 23 A. L. J., R. 32.
[4] Per Mullick, J., in *Abdul Hamid*, (1922) 2 Pat. 134.
[5] Per Mullick and Coutts, JJ., in *ibid*: Das, J. *contra*.
[6] *Uma Charan Singh*, (1901) 29 Cal. 244.
[7] *Narain*, (1875) 7 N. W. P. 209.
[8] *Nilka Jogi*, (1883) 1 Weir 64. See *Uma Charan Singh*, sup

area, otherwise than under a license, for a period of three months, it was held that if five persons joined or remained in any unlicensed procession, association, or assembly within such area, after it was ordered to disperse, and if such persons were acting together with the common object that the person who had convened the assembly or association or promoted the procession should resist the execution of the Superintendent's order, then each of such five persons would be a member of an unlawful assembly unless he was unaware of the fact that no license had been obtained.[1]

5. **Third clause.**—This clause specifies only two offences, *viz.*, mischief and criminal trespass, but the words "or other offence" seem to denote that all offences are included though only two are enumerated in a haphazard way. This construction is borne out by the fact that the word "offence" has been given a wider significance in this clause (see s. 40). 'Offence' under this clause means a thing punishable under the Code, or under any special or local law if punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine (s. 40).

As to the definition of 'mischief,' see s. 425; of 'criminal trespass,' s. 441.

An assembly of five or more persons becomes an unlawful assembly if the common object is not to arrest persons who commit an offence but to subject to humiliation persons who intervene on behalf of the offenders.[2]

6. **Fourth clause.**—The act falling within the purview of this clause is made punishable owing to the injurious consequences which it is likely to cause to the public peace. But this clause does not take away the right of private defence of property which belongs naturally to every man and which has been legalized and justified by the Code. It ought not to affect cl. (2) of s. 105, which allows a person to recover the property carried away by theft.

This clause is meant to prevent the resort to force in vindication of supposed rights. It makes a distinction between an admitted claim or an ascertained right and a disputed claim.[3]

'To enforce any right or supposed right.'—This would seem to make a division into (1) rights in actual enjoyment when interfered with; (2) rights claimed though not in actual enjoyment when interfered with.[4] The phrase 'to enforce a right' can only apply when the party claiming the right has not possession over the subject of the right, and therein lies the distinction between enforcing a right and maintaining a right.[5] The true import of the phrase relates to an initial act when it is done in furtherance of any right and not to an act when it is done to maintain a position already achieved in the lawful exercise of that right.[6] A person entitled to the land, but not in possession of it, may take peaceable possession, but if he enters by force in such a manner as to provoke a breach of the peace, then he takes the consequences, because he has no right to take the law in his own hands.[7] Persons who are not animated with the intention to enforce a right, or supposed right, but to maintain undisturbed the actual subsisting enjoyment of a right which is being at the time exercised, do not, in preventing an encroachment, commit an offence under this section.[8] Thus, a tenant is justified in resisting an illegal distraint.[9] If persons are rightfully in possession of land, and find it necessary to protect themselves from aggression they are justified in taking

[1] Held by Mullick and Couts, JJ. (Das, J., *dissentienti*), in *Abdul Hamid*, (1922) 2 Pat. 134.

[2] *Ramsahay Ram*, (1920) 31 C. L. J. 476.

[3] *Gulam Hossein*, (1909) 11 Bom. L. R. 849.

[4] *Ganouri Lal Das*, (1889) 16 Cal. 206, 219.

[5] *Ramnandan Prosad Singh*, (1913) 17 C. W. N. 1132; *Sarabdawan Singh*, (1913) 17 O. C. 21.

[6] *Baij Nath*, (1924) 1 O. W. N. 588, 27 O. C. 292.

[7] *Ramchandra Appaji*, Criminal Appeals Nos. 146-149 of 1911, decided on 21st June, 1911, by Chandavarkar and Hayward, JJ.

[8] *Shunker Singh* v. *Burmah*, (1875) 23 W.R. (Cr.) 25; *Birjoo Singh* v. *Khub Lall*, (1873) 19 W. R. 66; *Denonath Ghattack* v. *Rajcoomar Singh*, (1878) 3 Cal. 573; *Biku Koer* v. *W. J. Marshman*, (1901) 5 C. W. N. 369.

[9] (1875) 1 Weir 56.

precautions and using such force as is necessary to prevent the aggression.[1] But when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men, who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself but each side is trying to get the better of the other.[2] The question as to who was in actual occupation just before the occurrence took place is of paramount importance, and a right to possession, or constructive possession, is not generally of much importance.[3]

"The words...'to enforce a right or supposed right' show that it is perfectly immaterial whether the act which one seeks to prevent by the use of criminal force or show of criminal force is legal or illegal, the test of criminality being the determination to use criminal force and act otherwise than in due course of law so as to threaten the public peace."[4] "The natural tendency of the law of all civilized states is to restrict, within constantly narrowing limits, the right of self-help...In the domain of [illegible] defined by the law itself. [illegible] opponent of the accused [illegible] category of those in which self-defence is permitted."[5]

Cases.—Disputes regarding possession of land.—Where there was a dispute of long-standing between the accused and certain other parties regarding the possession of certain land, and the accused went to sow the land with indigo, accompanied by a body of men armed with clubs and who kept off the opposite party by brandishing their weapons while the land was being sowed, it was held that they were guilty of the offence.[6] Where two parties were entitled to joint possession of a property but one party having been out of possession their servants with thirty or forty other men went armed with clubs to take forcible possession of the property and succeeded in getting it without having had to use any force, it was held that the servants were guilty of this offence.[7] Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with clubs prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and died subsequently, it was held that the common object was not to enforce a right, but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful.[8]

Procession.—Where the accused assembled and forcibly interrupted a procession upon the ground that it was a nuisance or annoyance to them or their community, it was held that their act clearly fell within clause 4 of s. 141.[9] A headman and eighteen villagers conducted a funeral procession along a public road with the object of vindicating their right to use the road, and intending to resist obstruction. It was not proved that the party was armed, but some of its members used threatening language. It was held that the use of threats made the funeral party an unlawful assembly.[10] Where a party goes out armed for the express purpose of having a fight and its object is not so much to conduct a religious procession as to have a

[1] *Narsang Pathabhai*, (1890) 14 Bom. 441; *Pachkauri*, (1897) 24 Cal. 686; *Fouzar Rai*, (1917) 4 P. L. W. 111, 3 P. L. J. 419.

[2] *Prag Dat*, (1898) 20 All. 459; *Moher* [illegible]

[5] Per Holloway, J., in (1873) 7 M. H. C. App. 35.

[6] *Peary Mohun Sircar*, (1883) 9 Cal. 639

[7] *Bepin Behari Guha v. Pranakul Majumdar*, (1906) 11 C. W. N. 176

[8] *Silajit Mahto*, (1909) 36 Cal. 865.

[9] (1869) 5 M. H. C. App. 6, 1 Weir 27.

[10] *Nga Kyaw Yaung*, (1905) U. B. R. 21.

fight, the members of the party constitute an unlawful assembly and if they use force or violence, they are guilty of rioting under s. 147 of the Code.[1]

Illegal removal.—Paddy belonging to a society to which the first accused belonged was stored in a granary in a street. The treasurer of the society attempted to forcibly take possession of the paddy with his servants, whereupon all the accused resisted him, and maintained the possession of the first accused, some blows being struck. It was held that no offence was committed.[2]

Illegal construction of a dam.—The complainant's party without the permission of the accused constructed a dam across a pyne exclusively belonging to the accused who had obtained an injunction from the Civil Court restraining the complainant's party from interfering with the accused in their use and occupation of the pyne. The accused in attempting to cut the dam were opposed by the complainant's party two of whom were struck by the accused and the accused were convicted of rioting and of causing grievous hurt. It was held that after the Civil Court decree and injunction the accused could not be held to be enforcing a right within the meaning of clause (4) of this section and the presence of the complainant's party in opposing the accused was a criminal trespass which entitled the accused to a right of private defence.[3]

7. **Fifth clause.**—This clause is very comprehensive and applies to all the rights a man can possess, whether they concern the enjoyment of property or not. It differs from the preceding clause in the omission of any reference to a 'right or supposed right.'

The mere use of criminal force or show of criminal force by any person to take possession of any property is not sufficient to bring a case within this clause, unless some criminal intent is proved against the persons so using force or show of force.[4] Where, therefore, a District Board decided to replace a bridge across a *khal* which was out of repair by means of a road with pipes passing underneath for the flow of water, and the owners of the bed of the *khal* objected to the laying of the pipes on the ground that it would obstruct the flow of water and removed the pipes placed there by the District Board, it was held that the owners could not be convicted.[5]

8. **Explanation.**—An assembly which is lawful in its inception may become unlawful by the subsequent acts of its members.[6] It may turn unlawful all of a sudden and without previous concert among its members.[7] But an illegal act of one or two members, not acquiesced in by the others, do not change the character of the assembly.[8]

An assembly which is lawful in itself does not become unlawful merely because the members know that their assembly would be opposed and a breach of the peace would be committed.[9] The appellants assembled with others for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it. It was held that they could not be rightly convicted of an unlawful assembly.[10]

An assembly which is not unlawful in its inception does not become an unlawful assembly because of its refusal to obey an order to disperse.[11]

[1] *Dilli*, (1925) 2 O. W. N. 589.
[2] *Ayya Annasamy Aiyar*, (1901) 25 Mad. 624.
[3] *Ramnandan Prasad Singh*, (1913) 17 C. W. N. 1132.
[4] *Addaita Bhusa* v. *Kali Das De*, (1907) 12 C. W. N. 96.
[5] *Ibid.*
[6] *Khemee Sing*, (1864) 1 W. R. (Cr.) 19; *Lokenath Kar*, (1872) 18 W. R. (Cr.) 2.
[7] *Raghe Singh*, (1902) 6 C. W. N. 507.
[8] *Dinobundo Rai*, (1868) 9 W. R. (Cr.) 19.
[9] *Beatty* v. *Gillbanks*, (1882) 9 Q. B. D. 308.
[10] *Ibid.*
[11] *Girdhara Singh*, (1921) 4 U. P. L. R. (L.) 11.

"No man can foresee at the commencement what course they, *i.e.*, assemblies, will take, or what consequences will ensue. Though cases may occur in which the object of such assemblies is at first defined and moderate, they rapidly enlarge their powers of mischief; and from the natural effects of the excitement and ferment inseparable from the collection of multitudes in one mass, the original design is quickly lost sight of, and men hurry on to the commission of crimes, which at their first meeting they had never contemplated. The beginning of tumult is like the letting out of water; if not stopped at first, it becomes difficult to do so afterwards; it rises and increases, until it overwhelms the fairest and the most valuable works of man."[1]

9. **Section 142.**—Section 141 having explained what an unlawful assembly is, this section declares who may be said to be a member of such an assembly. Any one who joins an unlawful assembly or continues in it is a member of such assembly.

'**Continues.**'—Although individuals may in the first instance have associated themselves with a mob from motives perfectly innocent, nevertheless, if the mob is or becomes an unlawful assembly and the individuals in question take part in its proceedings, they will be liable as members of an unlawful assembly.[2] Where certain persons had assembled to prevent a procession by force from passing over a certain street, and they were ordered by the police to disperse but neglected to do so, it was held that they were guilty of the offence of being members of an unlawful assembly.[3]

Exercising of lawful rights.—When an attack is made on persons acting in the lawful exercise of their right over property, they are entitled to the right of private defence, and the only question that arises thereafter is whether any member of the party individually exceeded the right. Persons exercising their lawful rights are not members of an unlawful assembly, nor can the assembly become unlawful by their repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence In such a case each is liable only for his individual acts done in excess of such right.[4]

Statutory application.—See the Rangoon Police Act (Burma Act IV of 1899), s. 38 (2).

PRACTICE.

Evidence.—Prove (1) that the assembly in question consisted of five or more persons.

Where, of five persons convicted, it was found as regards two of them that there had been no common object, it was held that the conviction of the others could not be maintained, as there must have been five persons who had a common object before there could be an unlawful assembly and rioting.[5]

(2) That the object of the persons so assembled (either at the time it became an assembly, or during the time that it continued to be assembled) was any of the five objects mentioned in s. 141.

(3) That such object was common to the persons assembled.[6]

The essence of the offence is the common unlawful purpose and the accused cannot be convicted if the common object proved is different from the common object in the charge or for which he has been tried.[7]

If the common object fails and the substantive charge is disbelieved the accused should be acquitted. It is not proper for an appellate Court, while disbelieving the alleged common object of an unlawful assembly, to find out a different

[1] [illegible]

[2] [illegible]

[3] [illegible]

[4] *Kunja Bhuiya*, (1912) 39 Cal. 896; *Ambika Singh*, (1921) 1 Pat. 212; *Bhagwat Jha*, (1923) 6 P. L. T. 310.

[5] *Vyapuri Chetti*, (1909) 5 M. L. T. 285.

[6] *Bhagiram Dome* v. *Abar Dome*, (1888) 15 Cal. 338.

[7] *Loganathaiyar*, (1909) 6 M. L. T. 17.

common object regarding which the accused were never called upon to plead nor tried and to affirm the conviction.[1]

(4) That the accused joined, or continued in, such assembly.

(5) That he did so intentionally.

(6) That he did so being aware of the above facts.

[illegible] not compoundable—Any [illegible] gives power to a Magistrate to disperse unlawful assemblies by using civil or military force.[2]

Joint trial.—As a matter of procedure it is irregular to treat both parties to a riot as constituting one unlawful assembly, and to try them together inasmuch as they do not have one common object.[3] Members of each faction may be called as witnesses against their opponents.[4]

Charge.—The charge should state the common object of the assembly.[5] Omission to state it does not vitiate a conviction if there is evidence on the record to show it.[6] Such an omission is a mere irregularity which will vitiate the trial only if it has caused miscarriage of justice on the merits; and the test of such a mis-[illegible]

The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were a member of an unlawful assembly, the common object of which was (*specify the object*), and thereby committed an offence punishable under s. 143 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Joining unlawful assembly armed with deadly weapon.

144. Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT:

The risk to the public tranquillity is aggravated by the intention of using force evinced by carrying arms. This section, therefore, provides for an enhanced punishment where the member of an unlawful assembly is armed with a deadly weapon.

Scope.—The enhanced punishment under the section can only be inflicted on that member of an unlawful assembly who uses a weapon of offence. The word 'whoever' justifies this interpretation.

1. **'Weapon of offence.'**—That is, a weapon which under the present circumstances and at the present time (during the existence of the unlawful assembly) is an offensive weapon, notwithstanding that it might be otherwise at a different

[1] *Rahimuddi* v. *Asgarali*, (1900) 5 C. W. N. 31.

[2] Criminal Procedure Code, ss. 127—132.

[3] *Surroop Chunder Paul*, (1869) 12 W. R. (Cr.) 75.

[4] *Mahomed Hossein*, (1869) 1 N. W. P. 293; *Nawab*, (1881) P. R. No. 26 of 1881.

[5] (1865) 4 W. R. (Cr. L.) 9; *Ibid.*, 10; *Tafazzul Ahmed Chowdhry*, (1899) 26 Cal. 630.

[6] Reference [illegible] uary 1911.

time and place.[1] A crowd of about 100 persons, including the accused, had assembled together armed with bill-hooks and sticks, but it dispersed at once on seeing the Police. On these facts the Magistrate assumed that the intention of the members of the crowd was to use criminal force, and having regard to the weapons with which they were armed, he convicted the accused under this section. The High Court held that the prosecution had failed to show that the common object of the crowd was such as would constitute it an unlawful assembly as defined by s. 141, and that the accused were entitled to be acquitted.[2]

Sections 114 and 144.—When one person instigates another to join an unlawful assembly armed with a deadly weapon and afterwards joins the unlawful assembly himself, he may be punishable under this section, read with s. 114, even though he was not himself armed with a deadly weapon.[3]

PRACTICE.

Evidence.—Prove points (1) to (6) as in s. 143; and further

(7) That the accused was armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Any Magistrate.

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, being armed with a deadly weapon, to wit——, [*or* armed with something which, used as a weapon of offence, is likely to cause death, to wit —] were a member of an unlawful assembly, and thereby committed an offence punishable under s. 144 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Joining or continuing in unlawful assembly knowing it has been commanded to disperse.

145. Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section and s. 151 are connected with each other so far as the principle underlying both of them is concerned. Section 127 of the Code of Criminal Proce- [illegible] of a police-station may command [illegible] or more persons likely to cause a [illegible] it shall thereupon be the duty of the members of such assembly to disperse accordingly."

Section 188 of the Penal Code provides for the disobedience of any lawful order promulgated by a public servant. This section and s. 151 deal with special cases as the disobedience may cause serious breach of the peace.

'**Commanded in the manner prescribed by law to disperse.**'—This expression means, in the city of Bombay, commanded as prescribed in s 40 (1) of the City of Bombay Police Act, 1902. It cannot be construed in a wider sense so as to include a command by a Magistrate to disperse without any order having been given by an officer in charge of a police-station.[4]

[1] M. & M. 123.
[2] *Peelimuthu Tevan*, (1900) 24 Mad. 124.
[3] *Srihari Shome* v. *Lal Khan*, (1900) 5 C. W. N. 250.
[4] *Keshav Govind*, (1921) 23 Bom. L. R. 350, 6 Bom. Cr. C. 47.

passers-by commits the offence of rioting.[1] Where a husband and his friends took possession of his wife by force and violence they were held guilty of rioting.[2] Actual use of force, and not merely a show of force, is necessary. Where a number of men who were assembled at a certain place ran way on being attacked by the opposite party, they were held not guilty of rioting.[3]

'**Violence.**'—This word is not restricted to force used against persons only, but it extends also to force used against inanimate objects.[4] Thus, if an unlawful assembly came together for the purpose of pulling down a man's house, and proceeded to carry out the object, they could be said to have used violence. Similarly, where the accused struck at the door of the complainant who fled away to save himself from being beaten, it was held that they had used violence.[5] Pulling down a toddy shop and cutting and destroying spatts of toddy trees are enough to show that violence was used.[6]

'**Unlawful assembly.**'—See s. 141, *supra*.

'**Any member thereof.**'—Whether only one, or more than one, of the persons assembled use the force, the penal consequences apply equally to all. It will be otherwise, however, if the force or violence is used for a distinct purpose... as if it consists of a mere affray or assault upon each other, or upon bystanders, by some members of the assembly.[7] If any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself considered a rioter. Active participation in actual violence is not necessary. Some may encourage by words, others by signs, and others again may actually cause hurt and yet all would be equally guilty of rioting.[8]

2. '**In prosecution of the common object.**'—Section 141 indicates what objects are deemed unlawful. If the common object of an assembly is not illegal, it is not rioting if force is used by any member of that assembly.[9] If the common object is not unlawful then there can be no unlawful assembly and consequently no rioting. Thus, resistance to the execution of an illegal warrant within reasonable bounds does not amount to rioting because the common object is not unlawful; but when the right of resistance is exceeded and a severe injury, not called for, is inflicted, the person who inflicts such injury may be convicted of such injury.[10] Similarly, resistance to a search without a search warrant does not amount to rioting.[11] Where a warrant of attachment was signed, not by the Munsiff, but by the Sheristadar, and did not bear the seal of the Court, and the accused were charged with rioting with the common object of illegally rescuing the attached property, it was held that the omission of the seal rendered the attachment illegal, and that, therefore, the common object charged was not an unlawful common object and consequently the charge of rioting was not sustainable.[12] Although in ascertaining whether the object of the members composing an assembly is such as to constitute an unlawful assembly, all the circumstances must be regarded which tend to show what that object is, and the result of such consideration may be to negative the view that the object is such as to render the assembly unlawful, still when once the offence of rioting or any other offence is brought home to a member of an unlawful assembly, it rests with him to establish that the apparent

[1] *Sujatalli Nyamatalli*, (1921) 24 Bom. R. 110.
[2] *Askur*, (1864) W. R. (Gap No.) Cr. 12.
[3] *Mahomed Ishaq Khan*, (1904) 1 A. L. J. R. 02.
[4] *Samaruddi*, (1912) 40 Cal. 367; *Rasul*, 1888) P. R. No. 4 of 1889.
[5] *Venkatasubbaier*, (1922) 44 M. L. J. 07.
[6] *Marimuthu Naidu*, (1923) 32 M. L. T. 315.
[7] M. & M. 124.
[8] *Ganu*, (1875) Unrep. Cr. C. 99.
[9] *Jagarnath Mandhata*, (1897) 1 C. W. N. 233; *Parmeshwar Singh*, (1899) 4 C. W. N. 345.
[10] *Uma Charan Singh*, (1901) 29 Cal. 244.
[11] *Bajrangi Gope*, (1910) 38 Cal. 304.
[12] *Khidir Bux*, (1918) 3 P. L. J. 636.

offence is no offence, by reason of the act which constitutes the offence being justifiable under the provisions relating to the right of private defence.[1]

Acts done by some members of an unlawful assembly outside the common object of the assembly nor of such a nature as the members of the assembly could have known to be likely to be committed in prosecution of that object are only chargeable against the actual perpetrators of those acts.[2]

Sudden quarrel.—If a number of persons assembled for any lawful purpose suddenly quarrel without any previous intention or design, they do not commit a riot in the legal sense of the word.[3] Similarly, if a fight were to spring up between two of the persons unlawfully assembled, this would only make them individually responsible, and not convert the assembly into a riot.[4] It is, however, not necessary that there should be a common object prior to the commencement of the fight. It is also immaterial that the accused conceived the idea of injuring suddenly after the accused went to the scene of offence.[5]

Forcible entry.—A plea of right to possession is no answer to a charge of rioting by making a forcible entry on land cultivated by a trespasser, who is in possession and opposes the entry.[6]

Private defence.—It is often very difficult to decide how far the right of private defence may be urged as justification or palliation. But it is settled that there can be no right of private defence where the riot is premediated on both sides.[7] Where both parties are armed and prepared to fight, it is immaterial who is the first to attack, unless it is shown that a particular party was acting within the legal limits of the right of private defence.[8]

The illegality of certain act or acts opposed by criminal force is no defence to a charge of rioting, unless the circumstances are such that a right of self-defence arises.[9]

If the common object of an assembly is to enforce the right or supposed right of private defence of person or property, and force is used in prosecution of a common object to enforce that right by means of criminal force, or show of such force, rioting is committed, within the terms of the law, unless circumstances exist which give occasion for the exercise of the right of private defence and this right is exercised within the limits prescribed by law.[10]

The party of the accused accompanied by R went armed with clubs to fish in a tank in which R had a two-annas share. The complainant, who, with some other co-sharers, represented an eleven-annas interest in the tank, went there with some of these co-sharers, to protest on the ground that the accused had no share or interest in the tank. A fight ensued in the course of which some of the complainant's party received slight injuries. It was held that the accused were guilty of rioting and voluntarily causing hurt.[11] The accused went with three ploughs on land to which the complainant had the right of possession, and of which he was in possession till such entry, and began to plough up the land, to uproot some castor plants, and to throw them away. While they were thus in actual but temporary occupation, the complainant and his party went on the land and tried to unyoke the cattle, whereupon a riot took place. It was held that the accused were guilty

[1] *Rasul*, (1888) P. R. No. 4 of 1889.
[2] *Agra*, (1914) P. R. No. 37 of 1914, P. L. R. No 219 of 1915, P. W R. (Cr.) No. 69 of 1914.
[3] *Khajah Noorul Hossein* v. *Fabre-Tonnerre*, (1875) 24 W. R (Cr.) 26; *Government* v. *Doolubh*, 2 N. A. R. 883.
[4] *Muzhur Hossein*, (1873) 5 N. W. P. 208.
[5] *Golla Hanumappa*, (1911) 35 Mad. 243.
[6] *Appavu Nayak*, (1882) 6 Mad. 245; *Sujawara*, (1903) 5 P. L. R. 47. But see *Ram Kishan Singh*, (1922) 3 P. L. T. 335, which justifies such entry by an auction-purchaser.
[7] *Prag Dat*, (1898) 20 All. 459.
[8] *Kalee Beparee*, (1878) 1 C. L. R. 521; *Saadullah*, (1923) 6 L. L. J. 170.
[9] (1873) 7 M. H. C. App. 35; 1 *Weir* 58.
[10] *Rasul*, sup.
[11] *Anant Pandit* v. *Madhusudan Mandal*, (1899) 26 Cal. 874; *Gansuri Lal Das*, (1889) 16 Cal. 206; *Alladad*, (1869) P. R. No. 1 of 1870.

of rioting and that their action in beating the complainant's party was not justified by the fact of their having obtained temporary occupation.[1] Where more than twenty-five persons went in a body to enforce the right or supposed right of one of them to an animal by removing it from the house of a third person, and after they had removed it and gone some distance, they were followed by that person, who was consequently attacked and beaten by some of them and died by a blow on the head, it was held that the assembly was an unlawful assembly.[2]

The accused, on receiving information that the complainant's party were about to take forcible possession of a plot of land, which was found by the Court to be in the possession of the accused, collected a large number of men, some of whom were armed, and went through the village to the land in question. While they were engaged in ploughing, the complainant's party came up and interfered with the ploughing. A fight ensued, in the course of which one of the complainant's party was grievously wounded and subsequently died, and two of the accused's party were hurt. It was held that the accused were justified in taking such precautions as they thought were required to prevent the aggression, and that they could not be held to be members of an unlawful assembly.[3] Where the accused were maintained in possession of certain lands, including a homestead, under s. 145 of the Criminal Procedure Code, and the opposite party unlawfully attempted to take possession of some huts standing thereon, whereupon the accused came with an armed body and demolished the huts, and on being resisted by the opposite party wounded some of them, it was held, by the majority of the Court, that they were justified in taking precautions and using such force as was necessary to prevent aggression by the opposite party.[4]

Where, on K being assaulted by B, a number of persons rushed to the scene and a fracas occurred in which B was killed, and K and the other persons forming the assembly were convicted of rioting, it was held that they were not guilty of rioting as the common object of the crowd was to rescue K and not to assault B.[5]

See Comment and Cases on ss. 99 and 141, *supra*.

CASES.

Resistance to distraint.—Where a landlord, who had not tendered to his tenant such a lease as the latter was bound to accept under the Madras Rent Recovery Act (Mad. Act VIII of 1865), distrained his cattle for arrears of rent, the assistance of the Police having been procured for the purpose, and the tenant with others forcibly obstructed the removal of the cattle, it was held that they were guilty of rioting.[6] But obstruction offered to a distraint by a landlord when no rent was in arrear was held to be no offence.[7]

Resistance to a public officer.—N, S and G were appointed special constables under s. 17 of the Police Act, 1861. A Police Inspector accompanied by some police went to their village and informed them that they had been so appointed, and requested them to accompany him to a Police Station which they declined to do. The Inspector then had N arrested, whereupon N shook himself free, and N, S and G with other persons, who had assembled, abused and threatened the police and compelled them to withdraw from the village It was held that the refusal of N to accompany the Inspector was not an offence for which N could be arrested, and, as the police when obstructed were not acting in lawful discharge of their duty, none of the persons concerned could be convicted of an offence under s. 353, but they were guilty of rioting under this section.[8]

[1] *Jairam Mahton*, (1907) 35 Cal. 103.

[2] *Agra*, (1914) P. L. R. No. 219 of 1915, P. W. R. Cr. No. 69 of 1914, P. R. No. 37 of 1914.

[3] *Pachkauri*, (1897) 24 Cal. 686; *Fateh Singh*, (1913) 41 Cal. 43; *Samba Pillai*, (1916) 2 M. W. N. 213; *Fouzdar Rai*, (1917) 4 P.L.W. III, 3 P. L. J. 419; *Sunder Baksh Singh*, (1918) 3 P. L. J. 653.

[4] *Poresh Nath Sircar*, (1905) 33 Cal. 295.

[5] *Ambika Singh*, (1921) 1 Pat. 212.

[6] *Ramayya*, (1889) 13 Mad. 148.

[7] (1875) 8 M. H. C. App. 11; 1 Weir 56.

[8] *Raman Singh*, (1900) 28 Cal. 411.

Where a Sub-Inspector of Police, on receiving information of the commission of a dacoity, reached the house of one of the alleged offenders, accompanied by the complainant and the village officers, but without a search warrant, whereupon they were beaten by the accused who were charged with, and convicted of, rioting, with the common object of resisting the search, assault and causing hurt, under ss. 147, 323 and 353; it was held that the search was illegal, and that the common object having failed, the conviction under s. 147 was bad.[1] But where certain Police officers acting *bona fide* under a defective search warrant were resisted by more than five persons and hurt was caused, the former Chief Court of the Punjab held that they were guilty of an offence under s. 147 read with s. 99 if the common object was to cause hurt and hurt was caused.[2] A complaint was lodged against two persons under s. 498 for abduction of K, complainant's daughter-in-law, the Magistrate ordered the issue of a warrant for the arrest of K, apparently intending to act under s. 90 of the Code of Criminal Procedure, but the warrant erroneously charged K herself with an offence under s. 498. Under this warrant the Head Constable arrested K and had taken her to a distance of about 200 *kadams* when a large concourse of people assembled, amongst whom were the accused, who took away the woman from the custody of the Head Constable and the constables with him, and inflicted certain injuries upon them. It was held that the accused were rightly convicted of an offence of rioting.[3]

Preventing cow-killing.—Where several Hindus, acting in concert, forcibly removed an ox and two cows from the possession of a Mahomedan, not for the purpose of causing 'wrongful gain' to themselves or 'wrongful loss' to the owner of the cattle, but for the purpose of preventing the killing of the cows, it was held that they were guilty not of dacoity but of rioting.[4] But the authority of this case has been shaken by a subsequent decision of the same High Court. In the later case a large body of Hindus, acting in concert, and apparently under the influence of a religious feeling, attacked certain Mahomedans who were driving cattle along a public road, and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently restoring such cattle to their lawful owners. It was held that the offence of which the Hindus were guilty was dacoity and not merely rioting.[5]

Recovering possession of cattle.—Persons whose common object was by means of criminal force to recover possession of their cattle seized for trespass, and who made use of such force and took away their cattle, were held guilty of rioting.[6]

In the absence of a definite finding that five or more people took part in the occurrence, a conviction for rioting cannot be sustained.[7]

PRACTICE.

Evidence.—Prove (1) that five or more persons were assembled.

(2) That such assembly was, when it was convened, or subsequently became unlawful, having any one of the five objects specified in s. 141.

(3) That such object was the common object of those composing such assembly.[8]

[1] *Bajrangi Gope*, (1910) 38 Cal. 304.

[2] *Gaman*, (1913) P. R. No. 16 of 1913.

[3] *Attar Singh*, (1917) P. R. No. 9 of 1918.

[4] *Raghunath Rai*, (1892) 15 All. 22. This case has not been followed in *Parichat*, (1908) 5 N. L. R. 17, where it was held that a man who from conscientious objection to the killing of cattle took a buffalo from its owner without his consent, caused wrongful loss, and committed theft, though his object was to benefit the animal, not to injure the owner.

[5] *Ram Baran*, (1893) 15 All. 299.

[6] *Bolao Sheikh*, (1854) W. R. (Gap No.) Cr. 21.

[7] *Ramaswami Teran*, (1921) 14 L. W. 588, 30 M. L. T. (H. C.) 18; *Sinnaswami Mudali*, (1922) 16 L. W. 526; *Ala Muhammad*, (1923) 5 L. L. J. 475.

[8] *Sabir*, (1894) 22 Cal. 276; *Aminulla*, (1922) 35 C. L. J. 253, 26 C. W. N. 536.

It is essential to sustain a conviction that the persons forming the unlawful assembly should be animated by a common object, and in the absence of such a finding the conviction is not sustainable and ought on that ground alone to be set aside.[1] Where the common object has not been sustained, the High Court in a reference under s. 307 of the Criminal Procedure Code cannot invent another common object in order to support the conviction.[2]

(4) That the accused, or any member of such unlawful assembly, used force or violence.

(5) That such force or violence was used in the prosecution of such common object.

In cases of rioting it often happens that the Court may consider that the story told by the prosecution is false in some of its details, but is nevertheless sufficient [illegible] as being the case they had to meet.[3]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable[4]—Any Magistrate.

Separate trial.—Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly, and to try them together, as they had not one common object within the meaning of s. 141; and each party should be tried separately.[5]

Cumulative sentences.—Separate sentences may be passed under this section and s. 323 (causing hurt)[6]; or under this section and s. 325 (causing grievous hurt).[7] The Calcutta High Court in an early case held that a double sentence under this section and s. 353 was illegal where the force which was used, and which formed one of the component elements of the offence of rioting, was criminal force used to public servants.[8] But in a later case it laid down that separate sentences might be passed.[9] Though under s. 146 the use of force or violence is a necessary ingredient of the offence of rioting, yet separate sentences passed on those who actually used force or violence are not illegal.[10] Where an accused person was found with several others to have entered upon another person's land with the common object of cutting crops standing on it, and in prosecution of that object hurt was caused, it was held that the accused could not be convicted and sentenced for criminal trespass under s. 447, in addition to a conviction and sentence for rioting under this section, the common object of the riot and the intention in the criminal trespass being substantially the same in the case.[11] Where the common object of an unlawful assembly was to assault the Police Officers in discharging

[1] *Poresh Nath Sircar*, (1905) 33 Cal. 295.

[2] *Akbar Molla*, (1923) 38 C. L. J. 379.

[3] *Banga Hadua*, (1909) 11 C. L. J 270.

[4] This offence cannot be compounded under any circumstances. It is *ultra vires* of a Magistrate to allow a non-compoundable offence to be compromised on the grounds that the offence committed might probably in the end turn out to be a compoundable one or that the consequence of his action might probably, in his view, be better for the complainant; *Hira Singh*, (1907) P. R. No. 11 of 1907.

[5] *Sheikh Bazu*, (1867) 8 W. R. (Cr.) 47, [illegible] P. R. No. 26 of 1881; *Saifulla*, (1882) P. R. No. 15 of 1882; *Nga Shwe Ya*, (1884) S. J. L.B. 275; *Nga Shwe Zan*, (1885) S. J. L. B. 331; *Nath Singh*, O. S. C. 75.

[6] [illegible] C. L. J. 471.

[7] *Pershad*, (1885) 7 All. 414, F.B., *Bisheshar*, (1887) 9 All 645; *Tolha*, (1895) P. R. No. 8 of 1895; *Bhagwan Singh*, (1900) P. R. No. 4 of 1901; *Bhagwandin Singh*, O. S. C. 125.

[8] *Ramdhal*, (1898) 3 C. W. N. 174.

[9] *Prokash Chandra Kundu*, (1914) 41 Cal. 836.

[10] *Kapil Mandal* v. *Rabhani Sheikh*, sup.

[11] *Bhup Sing*, (1903) 8 C. W. N. 305.

their duty and hurt was actually caused to some of them, separate sentences under this section and s. 332 were disallowed and the sentence under s. 332 was only maintained.[1] Under the amended s. 35, Criminal Procedure Code, separate sentences may be passed subject to s. 71 of the Penal Code.

No separate sentences should be passed for rioting and theft, when it is not shown that any one of the rioters individually committed theft.[2]

As regards punishment, see s. 71, *supra*.

Charge.—The common object of the assembly must be stated in the charge in order that the accused person might have an opportunity of meeting it.[3] A conviction for rioting based upon a charge which does not specify the common object of the assembly charged with rioting is improper.[4] But the omission to set out the common object does not necessarily make the conviction bad. It is necessary to see whether or not the accused has been misled by the omission and the omission has caused a failure of justice.[5] It is not a general proposition of law that a conviction under this section cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge. Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy on their land, and thereby to forcibly oust them, but the common object established by the facts found was to maintain possession of the land by the accused, it was held that the common object in the charge had not been substantially made out and that the conviction under this section was bad.[6] Where the common object charged was "by means of criminal force to obtain possession of certain lands which comprised two plots, one of fifteen *cottahs* and the other of five *cottahs*, and it was found by the Court that the offence was committed for obtaining possession of the five *cottahs* plot, it was held that the variance between the common object alleged and that found was not such as to invalidate the conviction.[7] Where a charge, as drawn up by the Magistrate, alleges several alternative common objects of the unlawful assembly, it is incumbent on the appellate Court to determine, whether it is sustainable, and, if so, which of the common object stated has been made out.[8] Where the common object of an unlawful assembly is clearly set out in the charge and there is no question in the lower Courts as to the common object so set out, a conviction for rioting with the object set out is good even though there might be no express finding as to the common object, if the accused has not been in any way prejudiced by the absence of such finding.[9] Where the charge did not specify the property, the taking possession of which was stated to be the common object of the unlawful assembly, and its specification would have altered the whole complexion of the case, it was held that the omission had prejudiced the accused and was not cured by s. 537, cl. (*a*), of the Code of Criminal Procedure.[10] Where the common object of an unlawful assembly was stated in the charge to have been to cause obstruction to measurement and demarcation of *Khas Mahal* land, it was held that if it was not established that the land was in the actual possession of the Government, the charge as laid was not proved.[11]

The charge should run thus :—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

[1] *Gowardhan Das*, (1907) P. W. R. (Cr.) No. 38 of 1907.

[2] *Mithoo Singh* v. *Gopal Lal*, (1899) 3 C. W. N. 761.

[3] *Sabir*, (1899) 22 Cal. 276; *Behari Mahton*, (1884) 11 Cal. 106.

[4] *Chunder Coomar Sen*, (1899) 3 C. W. N. 605; *Poresh Nath Sircar*, (1905) 33 Cal. 295; *Panchanan Bose*, (1919) 30 C. L. J. 19.

[5] *Budhu* v. *Mussst. Lachmania*, (1905) 9 C. W. N. 599; *Gowardhan Das*, sup.; *Kudrutulla*, (1912) 39 Cal. 781.

[6] *Sitajit Mahto*, (1909) 36 Cal. 865; *Ritbaran Singh*, (1917) 4 P. L. W. 120.

[7] *Babbon Sheikh*, (1910) 14 C. W. N. 422.

[8] *Manaruddi*, (1908) 35 Cal. 718.

[9] *Dasarathi Mahapatra* v. *Raghu Sahu*, (1908) 8 C.L.J. 69, 12 C.W.N. 944; *Harinder Singh*, (1917) 2 P. L. J. 541; *Dakshinamurthi Rajah*, (1917) 7 L. W. 83.

[10] *Poresh Nath Sircar*, sup.

[11] *Panchanan Bose*, sup.

That you, on or about the——day of——, at——, were a member of an unlawful assembly, and, in prosecution of the common object of such assembly, *viz.*, in——, committed the offence of rioting, and thereby committed an offence punishable under s. 147 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Rioting, armed with deadly weapon.

148. Whoever is guilty of rioting, being armed[1] with a deadly weapon[2] or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The offence under this section is an aggravated form of the offence under the last section. Enhanced punishment is provided if a person is armed with a deadly weapon. This section bears the same relation to s. 147 just as s. 144 does to s. 143.

1. 'Being armed.'—If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under this section. It is only the actual person so armed who can be charged under it.

2. 'Deadly weapon.'—Such as fire-arms, swords, etc. The question whether or not a club is a deadly weapon is a question of fact to be determined on the special circumstances of each case.[2] Stout male bamboos have been held to be deadly weapons.[3]

PRACTICE.

Evidence.—Prove points (1) to (5) as in s. 147; and further,

(6) That the accused was armed with a deadly weapon, or with something which was likely to cause death, when used as a deadly weapon.

A charge under this section read with s. 149 is incongruous and improper. A person can be convicted under this section only where there is a finding that the particular accused was present in the mob armed with a deadly weapon.[4]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were a member of an unlawful assembly, and did, in prosecution of the common object of such assembly, *viz.*, in——, commit the offence of rioting with a deadly weapon (*or* with something which used as a weapon of offence was likely to cause death) to wit——, and thereby committed an offence punishable under s. 148 of the Indian Penal Code, and within my cognizance.[5]

And I hereby direct that you be tried on the said charge.

Every member of unlawful assembly guilty of offence committed in prosecution of common object.

149. If an offence is committed by any member of an unlawful assembly[1] in prosecution of the common object of that assembly,[2] or such as the members of that assembly knew to be likely to

[1] *Sabir*, (1894) 22 Cal. 276; *Ram Saran Rai*, (1899) 19 A.W.N. 77; *Bhunjun Pauray*, (1865) 4 W. R. (Cr.) 8. See, however, *Srihari Shome* v. *Lal Khan*, (1900) 5 C.W.N. 250, as regards s. 144.

[2] *Nathu*, (1892) 15 All. 19.

[3] *Krishna Chetti*, (1882) 1 Weir 70.

[4] *Jivan Raut*, (1922) 4 P. L. T. 502.

[5] (1865) 4 W. R. (Cr. L.) 9 and 10; (1867) 8 W. R. (Cr. L.) 17.

their duty and hurt was actually caused to some of them, separate sentences under this section and s. 332 were disallowed and the sentence under s. 332 was only maintained.[1] Under the amended s. 35, Criminal Procedure Code, separate sentences may be passed subject to s. 71 of the Penal Code.

No separate sentences should be passed for rioting and theft, when it is not shown that any one of the rioters individually committed theft.[2]

As regards punishment, see s. 71, *supra*.

Charge.—The common object of the assembly must be stated in the charge in order that the accused person might have an opportunity of meeting it.[3] A conviction for rioting based upon a charge which does not specify the common object of the assembly charged with rioting is improper.[4] But the omission to set out the common object does not necessarily make the conviction bad. It is necessary to see whether or not the accused has been misled by the omission and the omission has caused a failure of justice.[5] It is not a general proposition of law that a conviction under this section cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge. Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy on their land, and thereby to forcibly oust them, but the common object established by the facts found was to maintain possession of the land by the accused, it was held that the common object in the charge had not been substantially made out and that the conviction under this section was bad.[6] Where the common object charged was "by means of criminal force to obtain possession of certain lands which comprised two plots, one of fifteen *cottahs* and the other of five *cottahs*, and it was found by the Court that the offence was committed for obtaining possession of the five *cottahs* plot, it was held that the [illegible] found was not such as to in [illegible] by the Magistrate, alleges several alternative common objects of the unlawful assembly, it is incumbent on the appellate Court to determine, whether it is sustainable, and, if so, which of the common object stated has been made out.[8] Where the common object of an unlawful assembly is clearly set out in the charge and there is no question [illegible] for rioting with [illegible] the [illegible] of such finding.[9] Where the charge did not specify the property, the taking possession of which was stated to be the common object of the unlawful assembly, and its specification would have altered the whole complexion of the case, it was held that the omission had prejudiced the accused and was not cured by s. 537, cl. (*a*), of the Code of Criminal Procedure.[10] Where the common object of an unlawful assembly was stated in the charge to have been to cause obstruction to measurement and demarcation of *Khas Mahal* land, it was held that if it was not established that the land was in the actual possession of the Government, the charge as laid was not proved.[11]

The charge should run thus :—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

[1] *Gowardhan Das*, (1907) P. W. R. (Cr.) No. 38 of 1907.

[2] *Mithoo Singh* v. *Gopal Lal*, (1899) 3 C. W. N. 761.

[3] *Sabir*, (1899) 22 Cal. 276; *Behari Mahton*, (1884) 11 Cal. 106.

[4] *Chunder Coomar Sen*, (1899) 3 C. W. N. [illegible] C. W. N. 599; *Gowardhan Das*, sup.; *Kudrutulla*, (1912) 39 Cal. 781.

[6] *Silajit Mahto*, (1909) 36 Cal. 865; *Rit-* [illegible] V. N. 422. [illegible] *hu Sahu*, [illegible] *Harinder* [illegible] *inamurthi* [illegible]

[9] *Poresh Nath Sircar*, sup.

[11] *Panchanan Bose*, sup.

That you, on or about the——day of——, at——, were a member of an unlawful assembly, and, in prosecution of the common object of such assembly, *viz.*, in——, committed the offence of rioting, and thereby committed an offence punishable under s. 147 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Rioting, armed with deadly weapon.

148. Whoever is guilty of rioting, being armed[1] with a deadly weapon[2] or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The offence under this section is an aggravated form of the offence under the last section. Enhanced punishment is provided if a person is armed with a deadly weapon. This section bears the same relation to s. 147 just as s. 144 does to s. 143.

1. 'Being armed.'—If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under this section. It is only the actual person so armed who can be charged under it.

2. 'Deadly weapon.'—Such as fire-arms, swords, etc. The question whether or not a club is a deadly weapon is a question of fact to be determined on the special circumstances of each case.[2] Stout male bamboos have been held to be deadly weapons.[3]

PRACTICE.

Evidence.—Prove points (1) to (5) as in s. 147; and further,

(6) That the accused was armed with a deadly weapon, or with something which was likely to cause death, when used as a deadly weapon.

A charge under this section read with s. 149 is incongruous and improper. A person can be convicted under this section only where there is a finding that the particular accused was present in the mob armed with a deadly weapon.[4]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were a member of an unlawful assembly, and did, in prosecution of the common object of such assembly, *viz.*, in——, commit the offence of rioting with a deadly weapon (*or* with something which used as a weapon of offence was likely to cause death) to wit——, and thereby committed an offence punishable under s. 148 of the Indian Penal Code, and within my cognizance.[5]

And I hereby direct that you be tried on the said charge.

Every member of unlawful assembly guilty of offence committed in prosecution of common object.

149. If an offence is committed by any member of an unlawful assembly[1] in prosecution of the common object of that assembly,[2] or such as the members of that assembly knew to be likely to

[1] *Sabir*, (1894) 22 Cal. 276; *Ram Saran Rai*, (1899) 19 A.W.N. 77; *Bhunjun Pouray*, (1865) 4 W. R. (Cr.) 8. See, however, *Srikari Shome* v. *Lal Khan*, (1900) 5 C.W.N. 250, as regards s. 144.

[2] *Nathu*, (1892) 15 All. 19.

[3] *Krishna Chetti*, (1882) 1 Weir 70.

[4] *Jiwan Raut*, (1922) 4 P. L. T. 502.

[5] (1865) 4 W. R. (Cr. L.) 9 and 10; (1867) 8 W. R. (Cr. L.) 17.

their duty and hurt was actually caused to some of them, separate sentences under this section and s. 332 were disallowed and the sentence under s. 332 was only maintained.[1] Under the amended s. 35, Criminal Procedure Code, separate sentences may be passed subject to s. 71 of the Penal Code.

No separate sentences should be passed for rioting and theft, when it is not shown that any one of the rioters individually committed theft.[2]

As regards punishment, see s. 71, *supra*.

Charge.—The common object of the assembly must be stated in the charge in order that the accused person might have an opportunity of meeting it.[3] A conviction for rioting based upon a charge which does not specify the common object of the assembly charged with rioting is improper.[4] But the omission to set out the common object does not necessarily make the conviction bad. It is necessary to see whether or not the accused has been misled by the omission and the omission has caused a failure of justice.[5] It is not a general proposition of law that a conviction under this section cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge. Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy on their land, and thereby to forcibly oust them, but the common object established by the facts found was to maintain possession of the land by the accused, it was held that the common object in the charge had not been substantially made out and that the conviction under this section was bad.[6] Where the common object charged was "by means of criminal force to obtain possession of certain lands which comprised two plots, one of fifteen *cottahs* and the other of five *cottahs*, and it was found by the Court that the offence was committed for obtaining possession of the five *cottahs* plot, it was held that the variance between the common object alleged and that found was not such as to invalidate the conviction.[7] Where a charge, as drawn up by the Magistrate, alleges several alternative common objects of the unlawful assembly, it is incumbent on the appellate Court to determine, whether it is sustainable, and, if so, which of the common object stated has been made out.[8] Where the common object of an unlawful assembly is clearly set out in the charge and there is no question in the lower Courts as to the common object so set out, a conviction for rioting with the object set out is good even though there might be no express finding as to the common object, if the accused has not bee[illegible] any way prejudiced by the absence of such finding.[9] Where the charge did not [illegible] party, the taking posses[illegible]sion of which was stated to be the common [illegible]ly, and its specification would have altered the whole comp[illegible] the omission had prejudiced the accused and was not cured [illegible] Code of Criminal Procedure.[10] Where the common object of an unlawfu[illegible] was stated in the charge to have been to cause obstruction to measurement and demarcation of *Khas Mahal* land, it was held that if it was not established that the land was in the actual possession of the Government, the charge as laid was not proved.[11]

The charge should run thus:—

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[2] *Mithoo Singh* v. *Gopal Lal*, (1899) 3 C. W. N. 761.

[3] *Sabir*, (1899) 22 Cal. 276; *Behari Mahton*, (1884) 11 Cal. 106.

[4] *Chunder Coomar Sen*, (1899) 3 C. W. N. 605; *Poresh Nath Sircar*, (1905) 33 Cal. 295; *Panchanan Bose*, (1919) 30 C. L. J. 19.

[5] *Budhu* v. *Mussti. Lachminia*, (1905) 9 C. W. N. 599; *Gowardhan Das*, sup.; *Kudrutulla*, (1912) 39 Cal. 781.

[6] *Silajit Mahto*, (1909) 36 Cal. 865; *Bibaran Singh*, (1917) 4 P. L. W. 120.

[7] *Bablon Sheikh*, (1910) 14 C. W. N. 422.

[8] *Manaruddi*, (1908) 35 Cal. 718.

[9] *Dasarathi Mahapatra* v. *Roghu Sahu*, (1908) 8 C.L.J. 69, 12 C.W.N. 944; *Harinder Singh*, (1917) 2 P. L. J. 541; *Dakshinamurthi Rajah*, (1917) 7 L. W. 83.

[10] *Poresh Nath Sircar*, sup.

[11] *Panchanan Bose*, sup.

That you, on or about the——day of——, at——, were a member of an unlawful assembly, and, in prosecution of the common object of such assembly, viz., in——, committed the offence of rioting, and thereby committed an offence punishable under s. 147 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Rioting, armed with deadly weapon.

148. Whoever is guilty of rioting, being armed[1] with a deadly weapon[2] or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The offence under this section is an aggravated form of the offence under the last section. Enhanced punishment is provided if a person is armed with a deadly weapon. This section bears the same relation to s. 147 just as s. 144 does to s. 143.

1. 'Being armed.'—If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under this section. It is only the actual person so armed who can be charged under it.

2. 'Deadly weapon.'—Such as fire-arms, swords, etc. The question whether or not a club is a deadly weapon is a question of fact to be determined on the special circumstances of each case.[2] Stout male bamboos have been held to be deadly weapons.[3]

PRACTICE.

Evidence.—Prove points (1) to (5) as in s. 147; and further,

(6) That the accused was armed with a deadly weapon, or with something which was likely to cause death, when used as a deadly weapon.

A charge under this section read with s. 149 is incongruous and improper. A person can be convicted under this section only where there is a finding that the particular accused was present in the mob armed with a deadly weapon.[4]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were a member of an unlawful assembly, and did, in prosecution of the common object of such assembly, *viz.*, in——, commit the offence of rioting with a deadly weapon (*or* with something which used as a weapon of offence was likely to cause death) to wit——, and thereby committed an offence punishable under s. 148 of the Indian Penal Code, and within my cognizance.[5]

And I hereby direct that you be tried on the said charge.

Every member of unlawful assembly guilty of offence committed in prosecution of common object.

149. If an offence is committed by any member of an unlawful assembly[1] in prosecution of the common object of that assembly,[2] or such as the members of that assembly knew to be likely to

[1] *Sabir*, (1894) 22 Cal. 276; *Ram Saran Rai*, (1899) 19 A.W.N. 77; *Bhunjun Pauray*, (1865) 4 W. R. (Cr.) 8. See, however, *Srihari Shome* v. *Lal Khan*, (1900) 5 C.W.N. 250, as regards s. 144.

[2] *Nath*, (1892) 15 All. 19.

[3] *Krishna Chetti*, (1882) 1 Weir 70.

[4] *Jivan Raut*, (1922) 4 P. L. T. 502.

[5] (1865) 4 W. R. (Cr. L.) 9 and 10; (1867) 8 W. R. (Cr. L.) 17.

be committed[2b] in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

COMMENT.

Principle.—This section creates no offence, but like s. 34, is merely declaratory of a principle of the common law, which at any rate in England has prevailed. Its object is to make clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object.[1] "Section 149 declares in substance that every member of an unlawful assembly is responsible for an offence committed by another member, or the other members, in prosecution of the common object of such assembly, or one which he must have known was reasonably likely to be committed in the prosecution of such common object. In other words, this provision, so to speak, takes him out of the region of abetment, and makes him responsible as a principal, for the acts of each, and all, merely because he is a member of an unlawful assembly."[2]

A person cannot be tried and sentenced under this section alone. There must be some substantive offence charged to be read with this section.[3]

Section 34 and this section deal with liability for constructive criminality, *i.e.*, liability for an offence not committed by the person charged.

Scope.—This section is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. It is divided into two parts: (1) an offence committed by a member of an unlawful assembly in prosecution of the common object of that assembly; and (2) an offence such as the members of that assembly knew to be likley to be committed in prosecution of that object. In order to bring a case within the first part the act must be [illegible] accomplish [illegible] within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. But... there may be cases which would come within the second part, and not within the first...Persons assemble with a view to attack and plunder the house of a particular person; that would be an unlawful assembly, and the common object of the assembly would be house-breaking or the other offences which would be included in such acts, as attacking and plundering a man's house; but from some cause, such as a show of resistance, they might not continue to prosecute that common object; and before they had dispersed, and whilst they continued to be an unlawful assembly, some of them might plunder another house, and thereby commit an offence. Such a case might come within the second part."[4]

In *Sabid Ali's case*, Phear, J., says that inasmuch as the continuance of the unlawful assembly is by the definition of s. 141 made conterminous with the prosecution of the common object, it seems tolerably clear that the Legislature must have employed the words 'prosecution of the common object' with some difference of

[1] *Bisheshar*, (1887) 9 All. 645; *Theethumalai Gounder*, (1924) 47 Mad. 746, F.B.

[2] Per Straight, J., in *Ram Partab*, (1883) 6 All. 121, 123.

Theethumalai Gounder, sup.; *Chhedi Singh*, (1924) 3 Pat. 870.

[4] Per Couch, C. J., in *Sabid Ali*, (1873) 20 W. R. (Cr.) 5, 10; *Krishnarao Narayanarao*, (1903) 5 Bom. L. R. 1023.

meaning in the two parts of the section. Also the mere fact that the Legislature thought fit to express the second alternative appears to show very distinctly that it did not intend the words 'in prosecution' which are found in the first to be equivalent to 'during the prosecution'; for if they were, then the second alternative would have clearly been unnecessary. An offence in order to be committed in the prosecution of the common object must be immediately connected with that common object by virtue of the nature of the object. An offence will fall within the second alternative, if the members of the assembly, for any reason, knew beforehand that it was likely to be committed in the prosecution of the common object, though not knit thereto by the nature of the object itself.

In dealing with cases under this section, while on the one hand it is necessary for the protection of the accused that he should not, merely by reason of his association with others as members of an unlawful assembly, be held criminally liable for offences committed by his associates, which he himself neither intended, nor knew to be likely to be committed, on the other hand, it is equally necessary for the protection of the peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offender with one common object. These two cases respectively emphasize the necessity of keeping these considerations in view. Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of this section may be different on different members of the same unlawful assembly.

Ingredients.—The section has the following essentials:—

1. Commission of an offence by any member of an unlawful assembly.

2*a*. Such offence must have been committed in prosecution of the common object of that assembly; or

2*b*. The offence must be such as the members of that assembly knew to be likely to be committed.

1. **'Offence is committed by any member of an unlawful assembly.'**—As to the meaning of 'offence' see s. 40; and of 'unlawful assembly,' s. 141. This section only applies where there is an unlawful assembly.[2]

The word 'offence' does not include offences under a special Act. This section, therefore, cannot be applied to offences created by the Indian Railways Act, 1890. Where the accused were members of an unlawful assembly some other members of which removed railway rails, sleepers, etc., and there was no evidence that the accused themselves took any active part in any act specified by s. 126 of the Indian Railways Act, it was held that the accused could not be held constructively guilty of an offence under the Railways Act.[3]

2*a*. **'In prosecution of the common object of that assembly.'**—The test whether an offence is committed in prosecution of the common object is whether the common object is prosecuted in fact as well as in the intention of the doer. When that is the case, every person who is engaged in prosecuting the same object may well be held guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting. No offence, however, executes or tends to execute the common object, unless the commission of that offence is involved in the common object. When this is not the case, the offence committed not being

[1] *Jahiruddin*, (1894) 22 Cal. 396; *Adil Mohamed*, (1908) 8 C. L. J. 561. See also *Ram Sarup Rai*, (1901) 6 C. W. N. 98.

[2] *Maulo*, (1923) 6 L. L. J. 434.

[3] *Aydroos*, (1922) 17 L. W. 21, [1922] M. W. N. 800.

committed in prosecution of the common object, in its strict sense, may yet fall under the second branch.[1] The existence of a common object before the commencement of the fight is not necessary. It is enough if the common object is adopted by all the accused.[2] See ss. 34 and 111, *supra*.

The expression 'common object' is not used in the same sense as 'the common intention' in s. 34, which means the intention of all whatever it may have been. The expression refers to one of the five objects mentioned in s. 141.

2b. **'Or such as the members of that assembly knew to be likely to be committed.'**—*The word 'or' divides the definition into two branches.*[3] *It is not* used in an alternative sense.[4] The expression 'such as the members of that assembly knew to be likely to be committed' imports at least an expectation founded upon facts known to all the members of the assembly that an offence of the particular kind committed would be committed: something more than a speculation that such an offence might happen to be committed.[5]

This section does not subject any person to the consequences of an offence which, though committed in prosecution of the common object of the unlawful assembly, he himself had not directly contemplated, unless it were proved that he knew it to be likely that such offence would be so committed.[6] The word 'knew' is advisedly used, and cannot be made to bear the sense of "might have known."[7] If the offence be such as the members of the assembly knew to be likely to be committed by a person engaged in prosecuting the common object, and acting with the purpose of executing it, it may fairly be imputed to the other members of the assembly.

Culpable homicide.—To bring the offence of murder within this section, it must either necessarily flow from the prosecution of the common object or it must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen. The offence of murder, as strictly defined by the Code, requires a previous intention or knowledge in the perpetrator; and to 'know' that murder is likely to be committed, is to know that some member of the assembly has such previous intention or knowledge. This interpretation of the section, so far as murder is concerned, is confirmed by comparing ss. 398 and 396 with s. 148 and this section.[8] Members of a party setting out heavily armed for the purpose of committing dacoity must know that there is every likelihood of something occurring either on their way or at the scene of dacoity to interfere with their criminal plans and that their deliberate intention is to use their arms wherever necessary, either to effect the object in view or to avoid the risk of capture at any stage of the adventure, and therefore if some of the members of the party fire upon the police killing any one, all are guilty of the offence of murder under this section and s. 302.[9]

In order to sustain a conviction under this section and s. 304, it must be shown that there was an unlawful assembly whose common object was to commit an offence under s. 304 and that the accused was one of them.[10]

Where a prisoner is constructively guilty of murder under s. 34, it is doubtful if he can be said to have committed the offence of murder within the meaning of this section, so as to make the other prisoners, by a double construction, guilty of murder.[11]

[1] *Mahat Khan*, (1887) P. R. No. 61 of 1887; *Earil*, (1888) P. R. No. 4 of 1889; *Dhian Singh*, (1915) P.W.R. (Cr.) No. 17 of 1915; P. R. No. 16 of 1915.

[2] *Gollu Hanumappa*, (1911) 35 Mad. 243.

[3] *Mahat Khan*, sup.

[4] *Sabid Ali*, (1872) 20 W. R. (Cr.) 5, 11.

[5] *Mahat Khan*, sup.

[6] *Sabid Ali*, sup; *Hardeo Singh*, (1920) 3 U. P. L. R. (P.) 29.

[7] *Sabid Ali*, sup., p. 12.

[8] *Ibid.*; *Mahmadkhan Sultankhan*, (1907) 9 Bom. L. R. 153; *Imamdin*, (1920) 3 L. L. J. 215.

[9] *Dhian Singh*, sup.

[10] *Ramaswami Tevan*, (1921) 20 M.L.T. 18.

[11] *Jhakboo Mahton*, (1882) 8 Cal. 739, 752.

CASES.

Act done in prosecution of common object.—Where persons joined an unlawful assembly for the purpose of committing an assault, and, instead of preventing those armed from using their weapons, encouraged them to do so, they were held to be in the same position as those members of the unlawful assembly who

assembly used spears and deliberately pierced another man through the chest and abdomen, with the knowledge that death was likely to ensue, although without proof of any intention to cause death, all the members of the unlawful assembly were held guilty of murder.[3] Where a small compact body of men armed with clubs, and headed by a man carrying a gun, endeavoured to take forcible possession of certain lands, and one of the opponents was shot by their leader, it was held that all of them were guilty of murder.[4] The accused's cattle were doing considerable damage to the crops belonging to complainants who drove them to the cattle-pound. While they were on the way to the pound the accused came armed with clubs, to rescue the cattle. At the command given by one of them, the others assaulted the deceased and beat him with the result that he died. It was held that the offence was committed in pursuance of the common object and each one of the accused was guilty of an offence under s 302.[5] When a number of persons set out to abduct women and two of them are armed with pistols the obvious inference to be drawn is that the pistols were intended to be used, if necessary, to overcome any resistance that might be offered. The members of the gang would, therefore, know that murder was very likely to be committed.

A person retiring from a fight has no further common object with those who continue it.—A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first mentioned faction was wounded, and retired to the side of the road, taking no further active part in the affray. After his retirement, a member of the second faction was killed. It was held that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not, under this section, be made liable for the subsequent murder.[6]

Persons having no common object to do a particular offence are not liable for commission of it by others.—Where six persons at first united in abusing another and afterwards one of the six ordered him to be seized,—three others executed the order, and in doing so killed the person abused,—it was held that the remaining two accused were not liable to punishment, as the party had no illegal object in common until the deceased was ordered to be seized, and the evidence went to show that they took no part in it, but were merely unarmed spectators.[7] Similarly, where a number of persons went together to eject a man from a piece of land, the title of which was in dispute, and upon a vigorous resistance being made, one of the party who was armed with a gun, fired at, and killed, the resisting person, it was held that he was guilty of murder, but that the other members of the unlawful assembly were not guilty of murder under this section as the act of killing was not the common object of the assembly, or "likely to be committed in the

[1] *Dushruth Roy*, (1867) 7 W. R. (Cr.) 58. (Cr.) 3?

[3] *Rasul Khan*, (1915) 13 A. L. J. R. 470.

[4] *Kabil Cazee*, (1869) 3 Beng. L. R. (A. Cr. J.) 1; *Raghunandan*, (1912) 15 O. C. 183.

[7] *Foiz Ali*, (1864) 1 W. R. (Cr.) 20.

prosecution of that object."[1] A murder was committed by one of a number of persons concerned in an unlawful assembly, one or two of them being armed with [illegible] consideration whether such persons knew that a deadly weapon was likely to be used with a fatal result in the prosecution of their common object; and that though it might be presumed in the case of a number of persons armed with deadly weapons going out to commit an act of violence, that they knew that those weapons might be used with a fatal result, the presumption was still one of fact and must be reasonable in the particular circumstances of the case.[2] A gang of persons, making preparations to commit dacoity was discovered in the limits of a certain village and was pursued by villagers who seized and arrested two accused who were members of the gang. Shortly afterwards, a dacoit at large fired a gun and killed one of the villagers. It was held that the two accused were not guilty of murder as there could be no common object between them and the other after they separated.[3] M and his party were ploughing certain disputed land when the members of the complainant's party came up to interfere with them and to turn them out. The Sessions Judge found that the latter were not justified in forcibly preventing the ploughing of M's party and that on the other hand M was not justified in striking B (one of the complainant's party) on the head and thereby causing his death. It was held that as the members of the deceased's party were the aggressors, their object having been to dispossess the other party from the land, M's party were perfectly justified in exercising their right of private defence, and if M exceeded that right, he, and he alone, was guilty of the offence and this section did not operate to make M's companions equally guilty with him, as they were not at the time members of an unlawful assembly.[4]

Where, after the object of an unlawful assembly was accomplished, and the opposite party driven away, one of the members entered into an altercation with another and wounded him with a fish-spear, it was held that he alone was responsible for the offence.[5]

Where a riotous mob started pelting stones, etc., with the intention of wreaking vengeance on the proprietor of a *Dramatic Troupe for his refusal to give away the* day's takings to the Congress and Khilafat funds, but when the police started fire, the common object changed into one of vengeance on the Deputy Superintendent consequent on one of the mob having been shot dead, it was held that persons who were present in the mob only at the first attack could not be held guilty of offences committed in the second attack and conversely those present only at the second attack could not be held guilty of the offences committed in the first attack.[6]

PRACTICE.

Evidence.—Prove (1) that there was an unlawful assembly.

(2) That the accused was a member of that unlawful assembly (s. 142).

(3) That he had intentionally joined or continued in such unlawful assembly.

(4) That an offence was committed by a member of such assembly.

(5) That such offence was committed (*a*) in prosecution of the common object of such assembly, or (*b*) such as the members of the assembly knew to be likely to be committed in prosecution of the common object, etc.

[1] *Sabid Ali*, (1873) 11 Beng. L. R. 347, 20 W. R. (Cr.) 5. See *Chundersungjee*, (1869) Unrep. Cr. C. 14.

[2] *Rama Muppan*, (1879) 3 Mad. Jur. 416. See *Ram Khelawan Singh*, (1909) 13 C. W. N. 827.

[3] *Hari Bijal*, (1915) 17 Bom. L. R. 906, 3 Bom. Cr. C. 118.

[4] *Mihan Singh*, (1914) P. R. No. 26 of 1914.

[5] *Binod*, (1875) 24 W. R. (Cr.) 66.

[6] *Ganapathi Sarma*, (1922) 17 L. W. 197.

It is essential to prove that the person sought to be charged with an offence by the aid of this section was a member of the unlawful assembly at the time the offence was committed, and the burden of proof lies on the prosecution. Moreover, before an offence under any other section can be imputed under this section to all the persons who were members of an unlawful assembly at the time of its commission, it is necessary to show, among other things, that the offence sought to be imputed has been committed by a member of the assembly either known or unknown.[1]

Procedure.—Same as that for the offence committed. Not compoundable.

The Calcutta High Court has held that where a person is charged by implication under this section, he cannot be convicted of the substantive offence.[2]

charge.[3] The same is the view of the Patna High Court.[4] Where the accused have been acquitted of rioting they cannot be convicted of grievous hurt under s. 325 by the application of this section, where it has not been found that they or any of them were members of an unlawful assembly in prosecution of the common object, of which grievous hurt was caused by any other member of the same assembly, or the offence was such as each member of that assembly knew to be likely to be committed in prosecution of that object.[5]

Charge.—An accused person is entitled to know with certainty and accuracy the exact value of the charge brought against him, where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company.[6] It is obligatory to set out the common object in the charge, otherwise the conviction would be vitiated.[7] Where there is no count in the charge that the common object of the unlawful assembly was to commit dacoity, or to cause hurt for the purpose of committing theft, no conviction for dacoity by force of s. 34 or this section can be sustained.[8] The former Chief Court of the Punjab ruled that it was not always necessary that the common object should be set out in the charge, but it was desirable to do so where the nature of the case allowed or required it. In any case such an omission was not a fatal defect and was curable under s. 537 of the Code of Criminal Procedure.[9] The omission of this section from a charge does not create an illegality by reason of s. 233, Criminal Procedure Code. It is only an irregularity coming under s. 537 of the Code of Criminal Procedure.[10]

The charge should run thus :—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, were a member of an unlawful assembly, and in prosecution of the common object of which, *viz.*, in——, one of the members——, caused (*specify the offence*) to——, and you are thereby, under s. 149 of the Indian Penal Code, guilty of causing the said (*offence*) an offence punishable under s.——of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session).[11]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

[1] *Rasul*, (1888) P. R. No. 4 of 1889.
[2] *Reasudd*, (1912) 16 C. W. N. 1077; *Baij Nath*, (1924) 1 O. W. N. 588.
[3] *Theethumalai Gounder*, (1924) 47 Mad. 746, F.B.
[4] *Rulal Singh*, (1923) 5 P. L. T. 198.
[5] *Abhi Musser* v. *Lachmi Narain*, (1900) 27 Cal. 566.
[6] *Behari Mahton*, (1884) 11 Cal. 106.
[7] *Kudrutulla*, (1912) 39 Cal. 781.
[8] *Kottoora Thevan*, (1923) 46 M. L. J. 311.
[9] *Dhian Singh*, (1915) P. W. R. (Cr.) No. 17 of 1915.
[10] *Theethumalai Gounder*, sup.
[11] (1866) 5 W. R. (Cr. L.) 1.

Punishment.—See s. 71, *supra*.

Hiring or conniving at hiring, of persons to join unlawful assembly.

150. Whoever hires or engages, or employs, or promotes,[1] or connives[2] at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly,[3] shall be punishable as a member of such unlawful assembly, and for any offence[4] which may be committed by any such person as a member of such unlawful assembly, in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

COMMENT.

Object.—The object of this section is to bring within the reach of the law those who are really the originators and instigators of the offences committed by hired persons. The ordinary law of abetment might be sufficient to punish those who, by hiring or engaging others, instigate them to join an unlawful assembly. But if the prime agent keeps aloof, and the work of hiring, although known to him, is left entirely to his managers or servants, he will probably succeed in evading the ordinary law. The terms of this section, therefore, extend not only to acts of instigation by the master, but to acts of instigation when done by others (his agents) and knowingly permitted, or connived at, by him.

1. **'Promotes.'**—This word indicates cases of active assistance in hiring.

2. **'Connives.'**—That is, passively allows.

3. **'Any unlawful assembly.'**—This section refers to a particular unlawful assembly. Where, therefore, it is found that any person has hired or engaged any other person or persons to join or become members of a particular unlawful assembly he is liable for any offence committed by any member of that unlawful *assembly in the same way as if he had been a member of that unlawful assembly or* himself had committed such offence Where a Magistrate only found that "what the accused has been doing is collecting and harbouring men for the purpose of committing a riot should he find it in his interest to do so," and there was no finding that there had been any unlawful assembly, composed of persons said to have been hired by the accused, and in the course of which some offence had been committed for which the accused would have been responsible equally with those who were members of that unlawful assembly, not that an unlawful assembly made up of the elements provided for by s. 141 was in the contemplation of the accused, it was held that the accused could not be convicted of having committed an offence under this section or s. 157.[1]

4. **'Offence.'**—See s. 40, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused hired or engaged, etc., the person in question, or that he promoted, or connived at, such hiring, etc. In the case of connivance it should also be proved (*a*) that the accused was legally bound to prevent the hiring; (*b*) that he was physically able to prevent it; and (*c*) that he did not prevent it, or do all that lay in his power towards preventing it.

(2) That such hiring, etc., was to join, or to become member of, an unlawful assembly.

Procedure.—Cognizable—Not compoundable. See the offence committed.

[1] *Ram Lochan Sarcar*, (1901) 29 Cal. 214.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, hired (*or* engaged, *or* employed [*or* promoted (*or* connived at the hiring *or* engagement, *or* employment)] of one AB to join as (*or* become) a member of an unlawful assembly, and that the said AB as a member of such unlawful assembly in pursuance of such hiring (*or* engagement *or* employment) committed (*specify the offence and the person*), and that you have thereby committed an offence punishable under ss. 150 and——of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.

151. Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse,[1] shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation.—If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

COMMENT.

The offence under this section consists in the disobedience to the mandate of the law, which has ordered the assembly to disperse. Section 145 provides for the punishment of a person who joins or continues in an unlawful assembly knowing it has been commanded to disperse. The 'assembly' under this section need not be an 'unlawful assembly.' It must only be an assembly likely to cause a disturbance of the public peace.

1. 'After such assembly has been lawfully commanded to disperse.'— [illegible] d any unlawful [illegible] disturbance of [illegible] of the members of such assembly to disperse accordingly.[1] If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police-station, whether within or without the presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person not being an officer or soldier in His Majesty's Army or a volunteer enrolled und[illegible] as such, for the purpose of [illegible] and confining the persons [illegible] or that they may be punished according to law.[2] If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.[3]

The expression "lawfully commanded to disperse" means, in the City of Bombay, commanded as prescribed in s. 40 of the City of Bombay Police Act, 1902.[4]

[1] Criminal Procedure Code, s. 127.
[2] *Ibid.*, s. 128.
[3] *Ibid.*, s. 129.
[4] *Keshar Govind*, (1921) 23 Bom. L. R. 350, 6 Bom. Cr. C. 47.

Case.—Refusal to disperse.—Where the object of only three persons was to draw a crowd and their action was such as was calculated to and did draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace, it was held that the gathering constituted an assembly of five or more persons within the meaning of this section and a refusal to disperse after being lawfully commanded by an officer superior in rank to an officer in charge of a police-station rendered the members liable to punishment.[1]

A procession of Hindus, some of them carrying and using various musical instruments, was about to pass in front of a mosque, with the probable consequence in the circumstances that a serious riot would have resulted, when they were confronted by a Sub-Inspector of Police, who ordered the leaders of the procession to stop the music and that the crowd should disperse. The leaders of the procession did not obey the order of the Sub-Inspector, but on the contrary advanced a short distance playing on a drum. Subsequently, however, on a show of force being made by the police the procession laid down their musical instruments and dispersed; it was held that the two leaders of the procession were guilty under this section.[2]

PRACTICE.

Evidence.—Prove (1) that the assembly was composed of five or more persons.

(2) That such assembly was likely to cause a disturbance of the peace.

It is not sufficient to establish, on a charge under this section, merely that in the opinion of the Magistrate the particular assembly was likely to cause such a disturbance: it is necessary to establish to the satisfaction of the Court that the assembly was in fact likely to cause it.[3] The opinion of the police-officer dispersing it is admissible.[4]

(3) That such assembly had been commanded to disperse.

(4) That such command was lawful.

(5) That the accused joined, or continued in, such assembly, after it had been so commanded to disperse.

(6) That the accused did so knowingly.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or ab [illegible] continued in an
assembly of five or mor [illegible]
after knowing that such [illegible]
thereby committed an [illegible]
and within my cognizance.

And I hereby direct that you be tried on the said charge.

Assaulting or obstructing public servant when suppressing riot, etc.

152. Whoever assaults[1] or threatens to assault, or obstructs or attempts to obstruct, any public servant[2] in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly[3] or to suppress a riot[4] or affray,[5] or uses, or threatens, or attempts to use criminal force[6] to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.[4]

[1] *Tucker*, (1882) 7 Bom. 42.

[2] *Raghunath Venaik Dhulekar*, (1924) 47 All. 205.

[3] *Murlidhar*, (1887) P. R. No. 22 of 1887; *Girdhara Singh*, (1921) 3 L. L. J. 529.

[4] *Tucker*, sup.

COMMENT.

The last section punished disobedience to the order of a public servant commanding an assembly to disperse: this section punishes more severely persons who assault a public servant endeavouring to disperse an unlawful assembly. This section is intended to prevent the use of force on a public servant in order to prevent him from discharging his duty.

1. **'Assaults.'**—See s. 351, *infra*.
2. **'Public servant.'**—See s. 21, *supra*.
3. **'Unlawful assembly.'**—See s. 141, *supra*.
4. **'Riot.'**—See s. 146, *supra*.
5. **'Affray.'**—See s. 159, *infra*.
6. **'Criminal force.'**—See s. 350, *infra*.

PRACTICE.

Evidence.—Prove (1) that an unlawful assembly was held.

(2) That an endeavour was being made to disperse it.

(3) That the person endeavouring so to disperse it was a public servant.

(4) That such public servant was then acting in the discharge of his duty as such public servant.

(5) That the accused assaulted, or threatened to assault, or obstructed or threatened to obstruct such public servant, whilst so discharging his duties, or, that he used, or threatened to use, or attempted to use, criminal force to such public servant, whilst so discharging his duties.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—This section contemplates an assault or obstruction to some particular public servant. Where, therefore, the charge against the accused as framed was merely to the effect that they assaulted and obstructed members of the police force in the discharge of their duties, etc., the conviction under this section was not upheld.[1]

The charge should run thus:—

I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, assaulted (*or* threatened to assault, *or* used, *or* threatened to use, criminal force to)——, a public servant, in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly (*or* to suppress a riot *or* affray) and thereby committed an offence punishable under s. 152 of the Indian Penal Code and within my cognizance (*or* cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Wantonly giving provocation, with intent to cause riot—

if rioting be committed;

153. Whoever malignantly,[1] or wantonly,[2] by doing anything which is illegal,[3] gives provocation to any person intending or knowing it to be likely that such provocation[4] will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and, if the

[1] *Ferasat*, (1891) 19 Cal. 105.

offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

If not committed.

COMMENT.

This section punishes a person who does acts which provoke others to commit rioting but which do not amount to abetment. It is divided into two parts. If rioting is committed the punishment is more severe.

1. 'Malignantly' implies a sort of general *malice*.[1] According to Webster the adverbs 'maliciously' and 'malignantly' are synonymous. *Malice* is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means an unlawful act done intentionally without just cause or excuse.[2] *Malignant* means extreme malevolence or enmity; violently hostile or harmful. A riot took place between Hindus and Mussalmans. The excitement caused by the riot had not entirely subsided, when the accused composed and published a poem, giving an account of the outbreak, and incidentally extolling certain classes of the Hindu community, namely, the Ghatis and Kamatis, for the brave resistance which they had offered to the Mahomedan rioters. The poem extolled the Ghatis and Kamatis and then followed these lines:—

"May God give glory to you, confer joy on you night and day,
Fight again for your country's good."

The poem was written in Gujarati, a language not ordinarily spoken by the Ghatis and Kamatis or even by the Mahomedans. It did not appear that any copies of the work were distributed among the people who had taken part in the riot. Nor did any fresh riot take place subsequently to the publication of the work. The accused were prosecuted and convicted under s. 117 and this section, on the ground that the lines quoted above, especially the words "Fight again," were a direct instigation to the Ghatis and Kamatis to renew the disturbances. *It was held that the meaning of the passage complained of* was to be gathered from the whole poem. The general spirit of the poem was clearly in favour of peace and reconciliation. It consisted from beginning to end of a lamentation over the riots, and the destruction and death they had caused, and of repeated counsel to peace and harmony between Hindus and Mahomedans. And there was nothing to indicate that the author's intention was to instigate the Hindus or provoke the Mahomedans to renew the disturbances. The words "Fight again" were, no doubt, objectionable, but it would not be a proper construction of the words to allow them to override the whole context of the work.[3]

2. 'Wantonly' Means recklessly,[4] thoughtlessly, without regard for right or consequenc[illegible] this section a[illegible] far larger, vaguer, [illegible] mplied by the word 'malignantly [illegible] ile the word 'malignantly' occurs once again in s. 270.

Where certain persons taking part in a religious procession gratuitously disobeyed the orders of the police concerning the manner in which such procession was to be conducted, with the result that a riot was only averted by bringing armed police upon the scene, it was held that the persons concerned acted 'wantonly' within the meaning of this section.[5]

3. 'Illegal.'—An offence under this section requires that the offender should do something illegal by doing which he malignantly or wantonly gives provocation to any person intending or knowing it to be likely that a riot would be the result.[6] As to the meaning of 'illegal,' see s. 43, *supra*. A Mussalman

[1] *Kahanji*, (1893) 18 Bom. 758, 775; *Husain Bakhsh*, (1907) 29 All. 569, 571.
[2] *Bromage* v. *Prosser*, (1825) 4 B. & C. 247.
[3] *Kahanji*, sup.
[4] *Husain Bakhsh*, sup.
[5] *Ibid.*
[6] *Khushal Singh*, (1886) 6 A. W. N. 23.

procession passed by the door-way of the accused, outside which he had, without any permission, erected a screen and inside which was an image of the goddess Bhawani. The accused was asked to close the door or to put up a screen for a few minutes while the procession passed by, and he refused to do so. The Magistrate convicted the accused on the ground that "by this illegal omission of respect to the religious feelings of the Mussalmans, he provoked a riot." It was held that the conviction was wrong.[1]

4. **'Gives provocation to any person, etc.'**—The provocation should have been given with the intention or knowledge that it is likely to cause rioting. Where a Mahomedan killed a cow not in the presence of any Hindu, but the Hindus came to know of it subsequently, it was held that no offence was committed under [illegible] t on hearing of [illegible] of any Hindu [illegible] g provocation' if on subsequently hearing of the act the religious feelings of certain Hindus were hurt.[2] Where the natural and probable effect of reading a pamphlet was to give provocation to the fe[illegible] it was held that the [illegible] that such provocatic [illegible] offence under this section.[3]

PRACTICE.

Evidence.—(1) That the accused did an act which was illegal.

(2) That he did so malignantly or wantonly.

Very strong evidence is necessary to prove this.[4]

(3) That the illegal act was the cause of provocation.

(4) That the accused, when giving such provocation, intended or knew that it was likely that such provocation would cause a riot to be committed Prove also whether riot was or was not committed in consequence of such provocation.

If the riot was not committed, the accused would be liable under the first clause; if it was, then the offence would be punished under the second clause.

Procedure.—Cognizable—Warrant (if riot be committed), otherwise, summons—Bailable—Not compoundable—Any Magistrate—Triable summarily, if riot not committed.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, *malignantly* (*or* wantonly) [illegible] Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

153-A. Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes[1] or attempts to promote feelings of enmity or hatred between different classes[2] of Her Majesty's subjects shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Promoting enmity between classes.

Explanation.—It does not amount to an offence within the meaning of this section to point out, without malicious intention

[1] *Khushal Singh*, (1886) 6 A. W. N 23

[2] *Abdullah*, (1919) 17 A. L. J. R. 200, 1 U. P. L. R. 85.

[3] *Rahimatalli Mahomedalli Mulla*, (1919) 22 Bom. L. R. 166, 5 Bom. Cr. C. 175.

[4] *Kahanji*, (1893) 18 Bom. 758.

in such land, shall be punishable with fine not exceeding one thousand rupees,

if he or his agent or manager,[4] knowing that such offence is being or has been committed,[5] or having reason to believe[6] it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station,

and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

COMMENT:

Many duties of the police are by law imposed on landholders. The present section proceeds apparently upon a presumption that, in addition to any such duty, the owner or occupier of land is cognizant in a peculiar way of the designs of those who assemble on his land, and is able not only to give the police notice, but also to prevent and to disperse and suppress the assembly.[1] Under s. 45 of the Criminal Procedure Code village headmen, accountants, landholders and others are bound to report certain matters to the nearest Magistrate or to the officer in charge of the nearest police-station.

The section contemplates three different breaches of duty:

(1) Omission to give notice of a riot or unlawful assembly;
(2) Abstention from preventing it; and
(3) Negligence to suppress it.

1. **'Unlawful assembly.'**—See s. 141, *supra*.

2. **'Riot.'**—See s. 146, *supra*.

3. **'An interest in land'** means any fragment of the ownership. The section would, therefore, apply to tenants and mortgagees, remaindermen and reversioners; but not to one merely entitled to a charge on land or to an easement.[2]

It is impossible to punish in every case every person who has any interest in the land. The responsibility depends on the fact of the person who caused the riot being himself the person who has an interest in the land, or an agent or a manager of such person, and one of the facts to be proved is whose agent or manager the person fomenting the riot is;

4. **'Agent or manager.'**—The criminal liability of a person for the acts and omissions of an agent or manager depends upon the question by whom the latter was appointed. Where, therefore, it was shown that three Hindu *pardanashin* ladies had the management of the estate and were responsible for the appointment of the agent who had fomented the riot, and that their adopted sons had nothing to do with such appointment, though they took some share in the active management of the estate, it was held that the ladies were alone liable.[3] The accused was the sole proprietor of a village. A serious riot involving loss of life took place at that village, and the accused's agent instead of doing anything to prevent or suppress the riot accompanied the rioters and stood close by, while the riot was going on, after which he absconded. The accused, who had no knowledge that a riot was likely to be committed, was convicted under this section and fined. It was held

[1] M. & M. 128. See *Doma Sahu*, (1917) 2 P. L. J. 83.
[2] *Siva Sundari Chowdhrani*, (1912) 39 Cal. 834.
[3] Stokes.

that the landlord was liable under this section for the acts of commission as well as omission not only of himself, but of his agent or manager.[1]

5. **'Knowing that such offence, etc.'**—The Allahabad High Court has ruled that it is not necessary, in order to render the owner of land on which a riot takes place criminally liable, that he should be aware of the likelihood of such an occurrence. That his manager should have taken an active part in the riot is sufficient to warrant the conviction of the owner under this section.[2] Similarly, the Calcutta High Court has decided that knowledge, on the part of the owner or occupier of the land, of the acts or intentions of the agent, is not an essential element of an offence under this section, and he may be convicted under it though he may be in entire ignorance of the acts of his agent or manager.[3]

The owner or occupier of land on which an unlawful assembly is held cannot be convicted under this section unless there is a finding that the riot was premeditated.[4]

6. **'Reason to believe'**—See s. 26, *supra*.

Co-sharer.—A non-resident partner who has taken no active part in the management of the estate cannot, like a resident sharer, be convicted under this section.[5]

No delay in prosecution.—Prosecutions under this and the following sections should be instituted without delay, having regard to the object of the law laid down in these sections which is to impress upon landholders their responsibilities and obligations in respect of riots or unlawful assemblies committed under the circumstances mentioned in those sections and thus serve as wholesome warnings not only to persons concerned but also to others.[6]

PRACTICE.

Evidence.—Prove (1) that a riot took place.

(2) That the land upon which it was committed was owned or occupied by accused; or, that the accused had, or claimed, an interest in the land upon which it was committed.

(3) That the accused (*or* his agent *or* manager) knew that it was being, or had been, committed; or had reason to believe that such riot was likely to be committed.

(4) That the accused (*or* his agent *or* manager) omitted to give the earliest notice in his power to the principal officer at the nearest police station.

(5) That the accused (*or* his agent *or* manager) omitted to use all lawful means in his power to prevent such riot, or to suppress it if it had taken place.[7]

Evidence taken in another case to which the accused were not parties was held inadmissible to convict them under this section. The records of another case would not of themselves be legal evidence for the conviction.[8]

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Presidency Magistrate or Magistrate of the first or second class.

Liability of person for whose benefit riot is committed.

155. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the

[1] *Kazi Zeamuddin Ahmed*, (1901) 28 Cal. 504.

[2] *Payag Singh*, (1890) 12 All. 550.

[3] *Kazi Zeamuddin Ahmed*, sup.; *Nripendra Bhusan Ray v. Gobinda Bandhu Majumdar*, (1923) 39 C. L. J. 236; *Lekhraj*, (1904) 1 A. L. J. R. 145 (n); *Raja Bhagwan Bakhsh*, (1905) 8 O. C. 418.

[4] *Surroop Chunder Paul*, (1869) 12 W. R. (Cr.) 75.

[5] *Radha Nath Chowdhry*, (1880) 7 C. L. R. 289.

[6] *Eshak Meah*, (1902) 7 C. W. N. 245; *Sarat Chandra Shah Chowdhry*, (1902) 7 C. W. N. 301.

[7] See *Tarakant Das*, (1900) 4 C. W. N. 691.

[8] *C. G. D. Betts and Mahomed*, (1871) 6 Beng. L. R. App. 83, 15 W. R. (Cr.) 6.

subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

COMMENT:

Under the preceding section the owner of land is punishable for the taking place of an unlawful assembly or *riot on his land.* This section requires that the unlawful assembly or riot should take place in the interest of the owner or any person claiming interest in the land. The section, therefore, imposes unlimited fine. The preceding section referred to an unlawful assembly as well as a riot: this section refers to riot only.

The principle on which this and the following sections proceed is to subject to fine all persons in whose interest an affray is committed and the agents of such persons, unless it can be shewn that they did what they lawfully could do to prevent the offence.

A Zemindar ought not to be made liable under this section for a sudden and unpremeditated riot which there was no reason to infer he could have anticipated or thought likely to happen.[1]

PRACTICE:

Evidence.—Prove (1) that the riot was committed.

(2) That it took place with respect to some land, or that it arose out of some dispute.

(3) That the accused was the owner or occupier of such land, or claimed an interest therein, or claimed some interest in the subject of such dispute.

No conviction could be made unless it is shewn that the accused had property in the land.[2]

(4) That such riot was committed for the benefit or on behalf of the accused, or that the accused accepted or derived some benefit therefrom.

(5) That the accused or his agent or manager had reason to believe (a) that such riot was likely to be committed; or (b) that the unlawful assembly, which committed such riot, was likely to be held.

(6) That the accused, his agent, or manager did not respectively use all lawful means, etc., (a) to prevent such assembly or riot from taking place; or (b) for suppressing and dispersing the same.

Procedure [illegible] -Bailable—Not compoundable—[illegible] summary trial.

Where there is no evidence to show [illegible] absentee co-sharer in a zemindary takes an active part in the management, and a resident co-sharer has been sentenced to pay a fine under s. 155, the non-resident zemindar ought not to be convicted under this section.[3]

Liability of agent of owner or occupier for whose benefit riot is committed.

156. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or

[1] *Harnath Ray*, (1865) 3 W. R. (Cr.) 54.
[2] *Pramath Nath Ray Choudry*, (1912) 17 C. W. N. 1247.
[3] *Harendra Lal Roy*, (1904) 8 C. W. N. 509.

in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom,

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

COMMENT.

The last section punished the owner of land or any person claiming an interest in it; this section punishes the agent or manager of such person.

PRACTICE.

Evidence.—For points necessary to be proved see s. 155. See also *Brae's case*,[1] which lays down that to constitute an offence under this section it must be shown by legal evidence (1) that a riot was committed; (2) that the riot, if committed, was committed for the benefit of the accused; and (3) that the accused had reason to believe that a riot was likely to be committed.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class—Triable summarily.

Harbouring persons hired for an unlawful assembly.

157. Whoever harbours, receives or assembles in any house or premises in his occupation or charge, or under his control, any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired,[1] engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENT.

Object.—This section, as compared with s. 150, is of a wider application. It provides fo- [illegible]
or assembling [illegible]
an offence. [illegible]
of facts which in law would go to constitute an unlawful assembly.[2]

1. **'Hired, etc., or about to be hired, etc.'**—Under this section, it must be proved that the persons were hired or about to be hired for the purposes specified therein. It is not sufficient to show that some of the accused's servants have been taken from a district where men bear a well-known character as *lathials* (men with clubs) and had been in his service some time before the riot.[3]

PRACTICE.

Evidence.—Prove (1) that the house or premises in question was or were in the occupation or charge of, or under the control of, the accused.

(2) That the accused harboured, received, or assembled therein the persons in question.

(3) That such persons had been hired, engaged, or employed, or were about to become so, to join or become members of an unlawful assembly.

[1] (1883) 10 Cal. 338.
[2] *Ram Lochan Sarcar*, (1901) 29 Cal. 214.
[3] *Radha Nath Chowdhry*, (1880) 7 C. L. R. 289.

(4) That when the accused did as in (2) he knew that such persons had been so hired, etc., for that purpose.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class—Summary trial.

Being hired to take part in an unlawful assembly or riot;

158. Whoever is engaged or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both;

or to go armed.

and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon[1] or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section is intended to punish those persons who hire themselves out as members of an unlawful assembly or assist any such members. It is divided into two parts. Higher penalty is awarded where the accused is armed with a deadly weapon.

1. **'Deadly weapon.'**—Such as, firearms, swords, etc. Whether a particular thing is a deadly weapon or not is a question of fact depending upon the special circumstances of each case.

PRACTICE.

Evidence.—Prove (1) the engagement or hiring of the accused; or the offer or attempt by the accused to become so.

(2) That the object of such engagement or hiring was to do, or assist in doing, an act which would make an assembly an unlawful one (see s. 141).

Prove also (for the last part of the section) whether the accused went or offered to go armed with a deadly weapon.

Procedure.—Cognizable—Summons (if the case comes under the first clause) [illegible] istrate, [illegible] of the section.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, engaged or hired (*or* offered [illegible] do or assist in doing [illegible] and [illegible] used a [illegible] offence under s. 158 of the Indian Penal [illegible] d on the said charge.

Affray.

159. When two or more persons,[1] by fighting in a public place,[2] disturb the public peace,[3] they are said to "commit an affray."

Punishment for committing affray.

160. Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

COMMENT.

The word 'affray' is derived from the French word *effraier*, to terrify, and, in a legal sense, it is taken for a public offence to the terror of the people. From this definition it seems clearly to follow, that there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people.[1] No quarrelsome or threatening words whatsoever shall amount to an affray.[2] An affray is an offence against the public peace because it is committed in a public place and is likely to cause general alarm and disturbance.

Ingredients.—The section has three essentials:—

1. Fight between two or more persons.
2. Such fight must be in a public place.
3. The fight must disturb the public peace.

1. **'Two or more persons.'**—The fight must be between two or more persons.

2. **'Public place.'**—"A public place is one where the public go, no matter whether they have a right to go or not...Many shows are exhibited to the public on private property, yet they are frequented by the public—the public go there."[3] It is obvious that what is a public place may vary from time to time, and what the Court has to consider is, was a particular place at the time public?—a place where the public undoubtedly were.[4] Where a quarrel arose between four persons stationed at the entrance of a temple for the purpose of collecting fees and three other persons who wished to enter the temple without previous payment of the fee demanded, it was held that this offence was committed.[5] Where two persons met and after abuse came to blows and each struck the other down while others had also joined the fight and one of them died of the injuries received, but there was no evidence as to who the assailant was, it was held that any offence beyond an affray had not been committed.[6]

Public places.—An omnibus,[7] a railway platform,[8] a public urinal,[9] a goods-yard of a railway station,[10] an unfenced compound,[11] a place forming part of the compound of a Hindu temple,[12] harbour premises,[13] are public places.

Not public places.—A private *chabutra* adjoining a public thoroughfare,[14] a railway station and platform at a time when no train is due except a goods-train,[15] and a private garden,[16] are not public places.

3. **'Disturb the public peace.'**—It is essential that there must be a disturbance of the public peace.

Affray and riot.—An affray differs from a riot. The former cannot be committed in a private place, and does not require five or more persons; the latter requires at least five persons, and can be committed in a private place.

Affray and assault.—An affray differs from an assault. The one must be committed in a public place; the other may take place anywhere. The former

[1] 1 Hawk., s. 1, p. 487.
[2] *Ibid*, s. 2; *Angappanasari*, (1893) 1 Weir 71.
[3] Per Grove, J., in *Wellard*, (1884) 14 Q. B. D. 63, 67, *Hari Singh* v. *Jadu Nandan*, (1903) 31 Cal. 542; *Musa*, (1916) 40 Mad. 556; *Govindarajulu*, (1915) 39 Mad. 886; *Ramkaranlal*, (1916) 13 N. L. R. 68.
[4] *Wellard*, sup., p. 66.
[5] (1879) 1 Weir 71.
[6] *Langar*, (1912) P. W. R. (Cr.) No. 32 of 1912.
[7] *Holmes*, (1853) 3 C. & K. 369.
[8] *Ex parte Davis*, (1857) 26 L. J. Exch. 393.
[9] *Harris*, (1871) L. R. 1 C. C. R. 282; but see *Orchard*, (1848) 3 Cox 248.
[10] *Cawasji* v. *G. I. P. Ry.*, (1902) 4 Bom. L. R. 290, 26 Bom 609.
[11] *Hari Singh* v. *Jadu Nandan*, sup.
[12] *Musa*, sup
[13] [illegible]
[14] [illegible]
[15] [illegible] 7.
[16] [illegible]

is regarded as an offence against the public peace; the latter, against the person of an individual. An affray is nothing more than an assault committed in a public place and in a conspicuous manner, and is so called because it affrighteth and maketh men afraid.

PRACTICE.

Evidence.—Prove (1) that the accused and another person, or other persons, were fighting.

In an affray specific evidence as to the acts of each fighter cannot be expected; mere general evidence as to the accused taking part in it will be sufficient.[1]

(2) That such fight was in a public place.[2]

(3) That the fight disturbed the public peace.[3]

A conviction under this section, on a prosecution initiated by the police, would be no bar to a subsequent trial under s. 323 on a complaint laid by the party injured.[4]

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

[1] *Moher Sheikh*, (1893) 21 Cal. 392.
[2] *Vadde Ramugadu*, (1882) 1 Weir 71.
[3] *Ibid.*
[4] *Ram Sukh*, (1924) 47 All. 284.

CHAPTER IX.

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

THIS Chapter deals with two classes of offences, of which one can be committed by public servants alone, and the other comprises offences which relate to public servants, though they are not committed by them.

"Those offences which are common between public servants and other members of the community, we leave to the general provisions of the Code. If a public servant embezzles public money, we leave him to the ordinary law of criminal breach of trust. If he falsely pretends to have disbursed money for the public, and by this deception induces the Government to allow it in his accounts, we leave him to the ordinary law of cheating. If he produces forged vouchers to back his statement, we leave him to the ordinary law of forgery. We see no reason for punishing these offences more severely when the Government suffers by them than when private people suffer. A Government, indeed, which does not consider the sufferings of private individuals as its own, is not only selfish but short-sighted in its selfishness. The revenue is drawn from the wealth of individuals, and every act of dishonest spoliation which tends to render individuals insecure in the enjoyment of their wealth is really an injury to the revenue. On every account, therefore, we think it desirable that the property of the state should, in general, be protected by exactly the same laws which are considered as sufficient for the protection of the property of the subject."[1]

The fact that transgression by a public servant may always be punished by dismissal from the public service explains the comparative leniency of some of the punishments provided by this Chapter and the absence of any notice of certain malpractices.

Public servant taking gratification other than legal remuneration in respect of an official act.

161. Whoever, being or expecting to be[1] a public servant,[2] accepts or obtains, or agrees to accept, or attempts to obtain[3] from any person, for himself or for any other person,[4] any gratification[5] whatever, other than legal remuneration,[6] as a motive or reward[7] for doing or forbearing to do any official act[8] or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Legislative or Executive Government of India,[9] or with the Government of any Presidency,[10] or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—"Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

[1] Note E, p. 121.

"Gratification." The wo[illegible] ot restricted to pecuniary gratifications, or [illegible] *in money.*

"Legal remuneration." The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which is permitted by the Government which he serves, to accept.

"A motive or reward for doing." A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

ILLUSTRATIONS.

(a) A, a munsiff, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for [illegible] of Z. A has committed the [illegible] subsidiary Power, accepts [illegible] It does not appear that A accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to that Power with the British Government. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that Power. A has committed the offence defined in this section.

(c) A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z, and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

COMMENT.

Bribery or corruption on the part of a public servant is made an offence under this section. Not only a public servant *in esse* but also one who expects to be a public servant *in posse comes within the purview of this section.*

1. '*Expecting to be.*'—"If a person expecting to be appointed to a public office obtains money from another as the price of favour to be shewn to that other in the exercise of his functions in that office, he is surely as corrupt as one who does the same being actually in office. It must be proved of course that he gave the other party reason to believe that he was about to obtain the office, it must be proved also, . . . that he himself expected to obtain it. In practice the provision would probably be brought into action only against persons who after having [illegible] transaction, [illegible] office have [illegible]

2. '**Public servant.**'—A person who *de facto*, though wrongly, discharges *the duties of an office* through which he apparently figures as a public servant, may be tried for getting a bribe.[2] See s. 21, *supra*, as to the definition of 'public servant.'

§ 3. '**Obtains, or agrees to accept, or attempts to obtain.**'—The use of these words shows that solicitation by a public servant or other person was contemplated in framing the provisions of the Penal Code on the subject, and there is nothing in the Code to except from the definition of abetment the species of abetment involved in compliance with the corrupt wishes of the principal offender.[3] A mere asking is sufficient to constitute an attempt.[4]

[2] 2nd Rep., s. 66.

[3] *Ramkisto Doss*, (1871) 16 W. R. (Cr.) 27.

[4] *Ma Ka*, (1895) 1 U. B. R. (1892-1896) 158.

[4] *Baldeo Sahai*, (1879) 2 All. 253.

It is not necessary for the prosecution to show how the illegal gratification came to be demanded or obtained, so long as it can be clearly established by evidence that it was obtained.[1]

4. **'Any other person.'**—The other person may or may not be a public servant, and therefore wholly unconnected with the official conduct.[2]

5. **'Gratification'** includes all gratifications of appetite and all honorary distinctions.

The words of the section exclude the defence that the benefit bargained for was to go to somebody else, and also the notion that an officer is protected if he agrees to let his official acts be swayed by the motive of accepting a gratification to be used for advancing some public not private object, such as, charity, science, or religion. The *mahars* of a village having been suspended from their office, a meeting of the villagers was held at the house of the village Patel to consider the question of their restoration to office, and an agreement was come to that they should be restored on their paying Rs. 300 towards the repair of a temple. It was held that the Patel being a public servant had committed this offence.[3]

Cases.—A *putwari* who took grain as a consideration for showing favour to the giver in discharge of his functions as a *putwari* was guilty of an offence under this section.[4] The taking of a bribe by a head clerk to influence a Principal Suddar Ameen in his decisions was sufficient for a legal conviction whether the head clerk did or did not influence or try to influence that officer.[5] A *kulkarni* of a [illegible] orked for [illegible] y would [illegible] It was held that he had committed this offence.[6] Where the Colonel of a regiment accepted [illegible] as gamblers, and afterwards released them on payment of a sum of money by the latter, it was held that the offence committed was that of taking a bribe as regards the constable, and abetment of that offence as regards the others.[8] Where a Subordinate Judge went in company with a litigant in his Court to a cloth shop and accepted a present of cloth which was paid for by that litigant to gain favours with the judge in his suit, it was held that the judge was guilty of an offence under this section.[9]

6. **'Legal remuneration'** means what is given to a public servant by the Government which he serves or by any person having authority from that Government to give,—or what is given to him by any person whosoever, if the Government permits him to accept the gift.[10]

The word "Government" in the definition of "legal remuneration" includes a Court of Wards,[11] the Senate of the Allahabad University,[12] an employer of

[1] *Tapeshri Prasad*, (1916) 15 A.L.J.R. 127.
[2] *Bhagwandas Kanji*, (1907) 9 Bom. L. R. 331, 31 Bom. 335.
[3] *Appaji bin Yadavrao*, (1896) 21 Bom. 517, 520; *Amiruddin Salebhoy*, (1922) 24 Bom. L. R. 534, 543, 544.
[4] *Muds-ood-Deen*, (1870) 2 N. W. P. 148.
[5] *Kalechurn Serishdar*, (1865) 3 W. R. (Cr) 10.
[6] *Krishnaji Ganesh*, (1898) Unrep. Cr. C. 955.
[7] *Whitaler*, [1914] 3 K. B. 1283.
[8] *Mahomed Hossein*, (1866) 5 W. R. (Cr.) 49.
[9] *Bhimrao Narsimha Hublikar*, (1924) 27 Bom. L. R. 120.
[10] M. & M. 135.
[11] Bombay Court of Wards Act (Bom. Act I of 1905), s. 21 (2), Central Provinces Government Wards Act (XXIV of 1899), s. 12; the United Provinces Court of Wards Act (U. P. Act III of 1899), s. 30; the Ajmere Govern- [illegible]
[12] The Allahabad University Act (XVIII of 1887), s. 18 (2).

a railway servant,[1] and a municipal board under the United Provinces Municipal Act.[2]

7. **'A motive or reward.'**—It is essential that a bribe should be obtained 'as a motive or reward.'[3] This phrase evidently means "on the understanding that the bribe is given in consideration of some official act or conduct." Such an understanding need not be proved by explicit evidence of any precise agreement. It may be inferred from circumstances.[4] A bribe is not the less a bribe because its payment is postponed.[5] When a bribe has been given it is immaterial to inquire what, if any, effect the bribe had on the mind of the receiver.

The explanation of this phrase given in the section will not allow a public servant to justify his acceptance of a gift or bribe by urging that the order passed by him was nevertheless a just one and against the very person from whom he received the bribe. Thus, it guards against such a plea as was set up as an excuse for Lord Bacon. "It is pretended," says Hume in his History, "that Bacon had still, in the seat of justice, preserved the integrity of a Judge, and had given just decrees against those very persons from whom he had received the wages of iniquity."

"The term 'reward' is manifestly intended to apply to a 'past service.' What is forbidden speaking generally is the receiving any gratification 'as a motive' to do, 'or a reward' for having done any such thing as is described in the definition."[7]

8. **'Official act.'**—It must be an act or omission in connection with the official functions of the accused. If it is not an act of official duty the receipt of money may be some other offence, but it is not a bribe, *e.g.*, if a police-man arrests a man outside his jurisdiction and releases him on receiving a sum of money, this is not a bribe, for it is no part of his official duty to make the arrest. He may be liable for some other offence. Some village watchmen found a widow at the shop of a certain goldsmith at night, and the goldsmith gave them a reward to hold their tongues and to prevent them from being disgraced. It was held that they were not guilty of any offence.[8] Because to keep silence on a private matter, which is in no way concerned with any matter of the police, much less of crime, and which the watchmen had no business to make the subject of official report, or mention to any person, is unconnected with the "doing or forbearing to do any official act," or with "showing or forbearing to show, in the exercise of their official functions, favour or disfavour to any person." Where two of the accused offered a gratification to a public servant in consideration of his not proceeding against them and the other accused whose papers and books he had seized for bringing them to legal punishment, it was held that the offence committed did not fall under this section and s. 109, but under s. 214.[9]

The Allahabad High Court has held that it is sufficient if the accused thought that a particular public servant had an opportunity to show him favour in the exercise of his official functions, although he might in reality have no such opportunity.[10] This view seems to be unsound. The Madras High Court held in a case, where the charge against a *karnam* was that he received a bribe from a villager on the understanding that he would get him some *darkhast* land, that it did not constitute an offence under this section as getting a *darkhast* land was not the official act of a *karnam*.[11] The same is the view of the Lahore High Court.[12]

[1] The Indian Railways Act (IX of 1890), s. 137 (1).

[2] U. P. Act II of 1916, s. 84.

[3] *Upendra Nath Chowdhury*, (1916) 21 C. W. N. 552.

[4] *Bhagwandas Kanji*, (1907) 9 Bom. L. R. 331, 31 Bom. 335

[5] *Indra Nath Banerjee* v. *E. C. Rooke*, (1909) 14 C. W. N 101

[6] *Harrington* v. *The Victoria Graving Dock Co.*, (1878) 3 Q. B. D. 549; *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369 followed in *Indra Nath Banerjee* v. *E. C. Rooke*, sup.

[7] 2nd Rep. s. 67.

[8] *Abdul Aziz*, (1883) 3 A. W. N. 179.

[9] *Megraj*, (1880) P. R. No. 13 of 1881.

[10] *Kishan Lal*, (1904) 1. A. L. J. R. 207 (n).

[11] *Pulipati Venkiah*, (1924) 47 M. L. J. 662.

[12] *Ajudhia Parshad*, (1921) 1 L. C. 227.

It is an offence even when the act to be done in return for the bribe is a just and proper act. It is not necessary to show that as a matter of fact favour was shown to the person who offered the bribe. *It is sufficient if the* person giving the gratification is led to believe that the official act would go against him if he did not give gratification.[1]

The performance of the act which is consideration for the bribe is not essential.

9. **'Government of India.'**—See s. 16, *supra*.

10. **'Presidency.'**—See s. 18, *supra*.

Accomplice.—The mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.[2]

Abetment.—A person offering a public servant an illegal gratification for any of the purposes stated in the section is liable for abetment of an offence under this section.[3] See ill. (*a*) to s. 116. A mere offer to pay an illegal gratification to a public servant, although no money or other consideration is actually produced, amounts to an attempt to bribe.[4] If a party offers a bribe to a judge, meaning to corrupt him in a case depending before him; and the judge taketh it not; yet this is an offence punishable by law, in the party that offers it.[5] To bribe or to attempt to bribe a public servant is only punishable under the Penal Code as an abetment of the substantive offence of a public servant accepting or attempting to obtain an illegal gratification. Illustration (*a*) to s. 116 is only an example of abetment of an offence under this section. There are many other ways of instigating a public servant to commit an offence under this section besides by means of a direct offer of a bribe.[6] If a public servant allows illegal gratification to be delivered, but not in order to its acceptance, but merely for the purpose of having complete evidence of the transaction, the person offering the gratification will be *punished for abetment* under s. 116.[7] Even if a public servant is corrupt and solicits a bribe directly or indirectly, the giving him of a bribe is none the less an abetment of his offence.[8] A person offered a bribe to a Magistrate by thrusting currency notes into his hands. His defence was that he did so with a view to lay a trap as the Magistrate was known to be a corrupt official. It was held that his act amounted to abetment of the offence under this section.[9] The authors of the Code, however, say: "The person who, without any demand express or implied on the part of a public servant, volunteers an offer of a bribe, and induces that public servant to accept it, will be punishable under the (law of abetment) as an instigator. But the person who complies with a demand, however signified, on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe. We do not propose that such a person shall be liable to any punishment...We are strongly of opinion that it would be unjust and cruel to punish the giving of a bribe in any case in which it could not be proved that the giver had really by his instigations corrupted the virtue of a public servant, who, unless temptation had been put in his way, would have acted uprightly."[10]

[1] *Bhimrao Narasimha Hublikar*, (1924) 27 Bom. L. R. 120.

[2] *Deodhar Singh*, (1899) 27 Cal. 144; *Deo Nandan Pershad*, (1906) 33 Cal. 649; *Maganlal*, (1889) 14 Bom. 115; *Khadam Ali*, (1919) P. W. R. (Cr.) No 15 of 1918.

[3] *Maganlal*, sup.; *Ahad Shah*, (1917) P. R. No. 18 of 1918.

[4] *Rameshwar Singh*, (1924) 3 Pat. 647.

[5] *Vaughan*, (1769) 4 Burr. 2494, 2501.

[6] *Amiruddin Salebhoy*, (1922) 24 Bom. L. R. 534, 6 Bom. Cr. C. 297.

[7] *Raghudatt Singh*, (1894) 1 U. B. R. (1892-1896) 154; *Nga Hnin*, (1917) 9 L. B. R. 52; *Ahad Shah*, sup.

[8] *Ma Ka*, (1895) 1 U. B. R. (1892-1896) 158.

[9] *Lakshminarayana Aiyar*, [1917] M. W. N. 831, 22 M. L. T. 373.

[10] Note E, pp. 126, 127.

Separate Conviction.—Where a certain sum of money is paid to a public servant as illegal gratification on one day and a certain sum on another day for the same purpose, the offence of receiving illegal gratification becomes a *continuous offence* and there ought not to be separate convictions for offences under this section and s. 165 for the same offence.[1]

Taking gratification, in order, by corrupt or illegal means, to influence public servant.

162. Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person,[1] any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any member of the Senate of the Allahabad University, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

A person, who accepts for himself or for some other person, a gratification for inducing, by corrupt or illegal means, a public servant to forbear to do a certain official act, is punishable under this section.[2] Under this section the public servant is to be induced by corrupt or illegal means. The next section deals with the case where the public servant is induced by personal influence.

To admit solicitation of a bribe by a third person without the privity or connivance of the public servant concerned as an excuse for giving a bribe to such public servant *is an absolute absurdity*.[3]

1. 'For any other person.'—These words must be read so as to include everyone other than the actual recipient of the gratification.[4]

Amendment.—The words "or with any member of...University" were inserted by Act XVIII of 1887, s. 18 (2).

PRACTICE

Evidence.—Prove (1) that the accused accepted, or obtained, or agreed to accept, or attempted to obtain, from some one, for himself or for some one else, a gratification.

(2) That he accepted, etc., the same, as a motive or reward to induce, by corrupt or illegal means, a public servant (*a*) to do or forbear to do an official act; or (*b*) to show, in the exercise of his official functions, favour or disfavour to some person; or (*c*) to render, or attempt to render, any service or disservice to some person, with the Legislative, or Executive Government, etc., or with any public servant as such.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Court of Session, or Magistrate, Presidency or first class.

[1] *Jagat Chandra Sarma* v. *Lal Chand Das*, (1901) 5 C. W. N. 332.

[2] *Obhoy Churn Chuckerbutty*, (1865) 3 W. R. (Cr.) 19; *Hira Lal*, (1918) P. L. R. No. 63 of 1918, P. W. R. (Cr.) No. 18 of 1918.

[3] *Ma Ka*, (1895) 1 U. B. R. (1892-1896) 158.

[4] *Nemichand*, Criminal Appeal No. 47 of 1915, decided on 19th January 1916 (Unrep. Bom)

A conviction under this section cannot be had if the evidence does not show the person or persons from whom the gratification was obtained, or the public servant to be influenced in the exercise of his public functions.[1]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, being a public servant in the——Department, accepted (*or* obtained, or agreed to accept, or attempted to obtain) from——for yourself (*or for*——) a gratification (*this should be specified*) as a motive or reward for inducing, by corrupt or illegal means,——a public servant, to do (*or* to forbear to do) an official act, viz.,—[*or* to show favour (*or* disfavour) to—] [or to render (*or* attempt to render) a service (*or* disservice) to—] with the Legislative (*or* Executive) Government of India(*or* with the Government of any Presidency,or with any Lieutenant-Governor, etc.,) and thereby committed an offence under s. 162 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Taking gratification for exercise of personal influence with public servant.

163. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any member of the Senate of the Allahabad University, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

ILLUSTRATION.

An advocate who receives a fee for arguing a case before a Judge [illegible] exercise or profess to exercise personal influence.

COMMENT.

Section 162 and this section apply to cases where the person exercising [illegible] third person. If he does [illegible] committed under either [illegible] sections. He may, however, be guilty as an abettor of the offence under [illegible]

Under s. 162 the gratification is taken, in order 'by corrupt or ill[illegible] to influence a public servant. Under this section it is taken for [illegible] personal influence ' with a public servant. Both these sections [illegible] attempts.

Amendment.—The words "or with any member [illegible] inserted by Act XVIII of 1887, s. 18 (2).

[1] *Setul Chunder Bagchee*, (1853) [illegible]

PRACTICE.

Evidence.—Prove the same points as for s. 162 except that in (2) proof of "personal influence" should be given *instead of* "corrupt or illegal means."

Procedure.—*Not cognizable*—*Summons*—Bailable—Not compoundable—Magistrate, Presidency or first class.

Charge.—See s. 162 and substitute for "by corrupt or illegal means" the words "by the exercise of personal influence."

Punishment for abetment by public servant of offences defined in section 162 or 163.

164. Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

ILLUSTRATION.

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section is one of the 'express provisions' made by the Code for the punishment of abetment. Enhanced punishment is provided for an offence which would have been punishable under the provisions of abetment of an offence. See s. 109 and other sections of Chapter V.

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That as such he abetted an offence punishable under s. 162 or this section. Establish abetment under s. 107.

(3) That an offence under s. 162 or this section was committed.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Court of Session, Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, being a public servant in the——Department, abetted the commission of the offence punishable under s. 162 (*or* s. 163) by——, and thereby com- [illegible] 164 of the Indian Penal Code, and within [illegible] of the High Court.) [illegible] Court (*omit these words if not committed to Court of Session*)] on the said charge.

Public servant obtaining valuable thing without consideration, from person concerned in proceeding or business transacted by such public servant.

165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate,

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having

any connection with the official functions of himself or of any public servant to whom he is subordinate,

or from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

ILLUSTRATIONS.

(a) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred rupees a month. A has obtained a valuable thing from Z without adequate consideration.

(b) A, a Judge, buys of Z, who has a cause pending in A's Court, Government promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(c) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

COMMENT.

The mere taking of presents by a public functionary, when it cannot be proved that such presents were corruptly taken, is made penal by this section. Under s. 161 the gratification is taken as a motive or reward for doing or forbearing to do an official act; under this section the question of motive or reward is not material as the section prohibits the taking of a thing without consideration from a person having any connection with the official functions of the public servant. There is no absolute prohibition, but the limit is drawn by the framers of the Code who say:

"Absolutely to prohibit all public functionaries from taking presents would be to prohibit a son from contributing to the support of a father, a father from giving a portion with a daughter, a brother from extricating a brother from pecuniary difficulties. No Government would wish to prevent persons intimately connected by blood, by marriage or by friendship, from rendering services to each other; and no tribunals would enforce a law w[illegible] such services a crime. Where no such close con[illegible] presents by a public functionary is generally a [illegible] lime, a wreath of flowers, a slice of betel-nut, a drop of atar of roses poured on his handkerchief, are presents which it would in this country be held churlish to refuse, and which cannot possibly corrupt the most mercenary of mankind. Other presents, of more value than these, may, on account of their peculiar nature, be accepted, without affording any ground for suspicion. Luxuries socially consumed, according to the usages of hospitality, are presents of this description; it would be unreasonable to treat a man in office as a criminal, for drinking many rupees-worth of champagne in a year, at the table of an acquaintance; though if he were to suffer one of his subordinates to accept even a single rupee in specie, he might deserve exemplary punishment."[1] If a public servant was allowed to take presents he might be induced to take a bribe in the shape of presents.

A police-officer, employed to bring up each case with the witnesses for trial, asked for and obtained one rupee from the prosecutor in a case after the prosecution had ended. It was held that he was guilty of an offence under this section, and not under s. 161.[2]

[1] Note E, pp 123, 124.

[2] *Kampta Prasad*, (1877) 1 All. 530.

This section does not prohibit a sale or purchase by a public servant, at a fair price, to or from a person transacting business before him.[1]

If a person, being in any way connected with the official functions of a public servant, induces him to accept anything for an inadequate consideration, he abets the offence mentioned in this section.

By the Regulating Act, 1772[2] and the East India Company Act, 1793,[3] the receiving of gifts by any one holding any office under the Crown is punishable as extortion.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he has accepted or obtained, or has agreed to accept, or has attempted to obtain, for himself or for some one else, a valuable thing.

(3) That he gave no consideration for it, or gave a consideration which he knew to be inadequate.

(4) That the person from whom the accused accepted, etc., the same, was known to the accused to have been, or then was, or was likely to be, concerned in a proceeding or business transacted or about to be transacted by himself, or which had a connection with the official functions of himself, or of a public servant to whom the accused was subordinate or from person known to the accused to be interested in, or related to, the person so concerned. As to the non-admissibility of the evidence of similar but unconnected instances of receiving illegal gratifications, see *Vyapoory Moodeliar's case.*[4]

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, being a public servant in the——Department, accepted (*or* obtained, etc.,) for yourself (*or* for——) a valuable thing, *viz.*,——, without consideration (*or* for consideration which you knew to be inadequate) from——whom you knew to have been concerned in a proceeding (*or* business transacted by you), *viz.*,——, [whom you knew to be interested in, or related to, the person so concerned] and thereby committed an offence punishable under s. 165 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Public servant disobeying law, with intent to cause injury to any person.

166. Whoever, being a public servant, knowingly disobeys any direction of the law[1] as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury[2] to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

ILLUSTRATION.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section.

COMMENT.

The offence made punishable by this section consists, not in an inadvertent or even careless, but in a wilful departure from the direction of the law intending

[1] Stokes, Vol. I, p. 151.
[2] 33 Geo. III., c. 52, ss. 62 to 64.
[3] 13 Geo. III., c. 63, ss. 23 to 25.
[4] (1881) 6 Cal. 655.

to cause injury to any person. There must be a wilful disobedience of an express direction of the law, and a disobedience to an order is not sufficient, even though that order may be one that is given under a provision of law.[1] A mere breach of departmental rules will not bring a public servant within the purview of this section.

1. **'Direction of law.'**—It may be a direction given by a written law or a mandate proceeding from a competent authority which the public servant is bound by law to obey—as a writ or order for the liberation of a person from prison.[2]

If the direction of law given by a special Act is violated, the punishment will be under that Act. Thus, a postal official absenting himself from his station without leave would be charged under the Post Office Act and not under this section.[3]

Where a peon whose duty it was to require the signature of a person on whom a notice was served represented the notice to be a warrant and arrested him, it was held that he had disobeyed a direction of law and that he was guilty under this section.[4]

2. **'Injury.'**—See s. 44, *supra*.

English law.—Neglect of official duty is a misdemeanour according to the English law, if the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.

Statutory application.—See the Indian Evidence Act (I of 1872), s. 162; the Indian Christian Marriage Act (XV of 1872), s. 72.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he conducted himself in the particular manner charged.

(3) That such conduct was in the exercise of his public duties as such servant.

(4) That such conduct was in disobedience to a direction of law

(5) That when the accused disobeyed such direction of law, he did so knowingly.

(6) That when the accused was guilty of such disobedience, he thereby intended or knew that he was likely thereby to cause an injury.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency, first or second class.

Charge—The charge should be stated as nearly as possible in the language of the section of the Act which is disobeyed.[5] The particular direction of the law should be specified.[6] The charge should run thus—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, did (*or* omitted to do, *as the case may be*) such conduct being contrary to the provisions of Act———, section ——, and known by you to be prejudicial to——, and thereby committed an offence punishable under s. 166 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.[7]

[1] *Appaji Narayan*, (1895) Cr. R. No. 27 of 1895, Unrep. Cr. C. 764.

[2] M. & M. 139.

[3] *Viraswami Naick*, (1877) 1 Weir 72.

[4] *Rangasami Nayadu*, (1910) 20 M. L. J. 568, 7 M. L. T. 429.

[5] (1865) 2 W.R. (Cr. L.) 2.

[6] *Karm Din*, (1890) P. R. No. 34 of 1890.

[7] Crim. P. C., Sch. V, No. xxviii (1) (4).

Public servant framing an incorrect document with intent to cause injury.

167. Whoever, being a public servant,[1] and being, as such public servant, charged with the preparation or translation of any document,[2] frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause,[3] or knowing it to be likely that he may thereby cause, injury[4] to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The preceding section dealt generally with the disobedience of any direction of law; this section deals with a specific instance, *viz.*, that of framing an incorrect document with intent to cause injury. This section is similar to s. 218.

1. **'Public servant.'**—See s. 21, *supra*.

2. **'Preparation or translation of any document.'**—"Making what purports to be a copy of a document is not included in the words 'preparation or translation of any document,' nor in the words 'frames or translates that document."[1]

As to the meaning of "document," see s. 29, *supra*.

Submitting a false report.—Where an *amin*, who was entrusted with the execution of a warrant for the attachment of moveable property, submitted a report to the Court with a certificate, falsely stating in them that certain persons forcibly rescued the attached property, while it was in fact released by an amicable arrangement with the consent of the judgment-creditor, it was held that he was a public servant charged with the preparation of a document within the meaning of this section and was liable to be punished under it.[2]

Incorrect copy of an entry.—The accused, a village *putwari*, prepared an incorrect copy of an entry in his *roznamcha* for a plaintiff in a civil suit. The entry related to a contract between the plaintiff and another. It was held that the accused had committed an offence under this section of framing an incorrect document.[3]

3. **'Intending thereby to cause.'**—"Where an act, *in itself indifferent, if done with a particular intent becomes criminal, there the intent must be proved and found*; but where the act is in itself *unlawful*,...the proof of justification or excuse lies on the *defendant*; and, in failure thereof, the *law implies* criminal intent."[4]

4. **'Injury.'**—See s. 44, *supra*.

PRACTICE.

Evidence—Prove (1) that the accused was a public servant.

(2) That he had the charge of the preparation or the translation the document.

(3) That he had such charge, in his capacity of a public servant.

(4) That he framed or translated it in an incorrect manner.

(5) That he knew, or believed, that he was incorrectly framing or translating the same.

(6) That he did as above, with intent, or with knowledge that it was likely that he would thereby cause injury.

Procedure—Not cognizable—Summons—Bailable—Not compoundable—Court of Session, or Magistrate, Presidency or first class.

[1] Per Barkley, J., in *Deva Singh*, (1878) P. R. No. 15 of 1879, at p. 43.

[2] *Muthalagiri Raju*, (1892) 1 Weir 74.

[3] *Hira Sing*, (1872) P. R. No. 32 of 1872.

[4] Per Lord Mansfield in *Woodfall*, (1770) 4 Burr. 2661, 2667.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, being a public servant, to wit——, and being, as such public servant, charged with the preparation (*or* translation) of the document relating to——, framed (*or* translated) that document in a manner which you knew (*or* believed) to be incorrect, intending thereby to cause (*or* knowing it to be likely that you might thereby cause) injury to——and that you thereby committed an offence punishable under s. 167 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Public servant unlawfully engaging in trade.

168. Whoever, being a public servant,[1] and being legally bound[2] as such public servant not to engage in trade, engages in trade,[3] shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section punishes those public servants only who are legally bound not to engage in trade. It is in a way incomplete without the assistance of some other enactment or rule of law which imposes the legal prohibition required.

Public servants are not allowed to trade in order that they may not neglect their duties. Being in official position they could easily obtain unfair advantages over other traders.

1. **'Public servant.'**—See s. 21, *supra.*

2. **'Legally bound.'**—See s. 43, *supra.*

3. **'Engages in trade.'**—The Indian Penal Code contains no definition of the very general word 'trade,' and no explanation of the equally wide term 'engages in trade.' This section has been made the radix for a number of special enactments going to control the conduct of public servants in the matter of varied descriptions of traffic and money dealings.[1]

A person engages in trade who habitually buys and sells with a view to profit. The word 'trade' does not include lending money at interest. Lending money at interest does not, therefore, amount to 'unlawfully engaging in trade.'[2]

There are various enactments prohibiting public officers from engaging in trade.[3]

[1] *Narayan,* (1910) 6 N. L. R. 114.

[2] *Muhammada,* (1903) P R. No. 22 of 1903.

[3] Governor-General, Governor, or Member of Council (33 Geo III., c. 52 ; 3 & 4 Will. IV., c. 85) ; Revenue Officers (Act XVIII of 1881 ; Bom. Act V. of 1879 ; Beng. Reg. II of 1793 ; Mad. Regs. I and II of 1803) ; Officers [illegible] 1846) ; XIV of XX of 1[illegible]) ; the Administrator-General (Act III of 1913) ; [illegible] Punjab Municipal Act, XX of 1891 ; Punj. Act III of 1911, s. 48 ; C. P. Municipalities Act XVI of 1903 ; Burma Municipalities Act (Burma Act III of 1898) ; Ajmere Municipalities Regulation V of 1886. See also the Bom Port Trust Act (Bom. Act VI of 1879), [illegible]

[illegible]

A Vice-Chairman of a Municipal Board was vested with authoity to make contracts for the construction of municipal works, and to pass the contractor's bills and issue cheques for the payment of the same out of municipal funds. In pursuance of this authority, the Vice-Chairman gave two contracts for the construction of municipal drains to L, a regular contractor with the Board. L being without funds for the execution of the contracts, the Vice-Chairman, who had a private money-lending business, advanced money to L for that purpose, and subsequently passed L's bills and repaid himself from the realization of municipal cheques issued by him. It was held that the Vice-Chairman was guilty of an offence under this section.[1]

Statutory application.—See the Madras City Municipal Act (Mad. Act IV of 1919) s. 359.

PRACTICE.

Evidence.—Prove (1) that the accused was a public servant.

(2) That he, as such, was legally bound not to engage in trade.

(3) That he did engage in trade.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, being a public servant, to wit——, and being, as such public servant, legally bound not to engage in trade, did engage in trade, and thereby committed an offence punishable under s. 163 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Public servant unlawfully buying or bidding for property.

169. Whoever, being a public servant[1], and being legally bound[2] as such public servant not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

COMMENT.

This section is merely an extension of the principle enunciated in the last section. It prohibits a public servant from purchasing or bidding for property which he is legally bound not to purchase.

1. **'Public servant.'**—See s. 21, *supra*.

2. **'Legally bound.'**—See [illegible] *a. The* [illegible] *ot must be legally* bound not to bid for property [illegible] a Sub- was charged with having purchased a pony, wh[illegible] impounded [illegible] that he should have been convicted under thi[illegible] s. 19 of Ac[illegible] and that he could not be convicted under s. 406 [illegible] breach of [illegible]

CE.

[illegible] e (1) that [illegible] a p[illegible] for [illegible] as such, was l[illegible] to [illegible] in g[illegible]

(1911) 7 N[illegible] L
(1871) 16 W[illegible]

(3) That he did purchase or bid for that property, either in his own name, or in the name of another, or jointly, or in shares with others.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, being a public servant in the——Department and being legally bound as such public servant not to purchase (*or* bid for) certain property, *viz.*, ——, purchased (*or* bid for that property) in your name [(or in the name of——) *or* jointly or in shares with——] and thereby committed an offence punishable under s. 169 of the Indian Penal Code, and within my cognizance.

And hereby direct that you be tried on the said charge.

Personating a public servant.

170. Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office,[1a] or falsely personates any other person holding such office,[1b] and in such assumed character does or attempts to do any act under colour of such office, [2] shall be punished with imprisonment of either description, for a term which may extend to two years, or with fine, or with both.

COMMENT.

Section 140 punishes the person who wears the garb or carries the token used by a soldier. This section punishes a person who does any act in the assumed character of a public servant.

Scope.—"Section 170...does not make the act of pretending to hold a particular office as a public servant punishable, unless the person in such assumed character does, or attempts to do, any act under colour of such office."[1]

Ingredients.—The section requires two things :—

1. A person (*a*) pretending to hold a particular office as a public servant knowing that he does not hold such office, or (*b*) falsely personating any other person holding such office.

2. Such person in such assumed character must do or attempt to do an act under colour of such office.

1a. **'Pretends to hold any particular office as a public servant knowing that he does not hold such office.'**—The particular office must be an existing office. If it is uncertain who legally fills the office, a person doing an official act in pursuance of what he honestly believes to be his lawful title to the office, does not come within the section.

As to the meaning of 'public servant,' see s. 21, *supra*.

1b. **'Falsely personates any other person holding such office.'**—'Falsely' does not mean 'fraudulently.' A fraudulent or dishonest intention is immaterial.[2] "'To personate' means to pretend to be a particular person."[3]

2. 'In such assumed character does or attempts to do any act under colour of such office.'—It is not necessary that the act done or attempted to be done should be such an act as might legally be done by the public servant personated.[4] The accused was arrested when he was demanding one anna's worth of fruit from a fruit-seller for one pice on the representation that he was a Head Constable, which in fact he was not. It was held that if he pretended to be a police-officer and as such

[1] Per Copleston, J. C., in *Nga Pe*, (1896) 1 U. B. R. (1892-1896) 168; *Umalant Balvant*, (1907) 9 Bom. L. R. 222, 706.

[2] Per Coleridge, J., in *Hague*, (1864) 4 B. & S 715, 720.

[3] *Tun Aung Gyaw*, (1906) 3 L. B. R. 222.

[4] *Aziz-ud-din*, (1904) 27 All. 294.

police-officer tried to extort money or things from a fruit-seller, he committed an offence under this section, and it was not necessary that the act done under colour of office should be a legal act on the part of the accused.[1]

'Colour of such office.'—An act is done 'under colour' of an office, if it is an act having some relation to the office, which the actor pretends to hold. If it has no relation to the office, as, if A pretending to be a servant of Government, travelling through a district, obtain money, provisions, etc., the offence may amount to cheating under s. 415, but is not punishable under this section.[2] The mere assumption of a false character without any attempt to do an official act is not sufficient. Where the accused went to the platform of a railway station and obtained admission on a pretence that he was a C. I. D. Officer without purchasing a platform ticket, it was held that his conviction under this section was wrong because the act of the accused did not assume an official authority.[3] Where a person, pretending to be a police-officer, reprimanded some villagers on account [illegible] e [illegible] n deputed on such matters.[4] The phrase 'an act under colour of such office' points to acts which could not have been done without assuming official authority or responsibility, and [illegible] character, which might be d[illegible] doing them.[5] Wh[illegible] connection with a record on behalf of another the offence under this section was not committed.[6] Where a Village Revenue Officer, in the absence of the Village Magistrate, exercised the powers of a Village Magistrate, and it was found that he acted in good faith, it was held that a conviction under this section could not be sustained.[7]

PRACTICE.

Evidence.—Prove (1) that the accused personated some public servant or that he pretended to hold the office of a public servant.

(2) That he was not a public servant; or that he did not hold such office.

(3) That he acted falsely in such personation; or that he knew that he did not hold such office.

(4) That he, when assuming such character, did or attempted to do something under colour of such office.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Any Magistrate.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, pretended to hold the office of——, as a public servant (*or* falsely personated——holding such office), and in such assumed character did (*or* attempted to do)——under colour of such office and thereby committed an offence punishable under s. 170 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Wearing garb or carrying token used by public servant with fraudulent intent.

171. Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention

[1] *Aziz-ud-din*, (1904) 27 All. 294.
[2] M. & M. 142.
[3] *Sukhdeo Pathak*, (1917) 3 P. L. J. 389, 4 P. L. W. 30.
[4] *Gadanund Doss*, (1865) 2 W. R. (Cr.) 29.
[5] *Umakant Balvant*, (1907) 9 Bom. L. R. 222, 706.
[6] *Ibid.*
[7] (1881) 1 Weir 74.

that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

COMMENT.

Under this section the offence is complete, although no act is either done or attempted to be done in the assumed official character. The mere circumstance of wearing such a garb, or using such a token, with the intention or knowledge supposed is sufficient. If any act is done then the preceding section will apply. The English law is to the same effect. If a person at Oxford, who is not a member of the University, go to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtain goods, this appearing in a cap and gown is a sufficient false pretence although nothing passes in words.[1] Under s. 140 the wearing of the garb or carrying of the token of a soldier is made punishable.

Intention is the gist of the offence under this section. The intention must be to practise deception by wearing the garb or carrying the token of a public servant. Where the accused was found carrying a police jacket under his arm, with intent that it should be believed that he was a police constable, it was held that he committed no offence under this section as he was not wearing the jacket.[2]

PRACTICE.

Evidence.—Prove (1) that the accused wore the garb, or carried the token in question.

(2) That such garb or token resembled that of a public servant.

(3) That the accused did not belong to the class of public servants, who use such garb or token.

(4) That he did as in (1) with the intention, or with the knowledge, that it was likely that it might be believed he was such public servant.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Any Magistrate—Triable summarily.

Sentence.—Where an accused person is convicted of wearing the garb of a Police Constable, and of personating by means of such garb a Police Constable, and, as such, ordering a person to be kept in custody, only one sentence ought to be passed on him under the provisions of s. 71 of the Code.[3]

[1] *Barnard*, (1837) 7 C. & P. 784.
[2] *Nga Po Kyaw*, (1904) U B. R. (P. C.) 4 (1904-1906) 3.
[3] *Tukaram*, (1888) Unrep. Cr. C. 405.

CHAPTER IX-A.

OF OFFENCES RELATING TO ELECTIONS.

171-A. For the purposes of this Chapter—

(*a*) "candidate" means a person who has been nominated as a candidate at any election and includes a person who, when an election is in contemplation, holds himself out as a prospective candidate thereat: provided that he is subsequently nominated as a candidate at such election;

"Candidate," "electoral right" defined.

(*b*) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election[1].

COMMENT.

This Chapter has been introduced in the Code by the Indian Election Offences and Inquiries Act (XXXIX of 1920) to give effect to the recommendations of the Joint Select Committee appointed to report on the Government of India Act. In their report they observed: "The Committee are themselves firmly convinced that a complete and stringent Corrupt Practices Act should be brought into operation *before the first election for the Legislative Councils. There is no such Act* at present in existence in India, and the Committee are convinced that it will not be less required in India than it is in other countries." Act XXXIX of 1920 was, therefore, enacted to provide for the punishment of malpractices in connection with elections, and to make further provision for the conduct of inquiries in regard to *disputed elections to legislative bodies constituted* under the *Government* of India Act.

The Government of India thought it desirable that advantage should be taken of this opportunity to make election offences part of the general law of the land, not only in respect of Legislative bodies, but also in the case of elections to public bodies generally.

The Select Committee to which the Indian Elections Offences and Inquiries Bill [illegible] "We feel there are distinct advantages at t[illegible] [illegible] o important a part in the new public life [illegible] be markedly drawn to the danger of *corrupt practices in relation to the franchise, whether that franchise relates to* legislative or other bodies. We feel it is of the greatest importance that the principle of the purity of the franchise should be insisted on in the general criminal law of the country and that it should not be left to local legislatures to deal with the broad principles enacted in Part I of the Bill. There will be sufficient scope for *those bodies in elaborating and supplementing the* law as proposed in the Bill for we recognize that it is by no means exhaustive. Experience may no doubt show that minor offences will require to be provided against and that local conditions may need local treatment. We feel, however, that to lay down the broad basis of a law so necessary to protect the purity of the franchise is an appropriate piece of work for the Imperial Legislative Council."[2]

The present chapter, therefore, seeks to make punishable under the ordinary penal law, bribery, undue influence, and personation, and certain other malpractices

[2] G. I. 1920, Part V, p. 178.

at elections not only to the Legislative bodies, but also to membership of public authorities where the law prescribes a method of election; and, further, to debar persons guilty of such malpractices from holding positions of public responsibility for a specific period.[1]

The new offences that are thus inserted in the Penal Code are bribery, undue influence, personation and deliberate false statements with the object of prejudicing a candidate at or in connection with elections.[2]

1. **'Election.'**—'Election' is defined as including election to all classes of public bodies where such a system is prescribed by law (*vide* Explanation 3 to s. 21, *supra*).

Bribery.

171-B. (1) Whoever—

(*i*) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or

(*ii*) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right,

commits the offence of bribery: provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

COMMENT.

This section defines the offence of bribery at an election.

'Bribery' is defined primarily as the giving or acceptance of a gratification either as a motive or as a reward to any person, either to induce him to stand as, or not to stand as, or to withdraw from being, a candidate, or to vote or refrain from voting at an election. It also includes offers or agreements to give or offer and attempts to procure a gratification for any person. Gratification is already explained in s. 161 and is not restricted to pecuniary gratifications or to gratifications estimable in money.[3]

Sub-clause (2).—'Offers.'—By this clause the attempt to corrupt is made equivalent to the complete act.

Treating.—Treating will be bribery if refreshment is given or accepted with the intent required by law.[4] Treating of non-electors in order that they might influence voters[5] or of women in order that they might influence their fathers or brothers would be illegal.[6]

The gist of the offence of treating is the corrupt inducement to the voter to vote or refrain from voting, which may be given at any time, although for obvious

[1] See the Statement of Objects and Reasons, G. I., 1920, Part V, p. 135, s. 4.
[2] *Ibid*, s. 7.
[3] *Ibid*, s. 8.
[4] *Ibid*, s. 9.
[5] *Longford*, (1870) 2 O'M. & H. 6, 15.
[6] *Tamworth*, (1869) 1 O'M. & H. 75, 86.

One H, one of the respondent's principal agents, and chairman of one of the district committees at the election, who was a Justice of the Peace, and a trustee of several charities, and a very influential person in the borough, stood with his gardener, J. M., just outside one of the polling stations, and spoke to many of the voters as they came to the poll, and solicited one voter, who was wearing the petitioner's colours, to vote for the respondent. When another voter wearing the petitioner's colours was coming out of the polling station, J. M. called out, "We shall know him and remember him another day." It was held, that though this conduct was highly improper, yet it did not amount by itself to undue influence so as to avoid the election.[1]

When undue influence by the improper exercise of spiritual influence was proved to have been committed by agents of the respondents, the elections were avoided. In this case it appeared that a pastoral had been issued by the Catholic bishop to the clergy throughout certain constituencies, and was read by them from the altar a few days before the election. The pastoral denounced the political party to which the petitioners belonged, condemned their principles as unlawful and unholy, and threatened with spiritual injury and loss all persons who should vote for them.[2]

Personation at elections.

171-D. Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name;

and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence of personation at an election.

COMMENT:

This section defines 'personation at election.' The offence is punishable under s. 171-F.

The definition of 'personation' closely follows the definition in s. 24 of the Ballot Act, 1872, and covers both a person who attempts to vote in another person's name, or in a fictitious name, a voter who attempts to vote twice and any person who abets, procures or attempts to procure such voting.[3]

1. 'Having voted once...applies at the same election for a voting paper.'—The offence of double voting can be charged not only under this section but also under s. 55 (1) of the Madras District Municipalities Act (Mad. Act V of 1920).[4] It will be punishable also under similar provisions of the District Municipal Acts of other provinces.

Personation.—The usual method of voting at an election was for the voter to obtain a paper called the signature slip and thereupon to go to the election officer and obtain a voting paper. An applicant went to an election officer in charge of signature slips and produced a certain piece of paper bearing a certain number. The name L appeared in the electoral roll against that number and the applicant professed to be L. A *patwari* pointed out that the applicant was not L but was one M. After some dispute the applicant admitted that he was not L. It was held that the applicant was not guilty of an attempt to commit the offence of fraudulently applying for a voting paper and thereby personating at election.[5] The Court observed: "In this case the obtaining of the 'signature slip' was an act which

[1] *Lichfield*, (1880) 3 O'M. & H. 136.
[2] *North Meath*, (1892) 4 O'M. & H. 130, 185; Day's El. Cas. 132, 141.
[3] Statement of Objects and Reasons, G. I., 1920, Part V, p. 135, s. 10.
[4] *Sesha Ayyar*, (1924) M. W. N. 258.
[5] *Multhan Singh*, (1924) 22 A. L. J. R. 1162.

by itself would not have amounted to an application for a voting paper. The applicant was frustrated in the act of obtaining a signature slip. If he had not been frustrated, all that he would have committed was the obtaining of a signature slip on false pretences. The completion of this act would not have amounted to a [illegible] on of a voter at a [illegible] person who came forward to vote, he had, on the advice of others, put his name to a "signature sheet" in token that the thumb-mark made by the voter was that of the person entitled to vote under a certain name on the electoral roll. It was held that, inasmuch as the acts done by the applicant constituted the specific offence provided for by this section, he could only be tried for that offence, and could not be tried for abetment of the general offence provided for by s. 465 of the Code.[2]

Punishment for bribery.

171-E. Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:

Provided that bribery by treating shall be punished with fine only.

Explanation:—'Treating' means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

COMMENT.

This section specifies the punishment which should be inflicted for the offence of bribery. Bribery by treating is punishable with fine only.

PRACTICE.

Evidence.—Prove, where the accused is the giver of the bribe, that he gave a gratification to a person with the object of (*a*) inducing him or any other person to exercise any electoral right, or (*b*) of rewarding any person for having exercised any such right.

Prove, where the accused is the acceptor of the bribe, that he accepted either for himself or for any other person any gratification as a reward (*a*) for exercising any electoral right, or (*b*) for inducing or attempting to induce any other person to exercise any such right.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Sanction.—Previous sanction is necessary for prosecution under this section.[3]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge 'you' (*name of the accused*) as follows:—

(Where the accused is the giver of the bribe.)

That you, on or about the——day of——, at——, gave a gratification, to wit——, to——with the object of [inducing him or——to exercise his electoral right] [or rewarding——for having exercised his electoral right] and thereby committed an offence under s. 171-E of the Indian Penal Code and within my cognizance.

[1] *Malkhan Singh*, (1924) 22 A. L. J. R. 1102.

[2] *Ram Nath*, (1924) 47 All. 268.

[3] Criminal Procedure Code, s 196; *Ponnuswami Thevar*, (1921) 15 L. W. 199, [1922] M. W N 129.

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

COMMENT.

This section makes it illegal for any one, unless authorized by a candidate, to incur any expenses in connection with the promotion of the candidate's election.

PRACTICE.

Evidence.—Prove (1) that the accused incurred or authorized expenses on account of the holding of any public meeting, or upon any advertisement, circular, or publication, or in any other way.

(2) That he did so for the purpose of promoting or procuring the election of a candidate.

(3) That he incurred or authorized the said expenses without the general or special authority in writing of the candidate.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Sanction.—Previous sanction is necessary for prosecution under this section.[1]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you without the general (*or* special) authority in writing of——incurred (or authorized) expenses on account of the holding of a public meeting at—(*or* upon any advertisement, circular *or* publication Exhibit—, *or* in any other way whatsoever) for the purpose of promoting (*or* procuring) the election of—and thereby committed an offence punishable under s. 171-H of the Indian Penal Code and within my cognizance.

And I thereby direct that you be tried on the said charge.

Failure to keep election accounts.

171-I. Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at, or in connection with, an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees.

COMMENT.

This section punishes failure to keep accounts of expenses incurred in connection with an election, if such accounts are required to be kept by any law or rule having the force of law.

PRACTICE.

Evidence.—Prove (1) that the accused was required by any law for the time [illegible]

(2) That he failed to keep such accounts.

Procedure.—[illegible] compoundable—Triable by [illegible]

Sanction.—Sanction is necessary for prosecution under this section.[2]

[1] Criminal Procedure Code, s. 196. [2] *Ibid.*

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you being required by law for the time being in force to wit—, (*or* by any rule having the force of law, to wit—,) to keep accounts of expenses incurred at (*or* in connection with) the election to wit—, failed to keep such accounts and thereby committed an offence punishable under s. 171-I of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

CHAPTER X.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

THIS Chapter contains those penal provisions which are intended to enforce obedience to the lawful authority of public servants. Contempts of the lawful authority of Courts of Justice, of officers of Revenue, of officers of Police, and of other public servants are punishable under this head. The penalties prescribed in this Chapter for particular offences obstructive of judicial proceedings must not be taken to interfere with other powers possessed by Courts of Justice and public functionaries to enforce their orders. They will not affect other coercive powers of the Courts of Justice to compel performance of their orders and decrees, whether by attachment and sale of property, by imprisonment or otherwise.[1]

Absconding to avoid service of summons or other proceeding.

172. Whoever absconds in order to avoid being served with a summons, notice or order[1] proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order,[2] shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons or notice or order is to attend in person or by agent, or to produce a document in a Court of Justice,[3] with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Object.—The object of this section is to punish an offender for the contempt his conduct indicates of the authority whose process he disregards. The absconding must be with the intention of evading service.

Scope.—This section punishes the evasion of those orders which become binding from the moment they are served. It does not apply to orders which become binding without any kind of special service.

The second clause applies where the summons, notice or order is (1) for attendance in Court; or (2) for production of a document.

Ingredients.—The section requires two things:—

1. Absconding in order to avoid being served with a summons, notice or order.

2. Such summons, notice or order must proceed from a public servant legally competent to issue it.

1. '**Absconds in order to avoid bein**[illegible] **order.**' —"The term 'abscond' is not to be u[illegible] person leaves the place in which he is. [illegible] to hide oneself; and it matters not whether a person departs from a place or remains [illegible] it, if he conceals himself; nor does the term apply only to the commencement of [illegible] ing concealed himself before process issues, [illegible] he absconds."[2]

[1] M. & M. 143.

[2] Per Turner, C. J., *Madapusi Srinivasa Ayyangar*, (1881) 4 Mad. 393, 397.

Refusal to accept a notice, abusing the process-server and walking inside the house does not amount to absconding.[1]

'In order to avoid.'—The absconding must be with a purpose. This implies that the absconder knows, or at least has reason to believe, that the process has issued. He may abscond to avoid the issue of process, and this would not be an offence punishable under this section. When he knows, or has reason to believe, that it has issued, he may be unwilling to show contempt of the authority of the Court or officer who has issued it, and may comply with it, or so conduct himself that service may be effected; but he can hardly be said to be guilty of contempt of authority if he does not know, and has not reason to believe, the authority has been exercised, nor to be absconding to prevent the service of a process, if he does not know, nor has reason to believe, that it has issued.[2]

'Summons, notice or order.'—For the service of 'summons' see ss. 69-74, Criminal Procedure Code. A warrant addressed to a police-officer is not a 'summons, notice or order'[3]; nor a warrant addressed to a Nazir by a Civil Court for the arrest of a defendant in execution of a decree.[4] Because from the wording of the section it appears that 'the summons, notice or order' therein referred to should be addressed to the same person whose attendance is required and who absconds to avoid being served with such 'summons, notice or order.' A warrant is not an order served on an accused, it is simply an order to the police to arrest him.[5] But this section is held applicable to witnesses who abscond to evade the service of a warrant issued by a Magistrate under ss. 181 to 196 of the Criminal Procedure Code.[6] This section was, however, held applicable where the accused who was placed in charge of certain attached property did not produce it for sale and evaded the service of notice to produce it.[7]

2. **'Proceeding from a public servant legally competent...to issue such summons, etc.'**—The liability of the accused depends upon the legal competence of the officer to issue the 'summons, etc.'[8]

3. **'If the summons, etc., is to attend.'**—This shows that existence of a summons, notice or order is necessary to constitute the offence. It is not sufficient to [illegible]

See s. 20, *supra*, as to the meaning of 'Court of Justice.'

PRACTICE.

Evidence.—Prove (1) that the process in question was a summons, notice or order.

(2) That the same was issued by a public servant.

(3) That such public servant was legally competent as such to issue it.

(4) That such process was issued in order to be served on the accused.

(5) That the accused absconded in order to avoid being served with such process.

For the second clause of the section prove further—

(6) That the process required the attendance of the accused (either personally or by his agent) or required the production of a document by him (either personally or by his agent).

(7) That such attendance, or production was to be in a Court of Justice.

[1] *Bhujang*, (1924) 1 O W. N. 159.

[2] *Madapusi Srinivasa Ayyangar*, (1881) 4 Mad. 393.

[3] *Womesh Chunder Ghose*, (1866) 5 W. R. (Cr.) 71; *Amir Jan*, (1876) 7 N. W. P. 302; *Mayhi Mamud*, (1905) 2 C. L. J. 625.

[4] *Zahoor Ali Khan*, (1872) 4 N. W. P. 97; *Alla Bakhsh*, (1890) P. R. No. 28 of 1890. See *Hira Lal*, (1883) 3 A. W. N. 222.

[5] *Lakshmi*, (1881) Unrep. Cr. C. 152, Cr. R. No. 21 of 1881.

[6] [illegible]

[7] [illegible]

[8] [illegible] (Cr. [illegible]

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate is required.[1]

Preventing service of summons or other proceeding, or preventing publication thereof.

173. Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice, or order from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section punishes intentional prevention of the service of summons, notice or order. What is required is some act of opposition offered to the officer serving the summons.[2] A refusal to sign a summons,[3] a refusal to receive a summons,[4] throwing down of a summons after service,[5] a refusal to accept a citation issued under s. 147 of the Land Revenue Act (U. P. Act III of 1901) or to sign the duplicate thereof,[6] and a refusal to take *subpœna* under s. 160 of the Criminal Procedure Code,[7] are held not to constitute the offence of intentionally preventing the service of a summons. The words "prevents the serving on himself" cannot be held applicable to a case where the summons is tendered and refused, inasmuch as tendering is in itself good service. Under the Code of Criminal Procedure the mere tender to a person of a summons is sufficient, and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under this section.[8]

Refusal to serve as special constables.—In a case of dispute regarding the right to the possession of an estate between two parties, one of whom was represented by the Court of Wards, the Magistrate of the District took up the cause of the

[1] Criminal Procedure Code, s. 195. See also ss. 476-479, 487.

[2] *Uthudamawara*, (1923) 1 Rang. 49.

[3] *Kalya bin Fakir*, (1868) 5 B. H. C. (Cr. C.) 34; *Khushal*, (1869) Cr. R. for 1869, Unrep. Cr. C. 17; *Bhoobuneshwar Dutt*, (1877) 3 Cal. 621; *Krishna Gobinda Das*, (1892) 20 Cal. 358.

[4] *Perumalai Nadan*, (1882) 5 Mad. 192; *Ananta Kernaya*, (1884) 1 Weir 80; *Zapanlia*, (1920) 3 U. B. R. 202; *Uthudamawara*, sup.; *Debigir Tapdhari*, (1924) 23 A. L. J. R. 148.

[5] *Arumuga Nadan*, (1881) 5 Mad. 200 (n). 1 Weir 79.

[6] *Ahmad Husain Khan*, (1909) 31 All. 608.

[7] *Chandika Prasad*, (1918) 21 O. C. 150.

[8] See *Sahdeo Rai*, (1918) 40 All. 577.

latter, and alleging that it would be impossible to preserve the peace without employing a special police force, appointed the active men of the opposite party as special constables, and, on the latter refusing to serve as such, proceedings under this section were drawn up against them. It was held that the charge under this section had no relation to the offences alleged, and the proceedings thereunder were quashed.[1]

PRACTICE.

Evidence.—Prove (1) that the process in question was a summons, notice or order, or a direction for a proclamation.

(2) That the same was issued or made by a public servant legally competent to issue such process; or that such public servant was legally competent to direct such proclamation to be made, the same being lawful, and under his authority.

(3) That such summons, notice or order, was issued to be served either upon the accused, or upon some one else; or that such summons, notice or order, had been, or was to be, lawfully affixed to some place; or that such proclamation was about to be made.

(4) That the accused prevented such service of the summons, notice or order; or that he prevented the affixing of such process; or that he removed the same when so affixed; or that he prevented the making of such proclamation.

(5) That the accused did as above intentionally.

For the second clause of the section prove further—

(6) That the process, or proclamation required the attendance of the accused (either in person or by agent) or the production of a document; and

(7) That such process or proclamation was to attend, or to produce the document in a Court of Justice.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate is required.[2]

Non-attendance in obedience to an order from public servant.

174. Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant[1] legally competent, as such public servant, to issue the same,[2]

intentionally omits to attend at that place or time, or depart from the place where he is bound to attend before the time at which it is lawful for him to depart,[3]

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATIONS.

(a) A being legally bound to appear before the Supreme Court at Calcutta in obedience to a subpœna issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

[1] *Gopinath Paryah*, (1886) 10 C. W. N. 82, 2 C. L. J. 555.

[2] Criminal Procedure Code, s. 195. See ss. 476-78, 487.

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Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate is required.[1]

Preventing service of summons or other proceeding, or preventing publication thereof.

173. Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice, or order from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section punishes intentional prevention of the service of summons, notice or order. What is required is some act of opposition offered to the officer serving the summons.[2] A refusal to sign a summons,[3] a refusal to receive a summons,[4] throwing down of a summons after service,[5] a refusal to accept a citation issued under s. 147 of the Land Revenue Act (U. P. Act III of 1901) or to sign the duplicate thereof,[6] and a refusal to take *subpœna* under s. 160 of the Criminal Procedure Code,[7] are held not to constitute the offence of intentionally preventing the service of a summons. The words "prevents the serving on himself" cannot be held applicable to a case where the summons is tendered and refused, inasmuch as tendering is in itself [illegible] to a person [illegible] constitute the offence of intentionally preventing [illegible] this section.[8]

Refusal to serve as special constables.—In a case of dispute regarding the right to the possession of an estate between two parties, one of whom was represented by the Court of Wards, the Magistrate of the District took up the cause of the

[1] Criminal Procedure Code, s. 195. See also ss. 476-479, 487.

[2] *Uthudamawara*, (1923) 1 Rang. 49.

[3] *Kalya bin Fakir*, (1868) 5 B. H. C. (Cr. C.) 34; *Khushal*, (1869) Cr. R. for 1869, Unrep. Cr. C. 17; *Bhoobuneshwar Dutt*, (1877) 3 Cal. 621; *Krishna Gobinda Das*, (1892) 20 Cal. 358.

[4] *Punamalai Nadan*, (1882) 5 Mad. 199; [illegible] (1881) 1 Weir 80; *Zapantis*, [illegible] *ira*, sup.; [illegible] R. 148.

[5] [illegible] 200 (n), 1 Weir 79.

[6] *Ahmad Husain Khan*, (1909) 31 All. 808.

[7] *Chandika Prasad*, (1918) 21 O. C. 150.

[8] See *Sahdeo Rai*, (1918) 40 All. 577.

latter, and alleging that it would be impossible to preserve the peace without employing a special police force, appointed the active men of the opposite party as special constables, and, on the latter refusing to serve as such, proceedings under this section were drawn up against them. It was held that the charge under this section had no relation to the offences alleged, and the proceedings thereunder were quashed.[1]

PRACTICE.

Evidence.—Prove (1) that the process in question was a summons, notice or order, or a direction for a proclamation.

(2) That the same was issued or made by a public servant legally competent to issue such process; or that such public servant was legally competent to direct such proclamation to be made, the same being lawful, and under his authority.

(3) That such summons, notice or order, was issued to be served either upon the accused, or upon some one else; or that such summons, notice or order, had been, or was to be, lawfully affixed to some place; or that such proclamation was about to be made.

(4) That the accused prevented such service of the summons, notice or order; or that he prevented the affixing of such process; or that he removed the same when so affixed; or that he prevented the making of such proclamation.

(5) That the accused did as above intentionally.

For the second clause of the section prove further—

(6) That the process, or proclamation required the attendance of the accused (either in person or by agent) or the production of a document; and

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Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate is required.[2]

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intentionally omits to attend at that place or time, or depart from the place where he is bound to attend before the time at which it is lawful for him to depart,[3]

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATIONS.

(*a*) A being legally bound to appear before the Supreme Court at Calcutta in obedience to a subpœna issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

[1] *Gopinath Paryah*, (1886) 10 C. W. N. 82, 2 C. L. J. 555.

[2] Criminal Procedure Code, s. 195. See ss. 476-78, 487.

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or intentionally removes any such summons, notice, or order from any place to which it is lawfully affixed,

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COMMENT.

This section punishes intentional prevention of the service of summons, notice or order. What is required is some act of opposition offered to the officer serving the summons.[2] A refusal to sign a summons,[3] a refusal to receive a summons,[4] throwing down of a summons after service,[5] a refusal to accept a citation issued under s. 147 of the Land Revenue Act (U. P. Act III of 1901) or to sign the duplicate thereof,[6] and a refusal to take *subpœna* under s. 160 of the Criminal Procedure Code,[7] are held not to constitute the offence of intentionally preventing the service of a summons. The words "prevents the serving on himself" cannot be held applicable to a case where the summons is tendered and refused, inasmuch as tendering is in itself good service. Under the Code of Criminal Procedure the mere tender to a person of a summons is sufficient, and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under this section.[8]

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[1] Criminal Procedure Code, s. 195. See also ss. 476-479, 487.

[2] *Uthudamawara*, (1923) 1 Rang. 49.

[3] *Kalya bin Fakir*, (1868) 5 B. H. C. (Cr. C.) 34; *Khushal*, (1869) Cr. R. for 1869, Unrep. Cr. C. 17; *Bhoobuneshwar Dutt*, (1877) 3 Cal. 621; *Krishna Gobinda Das*, (1892) 20 Cal. 358.

[4] *Punamalai Nadan*, (1882) 5 Mad. 199; [illegible] *Zapantis*, [illegible] 1 Weir 79.

[6] *Ahmad Husain Khan*, (1909) 31 All. 608.

[7] *Chandika Prasad*, (1918) 21 O. C. 150.

[8] See *Sahdeo Rai*, (1918) 40 All. 577.

latter, and alleging that it would be impossible to preserve the peace without employing a special police force, appointed the active men of the opposite party as special constables, and, on the latter refusing to serve as such, proceedings under this section were drawn up against them. It was held that the charge under this section had no relation to the offences alleged, and the proceedings thereunder were quashed.[1]

PRACTICE.

Evidence.—Prove (1) that the process in question was a summons, notice or order, or a direction for a proclamation.

(2) That the same was issued or made by a public servant legally competent to issue such process; or that such public servant was legally competent to direct such proclamation to be made, the same being lawful, and under his authority.

(3) That such summons, notice or order, was issued to be served either upon the accused, or upon some one else; or that such summons, notice or order, had been, or was to be, lawfully affixed to some place; or that such proclamation was about to be made.

(4) That the accused prevented such service of the summons, notice or order; or that he prevented the affixing of such process; or that he removed the same when so affixed; or that he prevented the making of such proclamation.

(5) That the accused did as above intentionally.

For the second clause of the section prove further—

(6) That the process, or proclamation required the attendance of the accused (either in person or by agent) or the production of a document; and

(7) That such process or proclamation was to attend, or to produce the document in a Court of Justice.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate is required.[2]

Non-attendance in obedience to an order from public servant.

174. Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant[1] legally competent, as such public servant, to issue the same,[2]

intentionally omits to attend at that place or time, or depart from the place where he is bound to attend before the time at which it is lawful for him to depart,[3]

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATIONS.

(a) A being legally bound to appear before the Supreme Court at Calcutta in obedience to a subpœna issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

[1] *Gopinath Paryah*, (1886) 10 C. W. N. 82, 2 C. L. J. 555.

[2] Criminal Procedure Code, s. 195. See ss. 476-78, 487.

(b) A being legally bound to appear before a Zila Judge, as a witness, in obedience to a summons issued by that Zila Judge, intentionally omits to appear. A has committed the offence defined in this section.

COMMENT:

The offence contemplated by this section is an omission to appear at a particular time and at a particular place before a specified public functionary in obedience to a summons, notice, or order, not defective in form.

Ingredients.—The section requires three essentials.—

1. *A person must be legally bound to attend at a certain place and time* in obedience to a summons, notice, order or proclamation proceeding from a public servant.

2. The public servant must be legally competent to issue such summons, etc.

3. The person summoned must have (a) intentionally omitted to attend at that place or time, or (b) departed from the place where he was bound to attend before the time at which it was lawful for him to depart.

1. '[illegible] to attend, and refused or intentionally omitted to attend.[1]

'**Certain place and time.**'—It must be proved that he had notice to appear at a certain time and place and omitted to do so.[2] Where a summons did not mention the place at which, or the time of the day when, the attendance of the person summoned was required, it was held that such person could not be punished under this section.[3] Disobedience to a summons, directing a person to appear at such place in camp as the Magistrate might be on the date fixed, is not punishable.[4] A verbal order not specifying the particular day on which a person is to appear is not a lawful order.[5]

The place where a person is summoned to attend must be in British India. It is not, therefore, an offence to disobey a summons issued by a British Magistrate directing the person summoned to appear before him at a place outside the British territory.[6]

'*Summons.*'—*A summons should be clear and specific in its terms as to the* title of the Court, the place at which, the day and the time of the day when, the attendance of the person summoned is required, and it should go on to say that such person is not to leave the Court without leave, and, if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned.[7] It must be one which could lawfully be issued: hence, a summons to take away a bundle of leases for distribution is not such a summons.[8]

Where a summons was not sealed as required by Madras Act III of 1869, s. 2, under which it was issued, a conviction was held to be bad.[9]

'**Order.**'—A verbal order given to a witness by a Court to attend on a particular day at a particular hour is an order the disobedience of which is punishable under this section.[10] The order should be directed or addressed to the accused.[11]

[illegible]

[4] *Jaswant*, (1877) Colm. D. Cri. No. 89.

[5] (1870) 6 M. H. C. App. 10.

[6] *Paranga*, (1893) 16 Mad. 463.

[7] *Ram Saran*, sup.

[8] *Chikka Honnappa*, (1882) 1 Weir 97; *Jangama Pattan*, (1883) 1 Weir 93; *Yellappa*, (1883) 1 Weir 93.

[9] *Narasaiya*, (1882) 1 Weir 100.

[10] *Guman*, (1873) Unrep. Cr. C. 75; (1870) 5 M. H. C. App. 15; (1870) 1 Weir 87; (1872) 7 M. H. C. App. 3.

[11] *Firkha*, (1870) P. R. No. 6 of 1870.

Order to attend necessary.—A Munsif called upon a Vakil to show cause why a report should not be made against him to the High Court for gross professional misconduct. The Vakil put in a written explanation and the matter was ordered to be put up on a certain date for orders. On the day fixed he did not appear and a proceeding was drawn up for his prosecution. It was held that as there was no order enjoining upon the Vakil to appear personally before the Munsif the proceedings should be quashed.[1]

In the absence of an order in writing as required by s. 160, Criminal Procedure Code, a person who is asked orally to appear before a police-officer as a witness does not commit an offence under this section for non-appearance.[2]

'Public servant.'—See s. 21, *supra*. A receiver appointed under the Land Registration Act (Beng. Act VII of 1876, s. 56) is not a public servant within the meaning of this section.[3]

2. **'Legally competent, as such public servant.'**—The public servant must be legally competent to issue summons, etc. If he is not legally competent to issue the summons, notice, or order in virtue of which the attendance of the accused is required, no offence is committed.[4] Disobedience to a summons issued by a Village Magistrate who has no jurisdiction over the offence is not punishable under this section.[5] Similarly, disobedience to an order of a police-officer which he is not competent to issue is not punishable under this section[6] The Chairman of a Municipality, although a public servant, is not legally competent as such to issue an order for attendance before him; and disobedience to such an order is not an offence within the meaning of this section.[7] It was held similarly where a Tahsildar,[8] a Mahalkari,[9] a Mamlatdar,[10] and a Receiver[11] having no jurisdiction issued summons for attendance; where a Collector issued a notice under s 193 of the Land Revenue Act when there was no investigation, suit or other business before him[12]; and where a Sub-Deputy Collector issued a notice under s 8 of the Chowkeedaree Act (Beng. Act. VI of 1820) for attendance.[13]

The accused were appointed arbitrators in a civil suit. They were summoned to attend the Court on a certain day, but did not obey the summons. It was held that they could not be convicted under this section as the summons in question was a process not provided for by the law.[14]

3. **'Intentionally omits to attend at that place or time or departs . . . before time.'**—The omission to appear in answer to the summons must be intentional.[15] If the witness explains his inability to the process-server that he will not be able to attend, he does not "intentionally" disobey the summons.[16] It must be proved that the non-attendance was in the nature of a wilful disobedience.[17] Before conviction the Court is bound to decide whether there was an intentional disobedience to the summons after giving the accused an opportunity of explaining his absence.[18] If a person is sufficiently incapacitated by illness to have given up his ordinary avocations, this would be sufficient excuse for him not to attend a Court in obedience to a summons. The mere fact that he was not so dangerously

[1] *Prokash Chunder Sarkar*, (1903) 7 C. W. N. 797.
[2] *Virasami Pillai*, (1895) 1 Weir 86.
[3] *Ebrahim Sircar*, (1901) 29 Cal. 236.
[4] *Kashi Ram*, (1871) P. R. No. 2 of 1871.
[5] (1863) 1 Weir 87.
[6] *Chattar Singh*, (1885) 5 A. W. N. 43.
[7] *Purshotam Valji*, (1868) 5 B. H. C. (Cr. C.) 33.
[8] *Gopia*, (1904) 24 A. W. N. 122; *Khota Ram*, (1907) P. R. No 4 of 1907; *Shiam Lal*, (1914) 12 A. L. J. R. 680.
[9] *Venkaji Bhaskar*, (1871 8 B. H C. (Cr C.) 19.
[10] *Mahomed Ismal*, (1873) Unrep. Cr. C. 70, Cr. R. of 1873.
[11] *Ebrahim Sircar*, sup.
[12] *Waris Ali*, (1916) 14 A. L. J. R. 1069.
[13] *Basat Ali*, (1899) 3 C. W. N. cclxxi.
[14] *Kashi Ram*, sup.; *Kuria*, (1875) P. R. No. 18 of 1875.
[15] *J. R. Das*, (1923) 1 Rang. 549.
[16] [illegible] 1880. See [illegible] *Ghose*, [illegible]
[17] [illegible] 27 of 1907.

ill that he could not be moved or that he did not send a man to inform the Court of his illness, would not render him punishable under this section.[1]

A man in obedience to a summons attended a Magistrate's Court at 10 A.M., but finding the Magistrate not present in Court at the time mentioned in the summons, departed without waiting for a reasonable time. It was held that he was guilty of an offence under this section.[2] But a person who departs without permission is not guilty under this section in the absence of a direction that he should not leave without permission.[3]

Public servant absent.—Where a public servant is absent on a date fixed in the summons, the person summoned cannot be convicted, though he purposely fails to attend.[4]

Appearance through a lawyer instead of in person.—Where a person did make an appearance, though not a personal appearance, on service of summons, it was held, under the circumstances, not to be an offence under this section.[5] But having regard to Sch. V of the Code of Criminal Procedure, if a summons require appearance in person, the accused is legally bound to attend personally and cannot appear by agent unless exempted under s. 205.

The petitioner, a practising barrister of the High Court, was summoned under the Motor Vehicles Act, but being unable to appear owing to professional work on that day applied for adjournment through counsel, which was granted. He was then prosecuted for failing to attend in answer to the summons and convicted under this section and sentenced to pay a fine of Rs. 5 or to suffer two days' simple imprisonment. It was held, in revision, that there was no intentional omission to appear, that as an officer of the Court it was the duty of the advocate no less to the Bench than to his own client to be ready when the case in which he was briefed was called, and that finding himself unable to abandon his client's interests he had instructed counsel to represent the matter to the Court, and that no offence under this section was committed.[6]

Personal service necessary.—Before the provisions of this section can come into play, personal service of summons must be attempted.[7] Where a summons was shown to a person and taken back, it was held that it had not been served so as to render that person liable under this section for non-attendance.[8] Service of a notice on the pleader of a party is not sufficient in criminal cases.[9] The mere affixing of summons to the house of the person required to attend is not sufficient. It should be proved that it was brought to the knowledge of the accused that he was required to attend.[10]

Escape from custody.—The section does not apply to the case of a defendant escaping from custody under a warrant in execution of a decree of a Civil Court.[11]

Madras Regulation IV of 1816.—The provisions of this section are not in conflict with the special provisions of ss. 15 and 16 of Regulation IV of 1816 (Madras). In ordinary cases obedience to the summons of a Village Munsif should be dealt with under the Regulation. But if a charge is laid under the Penal Code the criminal Court must deal with it.[12]

[1] *Bohra Birbal*, (1922) 20 A. L. J. R. 192.
[2] *Kisan Bapu*, (1885) 10 Bom. 93; *Sutherland*, (1870) 14 W. R. (Cr.) 20.
[3] *Narayanappa*, (1890) 1 Weir 99.
[4] *Krishtappa*, (1890) 20 Mad. 31.
[5] *Durga Das Rakhit* v. *Umesh Chandra Sen*, (1900) 27 Cal. 935.
[6] *J. R. Das*, (1923) 1 Rang. 549.
[7] *Hurynath Chowdry*, (1867) 7 W. R. (Cr.) 58; *Firkha*, (1870) P. R. No 6 of 1870.
[8] *Kuppan*, (1887) 11 Mad. 137; *Karsandal Dánatram*, (1868) 5 B. H. C. (Cr. C.) 29.
[9] *Saraswati Debi* v. *Maharaja Durga Churn Laha*, (1902) 6 C. W. N. 927.
[10] *Periannamalawaram*, (1884) 1 Weir 84; (1871) 6 M. H. C. App. 29; *Ganapathi Aiyan*, (1882) 1 Weir 85.
[11] *Sardar Pathu*, (1863) 1 B. H. C. 33; (1874) 7 M. H. C. App. 43; *Dhola*, (1870) P. R. No. 27 of 1870. Contra, *Heera Singh*, (1870) P. R. No. 1 of 1871.
[12] *Ramachandrappa*, (1883) 6 Mad. 249.

Madras Act III of 1869.—There are several cases deciding whether disobedience to a summons issued by a Tahsildar under Act III of 1869 is punishable under this section or not.[1]

Statutory application.—See the Coroners Act (IV of 1871), s. 17; the Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 40; the Native Converts Marriage Dissolution Act (XXI of 1866), s. 11; the City of Madras Municipal Act (Mad. Act I of 1884), ss. 161, 454.

PRACTICE.

Evidence.—Prove (1) that the obligation to attend was in obedience to a summons, etc.

(2) That such summons, etc., was issued by a public servant, legally competent as such, to issue the same.

(3) That the accused became thereby legally bound to attend, in person or by agent, at a certain place and time.

(4) That he omitted to attend at such place or time; or that he departed from the place before the time at which it was lawful for him to depart.

(5) That he did as above intentionally.

To bring the case within the second clause it must be further proved

(6) That the summons or notice was to attend in person or by agent in a Court of Justice.

It must be proved that it was brought to the knowledge of the accused that he was required to attend and that he intentionally omitted to do so.[2] The mere production of the summons to the accused with an endorsement of service is not sufficient proof of service in the absence of the evidence of the officer who is said to have served the summons.[3]

A summons directing a person to appear within a certain number of days does not comply with the requirement of this section.[4]

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate is necessary.[5]

Omission to produce document to public servant by person legally bound to produce it.

175. Whoever, being legally bound[1] to produce or deliver up any document to any public servant,[2] as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees or with both;

or, if the document is to be produced or delivered up to a Court of Justice,[3] with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATION.

A, being legally bound to produce a document before a Zila Court, intentionally omits to procure the same. A has committed the offence defined in this section.

[1] (1871) 6 M. H. C. App. 44; *Reddi Narasuramayya*, (1889) 1 Weir 95; *Varathappa* [illegible] *Naidu*, [illegible] Weir [illegible] r 95; [illegible]

[2] [illegible]

[3] [illegible]

[4] [illegible]

[5] [illegible] See also ss. 476-78, 487.

COMMENT.

A witness who having a document does not produce it comes under this section and not under O. XVI, rr. 17-18, of the Civil Procedure Code.[1]

1. **'Legally bound.'**—See s. 43, *supra*.

2. **'Public servant.'**—See s. 21, *supra*.

A Receiver appointed under the Land Registration Act (Beng. Act VII of 1876, s. 56) *is not a public servant within the meaning of this section.*[2]

The public servant must be legally competent to call for the document.

A person called upon by a Sub-Registrar to produce the original document which was registered in his office, to enable him to compare it with the copy of the deed in the Registration Office Register, which, it was suspected, was tampered with, is not legally bound to produce it, and he cannot, on his failure to do so, be convicted under this section.[3]

Where an accused, while on his trial for offences under ss. 471 and 193 of the Penal Code, being directed to produce a certain incriminating document, did not produce the document and in consequence the prosecution against him failed, it was held that he could not be convicted for his omission to produce it.[4]

3. **'Court of Justice.'**—See s. 20, *supra*.

Statutory application.—See the Coroners Act (IV of 1871), s. 17; the Presidency Small Cause Courts Act (XV of 1882), s. 83; [illegible] 1894), s. 10; the Indian Works of Defence Act (VII [illegible] Irrigation Act (Beng. Act III of 1876), s. 10; Punjab [illegible]

The amendment of s. 136 of the Civil Procedure [illegible] present Code, and the omission from r. 21 of all references to s. 188 or other sections of the Penal Code, indicate that a party to a suit, who fails to comply with an order for production or inspection of documents, can be punished only in the manner prescribed by that rule, and is not punishable under this section or any other section of the Code.[5]

PRACTICE.

Evidence.—Prove (1) that it was a public servant, or a Court of Justice against whom the offence was committed.

(2) That the accused was legally bound to produce or deliver up the document in question to such public servant, or Court of Justice.

(3) That the accused omitted to produce, or deliver up the document.

(4) That the accused did so intentionally.

The prosecution must prove that the accused was in possession of the document required to be produced; when it is doubtful which of the two accused had the document, they could not be convicted.[6]

Procedure.—No[illegible] Bailable—Not compoundable—Triable by the Court i[illegible] subject to the provisions of Ch. XXXV of the [illegible] ot committed in a Court, a Presidency Magistra[illegible] econd class—Triable summarily.

When any such offence as is described in this section is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody; and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to a fine not exceeding two hundred rupees, and in default

[1] *Premchand Doulatram*, (1887) 12 Bom. 63. See also *Salig Ram*, (1890) 10 A. W. N. 171.

[2] *Ebrahim Sircar*, (1901) 29 Cal. 236.

[3] *Asmatulla Sirdar*, (1905) 2 C. L. J. 621.

[4] *Ishwar Chandra Ghoshal*, (1908) 12 C. W. N. 1016, 8 C. L. J. 320.

[5] *Ram Chand*, (1910) P. R. No. 15 of 1910.

[6] *Damri Ram*, (1917) 4 P. L. W. 65

of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.[1]

A criminal Court inflicting a fine for contempt of Court should specifically record its reasons and the facts constituting the contempt, with any statement the offender may make, as well as the finding and sentence.[2]

A Court other than the High Court can try persons for offences committed before itself only in cases to which s. 477, or 480 or 485 of the Criminal Procedure Code is applicable, and none of the sections is applicable when the accused is charged under this section.[3]

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate is required.[4]

Omission to give notice or information to public servant by person legally bound to give it.

176. Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant,[1] as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law,[2] shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence,[3] or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Scope.—This section applies to persons upon whom an obligation is imposed by law to furnish certain information to public servants, and the penalty which the law provides is intended to apply to parties who commit an intentional breach of such obligation,[5] and not where the public servants have already obtained the information from other sources.[6]

When once the information of the fact of the crime has reached the police, the object of the section has been fulfilled and no further duty imposed by it remains.[7]

Ingredients.—This section requires—

1. That a person must be legally bound to give any notice or to furnish information on any subject to a public servant.

2. That he has intentionally omitted to give such notice or information in the manner and at the time required by law.

1. **'Legally bound to give any notice or to furnish information to any public servant.'**—See s. 43, *supra*. To bring home the charge to the accused he must be shown to be legally bound to furnish information. Mere servants, for instance, who are dependent on their master, do not come within the category of persons legally

[1] Criminal Procedure Code, s. 480.

[2] *Panchanada Tambiran*, (1869) 4 M. H. C. R. 229.

[3] *Seshayya*, (1889), 13 Mad. 24

[4] Criminal Procedure Code, s. 195. See also ss. 476-478, 480-482, 487.

[5] *Phool Chand Brojobassee*, (1871) 16 W. R. (Cr.) 35; *Luchmun Pershad Gorgo*, (1872) 18 W. R. (Cr.) 22; *Keeree*, (1866) 1 Agra 37.

[6] *Sashi Bhusan Chuckrabutty*, (1878) 4 Cal. 623; *Pandya Nayak*, (1884) 7 Mad. 436; *Gopal Singh*, (1892) 20 Cal. 316; *Sher Singh*, (1888) P. R. No. 5 of 1889.

[7] *Sada*, (1893) Unrep. Cr. C. 674.

bound to give information.[1] Several Acts have imposed obligations on persons to give notice or information to public servants, *e.g.*, the Foreigners Act[2]; the Coroners Act[3]; the Criminal Tribes Act[4]; the Dramatic Performances Act[5]; the Indian Succession Act[6]; the City of Bombay Municipal Act[7]; the Land Acquisition Act[8]; the Code of Criminal Procedure[9]; the Indian Registration Act[10]; the Indian Mines Act[11]; the Indian Works of Defence Act.[12]

See s. 21, *supra*, as to the meaning of 'public servant.'

Presumption of knowledge of an offence.—The refusal of a person to join in a dacoity does not imply a knowledge on his part of the commission of that offence or render him liable under this section.[13]

2. **'Intentionally omits to give such notice...in the manner and at the time required by law.'**—Where a person is under a legal duty to report certain facts and fails to report them, he must be presumed to intend to conceal them. [illegible] bound to give information directed the village watchman to the knowledge of the others to make a report at the police-station and he neglected to do so, it was held that no offence was committed as it could not be said that the persons intentionally omitted to give the information.[15]

3. **'If the notice, etc., respects the commission of an offence or is required for...preventing the commission of an offence.'**—This expression refers to the commission or prevention of some particular offence and not to the commission or prevention of offences generally. Thus, the information required to be given under s. 565 of the Criminal Procedure Code cannot be said to be required for the [illegible] though it may be [illegible] the Code or under [illegible] imprisonment for a term of six months or upwards (s. 40).

CASES.

Omission to give information under s. 45, Criminal Procedure Code.—An omission by an owner of a house to give information of a sudden or unnatural death[17] is not an offence under this section, because owners or occupiers of houses in a village are not owners or occupiers of land under s. 45, Criminal Procedure Code.[18] In order to support a conviction under this section against a person for not giving information of an occurrence falling under clause (*d*) of s. 45, Criminal Procedure Code, it is not necessary to show that the death actually occurred on his land, when the circumstances disclosed show that a body has been found under circumstances denoting that the death was sudden, unnatural, or suspicious; the finding of the body being a fact from which a Court might

[1] *Thakri*, (1911) P. W. R. (Cr.) No. 17 of 1911.
[2] Act III of 1864, s. 20.
[3] Act IV of 1871, s. 17.
[4] Act XXVII of 1871, s. 9.
[5] Act XIX of 1876, s. 7
[6] Act XXXIX of 1925, s. 347 (3).
[7] Bom. Act III of 1888, ss. 473, 155 (1), (2) 187.
[8] Act I of 1894, s. 10 (2).
[9] Act V of 1898, ss. 44 and 45 (*a*), (*b*), (*d*), (*f*).
[10] Act XVI of 1908, s. 82.
[11] Act VIII of 1901, s. 11 (2).
[12] Act VII of 1903, s. 11.
[13] [illegible]
[14] [illegible]
[15] [illegible]
[16] [illegible] See [illegible] (1905) 1 N. L. R. 133.
[17] Criminal Procedure Code, s. 45 (*d*).
[18] *Mainda*, (1887) 1 Weir 101.

reasonably infer, in the absence of evidence to the contrary, that the death took place there.[1]

Liability of a Karnam.—A Karnam is legally bound to furnish true information regarding cultivation in his village.[2] But a Karnam who omits to submit cultivation accounts of his village in obedience to the orders of the Revenue Inspector is not guilty of an offence under this section.[3]

Punjab Land Revenue Act.—Accused, a Zahildar, was convicted under this section for failing to give information of two cases of house-breaking, it being his duty under Rule 25, framed under s. 28 of the Punjab Land Revenue Act, "to report heinous crimes to the Police and Magistrate." It was held that having regard to s. 43 of this Code, though a Zemindar was required by virtue of the rule to report, such rule did not cast upon him a legal duty to report, such as was im- [illegible] that he could be held [illegible] of the commission [illegible] of a Zahildar, was convicted, under this section, of intentionally omitting to give information about a riot which occurred in his village which he was legally bound to furnish. It was held that even assuming that the duties and powers of a Zahildar's *sarbarah* were co-extensive with those of the Zahildar himself, the conviction could not be sustained, for a breach of the rules drawn up by the Local Government in regard to Zahildars, though it might subject the Zahildar to the displeasure of his employer and possibly endanger his emoluments or position, could not be held to amount to a violation of a legal obligation within the meaning of this section, regard being had to the definition of the terms "illegal" and "legally bound to do" in s. 43 of the Code.[5]

N. W. P. and Oudh Land Revenue Act.—A *jamabandi* prepared under rules made under s. 234 of the N. W. P. and Oudh Land Revenue Act III of 1901 is a register, and consequently if a Zemindar refuses to give the *patwari* of a village information as to the collection of rent made by him he is liable under this section.[6]

The Central Provinces Land Revenue Act.—The appointment of a Mukaddum-gumasta under s. 137 of the Central Provinces Land Revenue Act does not absolve the Mukaddum from all responsibility to perform the duties laid on a Mukaddum by s. 141 of the Act. Where a Mukaddum has received information that a non-bailable offence has been committed in a village of which he is Mukaddum, and he is aware that the Mukaddum-gumasta has omitted to make any report, it is his duty to make the report himself and his omission to do so is an offence under this section.[7]

PRACTICE.

Evidence.—Prove (1) that the accused knew of the circumstance, or had information in question.

(2) That he was legally bound to give notice thereof, or to furnish such information.

(3) That such notice should have been given, or such information furnished, to a public servant.

(4) That he omitted to give such notice, or furnish such information, as required by law.

(5) That he omitted to do so intentionally.

For the second clause of the section prove further—

[1] *Maluki Misser*, (1885) 11 Cal. 619.

[2] *Venkatanarasappa*, (1891) 1 Weir 111.

[3] *Tolupur Bhagavannulu*, (1897) 1 Weir 105.

[4] *Hari Singh*, (1893) P. R. No. 25 of 1894.

[5] *Shah Muhammad*, (1886) P. R. No. 19 of 1886.

[6] *B. Suraj Bakhsh Singh*, (1907) 10 O.C. 238.

[7] *Local Government* v. *Manniharsingh*, (1911) 7 N. L. R. 101.

(6) That such notice or information had reference to the commission of the offence, or was required to prevent the commission of an offence, or in order to apprehend an offender.

Proc[illegible] lable—Triable by [illegible]

The [illegible] ited by an entirely different set of facts from one under s. 189, a conviction under s. 189 cannot be altered to one under this section.[1]

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate is required.[2]

Charge.—It is not necessary to frame a charge under this section as the offence is a 'summons' case, but if it is necessary to do so the charge should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false; and it should appear precisely what his duty was in the matter.[3]

Sentence.—A sentence under this section should commence at once according to the rule contained in r. 464 (2) of the Punjab Jail Manual and should not be postponed till the expiry of the term of imprisonment which the accused is undergoing in default of furnishing security.[4]

Furnishing false information.

177. Whoever, being legally bound to furnish information on any subject to any public servant,[1] as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false,[2] shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the information which he is legally bound to give respects the commission of an offence,[3] or is required for the purposes of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

ILLUSTRATIONS.

(a) A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.

[illegible] gers Z, a ause tual fully misinforms the police-officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction Here A is guilty of the offence defined in the latter part of this section.

[1] *Arjun Mal*, (1922) 3 Lah. 440.

[2] Criminal Procedure Code, s. 195. See also ss. 476-478, 487.

[3] *Meenubroo*, (1867) 8 W. R. (Cr.) 37.

[4] *Chetsingh*, (1918) P. L. R. No. 97 of 1918.

Explanation.—In section 176 and in this section the word "offence" includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and the word "offender" includes any person who is alleged to have been guilty of any such act.

COMMENT.

Section 176 deals with the omission to give information: this section, with the giving of false information. Under both the sections the liability depends upon legal obligation to give information. Persons who are not under any legal obligation to furnish information cannot be dealt with under these sections.

Scope.—This section contains two branches. The first branch—'*whoever* [illegible] make.[1] Under the second branch—'*or if information . . . or with both*'—the [illegible] venting [illegible] ly, but [illegible] to the [illegible] tement, [illegible] to give [illegible]

Ingredients.—This section requires—

1. That a person must be legally bound to furnish information on a particular subject to a public servant.

2 That he must furnish, as true, information on that subject which he knows or has reason to believe to be false.

1. '**Legally bound to furnish information . . to any public servant.**'—Sections 44 and 45 of the Criminal Procedure Code legally bind persons to give information regarding certain offences. See s. 43, *supra*, as to the meaning of 'legally bound.

See s. 21, *supra*, as to the meaning of 'public servant.'

Offence is committed if there is legal obligation to give information.—*False reports* [illegible] report as that which was made to him, was guilty under this section.[4] Where a police-officer who was bound to communicate information to his superior officer regarding the commission of riot and to make an entry thereof in his diary, omitted to give such information, it was held that he was guilty under this section.[5] Where a constable, whose duty it was to ascertain on his rounds whether certain notoriously bad characters were in their houses or not, falsely reported that they were, it was held that the offence fell within the first branch of this section.[6]

No offence where no legal obligation to give information.—*False return to a superior.*—Where the accused submitted to his official superior a false 'nil' return of lands in his enjoyment, and also made a false statement to the same effect

[1] *Appayya*, (1891) 14 Mad. 484; *Suraji*, (1873) Unrep. Cr. C. 76; *Parmaya*, (1885) Unrep. Cr. C. 210.

[2] *Panatulla*, (1887) 15 Cal. 386.

[3] *Lucklee Sing*, (1869) 12 W. R. (Cr.) 23.

[4] *Muhammad Ismail Khan*, (1897) 20 All. 151.

[5] *Syed Futteh Mahomed*, (1874) 21 W. R. (Cr.) 30.

[6] *Panatulla*, sup.

to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The offence under the section consists in the refusal to answer a question which is relevant to the subject concerning which the public servant is authorized to inquire, or which at least touches that subject. If a person gives false answers then he will be guilty under s. 193 and not under this section.

Whether a person who has once committed an offence under the last section can be held to have committed a further offence under this section when he refuses to answer the questions put to him is undecided.[1]

1. **'Legally bound to state the truth.'**—A person who is examined by a police-officer under s. 161, Criminal Procedure Code, is not legally bound to state the truth. The legal obligation to speak the truth when so examined existed under the Code of 1882; but the effect of the omission of the word "truly" in s. 161 of the present Code has been to do away with his legal obligation.[2] A person cannot be convicted of this offence for refusing, when required by a police-officer, to look at the hands of a complainant and to answer whether there were any marks of tying with a rope on his hands.[3]

Sections 121 to 132 of the Indian Evidence Act[4] enable witnesses to refuse to answer certain questions.

Where, in a murder case, a witness persisted in refusing to answer material and important questions put to him repeatedly by the Court with the result that the Judge's attempt to get at the truth was partially frustrated, it was held that the witness was guilty under this section.[5]

2. **'Public servant.'**—See s. 21, *supra*.

3. **'Refuses to answer any question.'**—If a Judge asks questions with a view to criminal proceedings being taken against a witness, the witness is not bound to answer them, and cannot be punished for not answering them, under this section.[6]

This section has nothing to do with the conduct of the accused in Court. It has no application to a refusal to plead to a charge. An accused who, on being charged before a Village Panchayat Court, said that he would not make any reply and remained silent was held to have committed no offence under this section.[7]

Complainant.—A complainant is not a witness punishable for refusing to answer.[8]

Statutory application.—The Indian Succession Act (XXXIX of 1925), s. 267 (3); the Public Gambling Act (III of 1867), s. 10.

PRACTICE.

Evidence.—Prove (1) that the accused was legally bound to state the truth to a public servant on the subject in question.

(2) That such public servant questioned him touching such subject.

(3) That such public servant was exercising his legal powers in putting such questions.

(4) That the accused refused to answer such questions.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of

[1] *Bepin Chandra Pal*, (1907) 7 C. L. J. 63.
[2] *Sankarlinga Kone*, (1900) 23 Mad. 544; *Savani Virabayi*, (1899) 1 Weir 111; *Gul Hassan Shah*, (1906) P R No 27 of 1908.
[3] *Fakira*, (1875) Unrep. Cr. C. 92.
[4] Act I of 1872.
[5] *Har Narain*, (1924) 22 A. L. J. R. 1100.
[6] *Hari Lakshman*, (1885) 10 Bom. 185.
[7] *Tirumala Reddi*, (1923) 46 M. L. J. 40.
[8] *Ganesh Narayan Sathe*, (1889) 13 Bom. 600.

Chapter XXXV of the Criminal Procedure Code; or, if not committed in a Court, a Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.[1]

Refusing to sign statement.

180. Whoever refuses to sign any statement[1] made by him, when required to sign that statement by a public servant[2] legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENT.

If a statement made to an officer of justice or other public servant is put into writing and the public servant being "legally competent to require" a person to sign that statement, does make the request, the refusal to sign under such circumstances constitutes the offence hereby made punishable.[2]

1. **'Statement.'**—The statement must be such an one as the accused can be legally required to sign. See ss. 154, 164, 200, 364 of the Criminal Procedure Code, and s. 20 of the Coroners Act.[3] An accused person who refuses to sign a statement made at his trial in answer to questions put by the Court, commits no offence under this section.[4] But, if the accused refuses to sign his statement recorded under s. 364 of the Code of Criminal Procedure, he commits this offence.[5] The inquest report is not a 'statement,' and a refusal to sign such a report is not punishable under this section.[6]

Deposition.—A witness is not legally bound to sign his deposition in a Revenue enquiry[7]; nor is he bound to sign or affix his thumb mark to his deposition in a civil case[8]; consequently he cannot be convicted under this section for his refusal to sign it. Where a witness is bound to sign his deposition it is only after the evidence has been read over to him and he has admitted it to be correct and has refused to sign it that he will be guilty under this section.[9]

2. **'Public servant.'**—See s. 21, *supra*.

Refusal to sign a receipt for summons.—A mere refusal to sign a receipt for a summons is not an offence under this section.[10]

PRACTICE.

Evidence.—Prove (1) that the accused made the statement.

(2) That he was required to sign such statement by a public servant.

(3) That such public servant was legally competent to require him so to sign it.

(4) That the accused refused to sign that statement

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Criminal Procedure Code; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class—Triable summarily.

Complaint—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate, is required.[11]

[1] Section 195, Crim. P. C See also ss. 476-78, 480-82, 487.

[2] M. & M. 50.

[3] Act IV of 1871.

[4] *Sirsapa*, (1877) 4 Bom. 15; *Ba Tin*, (1906) 3 L. B. R. 199.

[5] *Umar Khan*, (1917) 39 All. 399.

[6] *Andi*, [1910] M. W. N. 366.

[7] (1871) 6 M. H. C. App. 14; (1871) 1 Weir 112.

[8] [illegible]

[9] [illegible]

[10] [illegible]

[11] [illegible] also ss. [illegible], [illegible], [illegible].

False statement on oath or affirmation to public servant or person authorized to administer an oath or affirmation.

181. Whoever, being legally bound by an oath or affirmation to state the truth on any subject to any public servant or other person authorized by law to administer such oath or affirmation,[1] makes to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true,[2] shall be punished with imprisonment[3] of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

This section may be compared with s. 191. It is more general. Under it a false statement to any public servant is punishable. Section 191 describes the offence in which the false statement is made at any stage of the judicial proceeding.

Ingredients.—This section requires—

1. That there must be a person legally bound by an oath or affirmation to state the truth on a subject to (*a*) a public servant, or (*b*) some other person authorized by law to administer such oath or affirmation.

2. That he must make to such public servant or other person as aforesaid a statement touching that subject which is false, and which he either knows or believes to be false or does not believe to be true.

1. **'Legally bound by an oath or affirmation to state the truth on any subject to any public servant.'**—See s. 43, *supra*, as to the meaning of 'legally bound.'

See s. 51, *supra*, as to the meaning of 'oath.'

See s. 21, *supra*, as to the meaning of 'public servant.'

'Authorized by law to administer such oath, etc.'—This section applies only where the public servant is "authorized by law to administer an oath"[1]; it does not apply where the public servant administers the oath in a case wholly beyond his jurisdiction[2]; and also where he is not competent to take a statement on solemn affirmation.[3] Where three persons, of whom one was a pleader, were tried together and convicted of having made false statements on solemn affirmation, about the same matter, in the course of an enquiry into the conduct of the pleader under the provisions of the Legal Practitioners Act, it was held that the conviction of the pleader was bad as his statement was improperly taken from him on solemn affirmation.[4]

In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegation in the petition of appeal on solemn affirmation, and he did so. It was held that the appellant committed no offence under this section.[5]

2. **'Makes to such public servant...any statement which is false, and which he either knows or believes to be false or does not believe to be true.'**—The making of a false statement with no knowledge one way or the other as to its truth constitutes it a false statement since the person making it does not believe it to be true.[6]

3. **'Shall be punished with imprisonment.'**—The sentence must include a term of imprisonment, however short, to which a fine may be added.[7]

Bom. L.R.

[4] *Subbayya*, (1889) 12 Mad. 431.

[5] *Echan Meeah*, (1865) 2 W. R. (Cr.) 47.

[7] (1869) 4 M. H. C. App. 18.

False statement on oath.—The Bombay and Calcutta High Courts have held that this section does not apply to cases in which a person gives a false statement on oath before a public officer in a stage of judicial proceeding, such person being liable to be convicted under s. 193, but only refers to cases in which the false statement is made in proceedings other than judicial proceedings.[1] The principle on which these rulings are based being that when the facts found constitute an offence triable exclusively by the Court of Session, a Magistrate is not at liberty to pass over material points of the evidence before him, so as to withdraw the case from the cognizance of the proper tribunal. Although the wording of this section is apparently wide enough to admit false statements of every description, its action is restricted as regards those made under certain circumstances by the succeeding s. 193. Were it not so, a Magistrate acting under this section might try all cases of perjury himself instead of committing them, as he is no doubt bound to do, to the Court of Session. The Madras High Court has, however, held that a witness in a criminal case, who gives false evidence before a Magistrate, may be convicted by a Magistrate under this section though he might also have been charged under s. 193, and, if so charged, would only have been triable by the Sessions Court.[2] But in an earlier case it held that this section would appear to apply to cases in which the proceedings were not of a judicial character.[3]

Amendment.—The words "or affirmation" were inserted by Act X of 1873, s. 15.

PRACTICE.

Evidence.—Prove (1) that the accused took the oath, or made the affirmation in question.

(2) That the same was legally binding upon him.

(3) That such oath or affirmation was administered by a public servant or by a person authorized by law to administer the same.[4]

(4) That the accused whilst so bound made the statement in question to such persons

(5) That such statement was made touching the subject on which he was thereby bound to state the truth.

(6) That what he so stated was false.

(7) That he then knew that his statement was false, or had reason to believe it was false, or did not believe it was true.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate is required.[5]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, being legally bound by an oath to state the truth, on a certain subject, to wit——, to——, a public servant (*or* person authorized by law to administer such oath) did make to such public servant (*or* person as aforesaid) touching that subject, a statement, which was false, and which you knew (*or* believed) to be false, to wit——, and thereby committed an offence punishable under s. 181 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

[1] [illegible]

[2] [illegible]

[3] *Andy Chetty*, (1863) 2 M. H. C. 438.

[4] *Juggut Chunder Dutt*, (1866) 6 W. R. (Cr.) 81.

[5] Criminal Procedure Code, s. 195. See also ss. 476, 478, 487.

And I hereby direct that you be tried [*by the said Court* (in cases tried by *Magistrate omit these words*)] on the said charge.

False information with intent to cause public servant to use his lawful power to the injury of another person.

182. Whoever gives to any public *servant* any *information*[1] which he knows or believes to be false,[2] intending thereby to *cause, or knowing it to be likely that he will thereby cause*, such public servant—

(*a*) to do or omit anything which such public *servant ought not to do or omit*[3(a)] if the true state of facts respecting which such information is given were known by him, or[3(b)]

(*b*) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of *either description* for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ILLUSTRATIONS.

(*a*) A informs a Magistrate that Z, a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(*b*) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

(*c*) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.

COMMENT.

The present section was substituted for the original section by Act III of 1895, s. 1. In the old section clause (*b*) stood first, and clause (*a*) second. The present alteration arose out of a case in which, information having been given by a man to the police that he had been robbed at a certain village, the police went down and made inquiries and gave a great deal of trouble and annoyance to the people. It turned out that the information was absolutely false, but on prosecution the High Court of Calcutta ruled that inasmuch as it was not intended, or could not be shown that it was intended, to injure or annoy any particular person, the case did not fall within the section in question.[1] The present section has been introduced to amend that, and to say that if such information is given the person giving it should be punished whether any particular person was aimed at or not. That is to say, it has been made an offence to give false information which misleads a public servant into doing what he ought not to do, whether that can be shown to be intended for the purpose of injuring any particular person or not.[2]

Object.—The intention of the legislature in drawing up this section is that a public servant should not be falsely given information with the intent that he

[1] *Golam Ahmed Kazi*, (1887) 14 Cal. 314.

[2] The case of *Golam Ahmed Kazi* is expressly overruled by ill. (*c*). The case of *Periannan*, (1881) 4 Mad. 241, may also be regarded as overruled.

should be misled by a person who believed that information to be false, and was intending to mislead him.

"Suppose a man, knowing the statement to be untrue, but intending the Magistrate to act upon it, informed the Magistrate of the district that a violent fire was raging in a city in the district of which he had charge. Now if the Magistrate believed that statement he would naturally send as many police as he could spare to assist in quelling the fire and keeping order. He might possibly also ask for the assistance of the military, if there were any in the neighbourhood. That would be a perfect example of a hoax, and I have not a doubt that it would come within s. 182, whether the Magistrate acted upon the information or not. To take another example of a case which in my opinion would come within the section, although the public servant was not induced to take action or to omit to take action upon the information given to him. Let us say that a man had absconded for an offence from Allahabad, and that it was surmised that he would seek to escape at one of the shipping ports. Information of his having absconded would be communicated to those ports, Calcutta amongst the number. A person who, knowing that that man had not been arrested, and intending that the authorities at Calcutta should cease to watch the outwardbound shipping, telegraphed to the authorities at Calcutta informing them that the absconder had been arrested elsewhere, would in my opinion have committed an offence under s. 182, although the public servant at Calcutta had not acted on the telegram, but had persisted in his surveillance of the outwardbound shipping."[1]

Difference between s. 182 and s. 211.—The offence under this section is a distinct offence from that described in s. 211, which relates to an attempt to put the criminal Courts in motion against a person. The circumstances which are necessary to bring a case within this section involve different considerations from those that arise from s. 211. This section does not necessarily impose upon the person giving information to the officer criminal liability for mere want of caution before giving that information. There must be positive and conscious falsehood established.[2] See Comment on s. 211 where the difference between this section and s. 211 is discussed.

Scope.—A person can be prosecuted under this section even after the dismissal of his complaint to a Magistrate. A person gave false information to the police and subsequently made a complaint to a Magistrate and the Magistrate issued a summons to the accused to appear but the complainant did not appear at the time of the hearing and the police reported that the complaint was false. After the discharge of the accused the police-officer to whom the complainant had given information laid a complaint and preferred a charge under this section. It was held that the complainant's making a complaint to a Magistrate and then dropping the proceedings was no bar to the police-officer acting under this section.[3]

[illegible] three essentials—

[illegible] public servant.

[illegible] been known or believed to be false by the giver.

3. The information must have been given with the intention to cause, or knowing it likely that it will cause, such public servant (*a*) to do or omit anything which he ought not to do or omit to do if the true facts were known to him, or (*b*) to use his lawful power to the injury or annoyance of any person.

1. 'Gives to a public servant any information.'—The expression 'gives information' means to volunteer information and is not intended to apply to a

[1] *Budh Sen*, (1891) 13 All. 351, 355; *Ganesh Khanderao*, (1889) 13 Bom. 506.

[2] *Ramkrishna Yeshwant*, (1906) 9 Bom. L. R. 33.

[3] *Mula*, (1918) 17 A. L. J. R. 32; *Bakhshi*, (1923) 46 All. 43.

statement made in answer to questions put by a public servant.[1] If the false information is given to a person who is not a public servant, the offence will be that of defamation.[2] In support of an application to transfer a case, a person swore to an affidavit and handed it over to the pleader of the applicant who filed it in Court. The affidavit contained allegations which were subsequently found to be false. The deponent was prosecuted under this section. It was held that the affidavit having been given to the applicant's pleader on his behalf and as it was open to the applicant to instruct his pleader not to file the same there was no information given to a public servant within the meaning of this section.[3]

See s. 21, *supra*, as to the definition of 'public servant.'

No offence under this section can be made out in respect of a false information given to a police officer of a Native State.[4]

Any information.—Any 'false' information given to a public servant, with the intent mentioned in the section, is punishable under it, whether that information is volunteered by the informant or is given in answer to questions put to him by the public servant.[5]

Statement made by an accused in his defence.—Statements made by a prisoner for the purposes of his defence do not fall under this section[6]. Where the petitioner on being questioned by a Superintendent of Police whether he was the author of certain mischievous articles that appeared in a paper said he was not the author but some one else was when in reality he was the author, it was held that as the statement was given merely in defence or excuse he was not guilty of an offence under this section.[7] In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witness. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegations in the petition of appeal on solemn affirmation, and he did so. It was held that the appellant had not committed an offence under s. 181 of this section.[8]

Statement made by an accused in his application for transfer of the case.—Where the accused in support of an application for the transfer of the case against him to some other Magistrate made unfounded and defamatory allegations against the trying Magistrate, the Allahabad High Court held that he could not be prosecuted under this section[9] The Lahore High Court has dissented from this view. It has held that an application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by s. 342 of the Criminal Procedure Code upon answers to questions put to the accused by the Court.[10]

Mere belief is not 'information' under this section.—Where a person falsely informed a Collector that certain Zemindars had usurped possession of certain land belonging to Government, with the intent "to give trouble to such Zemindars, and waste the time of the public authorities," it was held that as the information was no more than an expression of a private person's belief or opinion that the Collector might, if he chose, sustain a civil action against them, this was

[1] *Mangu*, (1914) P. W. R. (Cr.) No. 35 of 1914, P. L. R. No. 227 of 1914.

[2] *Santaram*, (1887) Unrep. Cr. C. 315, Cr. R. No. 1 of 1887.

[3] *Katta Pralasam*, (1924) 47 M. L. J. 658, [1925] M. W. N. 146.

[4] *Ramkhartki, Hirakhartki*, (1923) 25 Bom. L. R. 772, 7 Bom. Cr. C. 78.

[5] *Ramji Sajabarao*, (1885) 10 Bom. 124; *Bhikaiji*, (1877) Unrep. Cr. C. 124, Cr. R. No. 171 of 1877. In *Nga Aung Po*, (1905) U. B. R. (P. C.) 13, it is held that false answers to questions put by a police-officer in the course of investigation of a cognizable offence do not fall under this section.

[6] *Daria Khan*, (1870) 2 N. W. P. 129.

[7] *S. A. Gordon*, Criminal Appeal No. 22 of 1910. Unrep. (Bom). Per Batchelor and Davar, JJ., decided on the 10th March, 1910.

[8] *Subbayya*, (1889) 12 Mad. 451.

[9] *Matan*, (1910) 33 All. 163.

[10] *Ghulam Muhammad*, (1922) 3 Lah. 46; *Allah Wasai*, (1923) 1 L. C. 524.

not the information contemplated by this section.[1] Where a person in whose house theft took place informed the police that he suspected two persons whom he named as the perpetrators of the crime, it was held that that did not amount to giving false information.[2]

Information must be given by the accused.—When the information on which proceedings are taken is not given by the accused, a conviction under this section cannot stand. One S made a report at a Police Station. On enquiry the investigating Police-officer came to the conclusion that the report was false and that it had been made at the instance of one U. The Sub-Inspector sent a report to the Assistant Superintendent of Police asking that action should be taken under this section against S and U. The Assistant Superintendent of Police declined to take action, but sent the report to the Sub-divisional Magistrate, who took cognizance of an offence against S and U under this section. It was held that the Sub-divisional Magistrate had no jurisdiction to take any action under this section. Report of a police-officer was not a complaint under s. 195 (1), Criminal Procedure Code. U, not having given the information himself, could not be prosecuted under this section.[3]

2. 'Knows or believes to be false.'—The information given should be information which the accused knew or believed to be false.[4] But he cannot be convicted if he shows that he had reasonable grounds for believing the information to be true. He is not bound to show that it was in fact true.[5]

Where the accused falsely telegraphed to a District Magistrate that a town was attacked by a gang of 200 robbers, and the Magistrate put no faith in the telegram and took no action, it was held that the accused were guilty of the offence under this section.[6] Where the accused got enlisted in the police force calling himself *jat* being an *ahir*, a caste whose enlistment was prohibited, it was held that this offence was committed.[7] Where a person gave a false information to a Village Magistrate charging another with having committed an offence, he was held guilty under this section.[8]

3a. 'To do or omit anything which the public servant ought not to do or omit.'—It is not necessary that the public servant to whom false information is given should be induced to do anything or to omit to do anything in consequence of such information. The gist of the offence is not what action may or may not be taken by the public servant to whom false information is given; but the intention or knowledge (to be inferred from his conduct) of the person supplying such information.[9] [illegible]
tion given. Ask [illegible]
if true facts wer [illegible]
The information must be information regarding a fact which would induce the public servant to do something which he would be legally competent to do if he had been cognizant of the true facts.[10] A false report to the police regarding the commission of a non-cognizable offence does not come under this section.[11] Under this clause it is not necessary to show that the act done will be to the injury or annoyance of any third person.[12]

The words "ought not to do or omit" imply duty and exclude personal choice.

[1] *Madho*, (1882) 4 All. 498. See *Santaram*, (1887) Unrep. Cr. C. 315.

[2] *Ananga Mohan Dutta*, (1917) 22 C. W. N. 478, 27 C. L. J. 230.

[illegible] of [illegible] R. [illegible] Weir [illegible]

[4] *Fateh Khan*, (1890) P. R. No. 35 of 1890.

[5] *Budh Sen*, (1891) 13 All. 351.

[7] [illegible]

[8] *Budh Sen*, sup.; *Raghu Tiwari*, (1893) 15 All. 336.

[9] *Manohar*, (1918) 16 A. L. J. R. 614.

[10] *Algoo Lal*, (1920) 18 A. L. J. R. 636.

[11] *Ganesh Khanderao*, (1889) 13 Bom. 506.

3b. 'To use the lawful power...to the injury.'—See s. 44, *supra*, as to the meaning of 'injury.' Where a person gives false information to an officer who can exercise his power to the direct and immediate prejudice of another against whom the information is levelled, this offence is complete.[1]

Using lawful powers of a public servant to the injury of another.—Where a person made a petition to the police f[illegible] of having committed an offence and p[illegible] come within the purview of this sec[illegible] intent to cause a public servant to use his lawful powers to the injury of another person.[2] P appeared before a District Magistrate and made a statement in which he accused a certain police-officer of having beaten him, demanded a bribe of him and locked him up in the police cell. He stated, however, that he did not wish to make a complaint, but only desired that an inquiry should be made. Nevertheless the Magistrate examined P on oath, and, subsequently, the charge having been found to be baseless, P was convicted under this section and s. 193. It was held that, inasmuch as P had expressly stated that he did not wish to make a complaint, the statement must be taken to have been made to the District Magistrate, not as a Magistrate, but as head of the district police, and the conviction under s. 193 could not be upheld.[3]

A person stated to a police-officer—"I find there has been a theft: I suspect the persons named, and I want an inquiry to be made." It was held that, if the statement was false, the offence committed fell under this section.[4] Where a person falsely gave information to the police that a horse belonging to him had strayed, when in [illegible] d this with the intention that a [illegible] was held that he was guilty un[illegible]

Statutory application.—See the Indian Companies Act (VII of 1913), s. 244.

CASES.

Personation.—A personated B at an examination called the Vernacular Sixth Standard Examination. A passed the examination and obtained a certificate from the Educational authorities in B's name. B, thereupon, applied to the Assistant Collector to have his name entered in the list of candidates for Government service. He attached to this application the certificate issued in his name, and his name was ordered to be entered on the list of candidates. It was held that he was guilty under this section.[5] B appeared before a Village Registrar and falsely personated W, and, in such assumed character, expressed a desire to execute a lease in favour of A, who was present and assented to take the lease. When B made some mistakes in giving the area of the land, C corrected him. E identified B as W before the Village Registrar and E and D assured the attesting witnesses that B was W. It was held that C, D and E could not be convicted under s. 82 (*d*) of the Registration Act, 1877, but that they were guilty of an offence under this section.[7] A person signed a notice of transfer of survey numbers in the character of his father who was dead; and the declaration to the notice was signed by the accused who confirmed the assumed character. It was held that the accused was guilty of giving false information to a public servant.[8]

False statement in a petition.—An accused who has made a false statement in [illegible] ention, [illegible] and [illegible] ot be

[1] *Shripati bin Waman*, (1897) Unrep. Cr. C. 946.
[2] *Gopal Bhilaji*, (1873) Unrep. Cr. C. 72.
[3] *Phulel*, (1912) 35 All. 102.
[4] *Mathura Prasad*, (1917) 39 All. 715.
[5] *Incha Ram*, (1922) 44 All. 647.
[6] *Ganesh Khanderao*, (1889) 13 Bom. 506.
[7] *Bala bin Kashaba*, (1895) Unrep. Cr. C. 701.
[8] *Malharji*, (1882) Unrep. Cr. C. 182.

said that the Court was thereby induced to do what it ought not to have done.[1] It was held similarly where the false statement was made in a memorandum of appeal.[2]

Where a person submitted a petition of resignation to a Collector as the officer in charge of the Court of Wards and such petition contained an untrue account of an affray and defamatory statements and the District Magistrate ordered the petitioner's prosecution for giving false information under this section, it was held that no offence under it was committed.[3]

Income-tax return.—Where a person does not sign the declaration in his income-tax return as to his 'other sources of income' the mere mention of some source of income alone in a previous part of the return which was signed will not make the return 'false' within the meaning of this section.[4]

PRACTICE.

Evidence.—Prove (1) that the person to whom the information was given was a public servant.

(2) That the accused gave the information in question to that public servant.

(3) That such information was false.

(4) That the accused knew or believed such information to be false when giving it.[5] The fact that an information is shewn to be false does not cast upon the party who is charged with an offence under the section the burden of showing that, when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false.[6]

(5) That the accused intended thereby to cause, or knew that it was likely that he would thereby cause, such public servant to do or omit anything which such public servant ought not to do or omit if the true state of facts were known to him; or that he intended thereby to cause, or knew that it was likely that he would thereby cause, such public servant to use his lawful powers to the injury or annoyance of any person

A decision in a previous case is not admissible to prove the falsity of the information given by the accused. Evidence must be adduced in their presence.[7]

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Where as the result of a police investigation it appears that a complaint made to the police of the commission of an offence is false, it is not necessary that the complainant should be given any further opportunity of establishing the truth of [illegible] tion.[8]

[illegible] trate should enquire into and [illegible] prosecution for making a false [illegible] [10]

An acquittal under this section is no bar to a subsequent prosecution under s. 500.[11]

Madras Rule.—When an offence falls under two sections of the Penal Code, the one general and cognizable by an inferior tribunal, the other specifying aggravated circumstances and cognizable by a superior tribunal only, the jurisdiction

[1] *Sunt Lal*, (1881) P. R. No. 41 of 1881; *Gobal*, (1879) P. R. No. 34 of 1879.

[2] *Ghanaya*, (1879) P. R. No. 17 of 1879.

[3] *Debi*, (1918) 16 A. L. J. R 105.

[4] (1907) 17 M. L. J. 25 (n.)

[5] *Maulvy Abdool Luteef*, (1868) 9 W. R. (Cr.) 31.

[6] *Ryan Kutti*, (1903) 26 Mad. 640.

[7] *Ram Dass Boistub*, (1869) 11 W. R. (Cr.) 35.

[8] *Rajku Tiwari*, (1893) 15 All. 336.

[9] *Jamna*, (1883) 5 All. 387.

[10] *Gati Mandal*, (1905) 4 C. L. J. 88; *Gunamony Sapui*, (1899) 3 C. W. N. 758.

[11] *Ramsekak Lal* v. *Muneswar Singh*, (1910) 37 Cal. 604.

cases in which a person simply neglects his property, and by allowing a wall or a gateway to remain in a dilapidated condition, renders theft or other crime more easy of commission than would otherwise be the case. The law does not contemplate that the physical barrier of a wall or a gate is the means of restraining persons from crime, and no order of this nature can be made on the mere ground of any such apprehension." In this case the accused were in possession of an inn where travellers put up. The Magistrate passed an order directing them to repair the gate of the inn within a month as it was apprehended that travellers' property would otherwise be stolen. The repairs required by the order were not made till after the expiry of the month and the accused were therefore convicted under this section. It was held that the conviction was wrong.[1] A conviction in the absence of evidence as to the likely result of the disobedience of an order is bad in law.[2] Thus disobedience to an order under s. 111 of the Criminal Procedure Code prohibiting a person from holding a market on certain specified days was held not to be punishable in the absence of evidence showing that the disobedience was likely to lead to a breach of the peace.[3] The accused were directed not to make any disturbance over a certain person's rights of a ferry and thereafter they being found plying another ferry at the site in question but not causing any disturbance were ordered to be prosecuted under this section. It was held that the order for prosecution was infructuous.[4] Where proclamation and attachment were issued against an absconder attaching some undivided land of the joint family to which the absconder belonged, and one of the other members of the family cultivated the lands in spite of the order, it was held that he could not be convicted under this section.[5] But if the act of disobedience hastened to cause annoyance it is sufficient under the section. Objectionable language near a liquor shop, such as "if you drink, you will be drinking the blood of your children," speaks for itself and no more evidence than the words used is required.[6] The accused sold drink in his shop during a festival day in contravention of an order promulgated by the District Magistrate and he was convicted under this section. It was held that the conviction was illegal as there was no question or proof of causing or tending to cause obstruction, annoyance or injury, to any one and as it does not follow as a matter of course that selling drinks will lead to riots or disturbance.[7]

Section not applicable to orders made in civil suits.—The section applies to orders made by public functionaries for public purposes and not to an order made in a civil suit between party and party.[8] The operation of the section is limited

[1] *Habibullah*, (1886) 6 A. W. N. 251.

[2] *Brojo Nath Ghose*, (1900) 4 C. W. N. 226. In this case it was said that although the establishment of a rival *hat* (bazaar) at a place near to an old *hat* (bazaar) and held on the same day might lead to the breach of the peace, but that should not alone form a sufficient ground for a conviction. The decision seems to give the go bye to the words 'tends to cause.'

[3] *Shyamanand Das Paharaj*, (1904) 31 Cal. 990; *Ram Gopal Daw*, (1905 32 Cal. 793; *Parmeshwar Rai*, (1922) . 268. See *Nand Kumar Bose*, (18 R. App. 149, in which a conv ying an order prohibiting the rms was set aside in the absen o show that the disobedience nd to cause annoyance, obs ry to human life, health or ram *Ba* (1865) 2 W. I the as set aside ve ct roof dra)

Unrep. Cr. C. 433, where a man held a caste feast contrary to orders of a Municipality when cholera was raging in the city.

[4] *Sujal Biswas* v. *Samiruddin Mandal*, (1917) 22 C. W. N. 599.

[5] *Bisi Behari*, (1917) 2 P. L. W. 179.

[6] *Govind Venkatesh Yalgi*, (1908) 10 Bom. L. R. 1047.

[7] *Yerlagadda Venkanna*, [1925] M. W. N. 396.

[8] *Ch rakanta De*, (1890) 6 Cal. 445; *Ul* (1896) Unrep. Cr. C. 864, *C* of 1896; *Hanmant Chungol-ra* and Heaton, JJ., in Cr. *R* 1906, decided on the 10th *Se* ; *Mallapa Tavargri*, (1915) 17 6, 3 Bom. Cr. C. 89; *Nana-b* v. *Dwarkadas Dharamsi*, (1 . 639 (n); *ndy* v. *T*) 17 M. See, ho *et bin* (1868) 5 ; *Ra* (1901) 14 *Hira* O. C. 18.

to the promulgation by public servants of orders relating to safety, health, or convenience of the public. Thus, disobedience to an order issued under O. XXI, r. 46, Civil Procedure Code, 1908, is not punishable under this section.[1] The proper remedy for disobedience to an order of injunction passed by a civil Court is a committal for contempt.[2]

Orders issued under ss. 69 and 70 of the Bengal Tenancy Act (VIII of 1885) are not of a civil nature as the primary purpose of orders made under s. 69 is to prevent breaches of the peace. Disobedience to such orders is punishable under this section.[3] Disobedience to an order of summary ejectment issued under s. 219 of the Central Provinces Land Revenue Act (II of 1917) is held to be punishable under this section on the ground that it is an order made by a public functionary for a public purpose.[4]

Statutory [illegible] raphs Act (XIII of 1885), s. 16; the Epidemic Dis[illegible] the City of Bombay Municipal Act (Bom. Act III [illegible] Mamlatdars' Courts Act (Bom. Act II of 1906), s. 21; the Calcutta Municipal Act (Beng. Act III of 1899) s. 576.

CASES.

Valid orders.—An order issued by a Magistrate prohibiting a Zemindar from holding a new market on his estate close to an old established one belonging to a neighbouring zemindar, on the ground that it had caused unlawful assemblies and raised apprehension of a breach of the peace[5]; an order to the priests of a temple, much frequented by pilgrims, to widen and heighten the doorway so as to obviate the dangers arising from overcrowding, and improve the ventilation[6]; an order prohibiting a person from plying a boat for hire at or in the immediate vicinity of a public ferry[7]; an order commanding an assembly of five or more persons to disperse[8]; an order directing the rival owners of two markets not to hold them on certain days, in order to prevent any likelihood of a breach of the peace[9]; and an order not to slaughter cows or bullocks on particular days[10] are all held to be valid orders under this section.

An order was issued by a Magistrate prohibiting shouting against drink near [illegible] meant for persons using that road he was as much shouting in a public place as if he stood on the road itself and shouted.[11]

Invalid orders.—An [illegible] take proper care of the [illegible] wall to his own house, [illegible] to remove the banks of a tank in a dry river because they obstructed the current in rainy season[14]; an order to cut down trees because they impeded ventilation[15]; an order under s. 144, Criminal Procedure Code, prohibiting a person from collecting rents from tenants[16]; a general order under s 144, Criminal Procedure Code,

[1] *Yaung Hon*, (1909) U. B. R. (P. C.) 23.
[2] See, however, *Rajji Khandu* v. *Fraser*, (1906) 8 Bom. L. R. 638.
[3] *Lakshan Bor* v. *Naranarain Hazra*, (1921) 25 C. W. N. 617.
[4] *Hirasingh*, (1920) 17 N. L. R. 88.
[5] *Bykuntram Shaha Roy*, (1872) 10 Beng. L. R. 434, 18 W. R. (Cr.) 47, F. B.
[6] *Ramchandra Eknath*, (1869) 6 B. H. C. (Cr. C.) 36.
[7] *Muthra* v. *Jawahir*, (1877) 1 All. 527.
[8] *Tucker, Norman and Thompson*, (1882) 7 Bom. 42.
[9] *Lalla Mitterjeet Singh* v. *Rajcoomar Sircar*, (1872) 18 W. R. (Cr.) 22.
[10] *Abdul Ghafur*, (1914) 18 O. C. 70.
[11] *Govind Venkatesh Yalgi*, (1908) 10 Bom. L. R. 1047.
[12] *Amiraddi*, (1869) 3 Beng. L.R. (A Cr. J.) 45, 12 W. R. (Cr.) 36.
[13] *Kashichunder Doss*, (1873) 10 Beng. L. R. 441.
[14] *Gholam Durbesh*, (1868) 10 W. R. (Cr.) 36.
[15] *Uttam Chunder* v. *Ram Chunder*, (1870) 13 W. R. (Cr.) 72.
[16] *Premi Chand Singh Roy* v. *Dharamadas Singh Roy*, (1905) 9 C. W. N. 392.

cases in which a person simply neglects his property, and by allowing a wall or a gateway to remain in a dilapidated condition, renders theft or other crime more easy of commission than would oth[illegible] The law does not contemplate that the physical barrier of a [illegible] persons from crime, and no order of this nature can [illegible] of any such apprehension." In this case the accused were in possession [illegible] where travellers put up. The Magistrate passed an order directing them to repair the gate of the inn within a month as it was apprehended that travellers' property would otherwise be stolen. The repairs required by the order were not made till after the expiry of the month and the accused were therefore convicted under this section. It was held that the conviction was wrong.[1] A conviction in the absence of evidence as to the likely result of the disobedience of an order is bad in law.[2] Thus disobedience to an order under s. 144 of the Criminal Procedure Code prohibiting a person from holding a market on certain specified days was held not to be punishable in the absence of evidence showing that the disobedience was likely to lead to a breach of the peace.[3] The accused were directed not to make any disturbance over a certain person's rights of a ferry and thereafter they being found plying another ferry at the site in question but not causing any disturbance were ordered to be prosecuted under this section. It was held that the order for prosecution was infructuous.[4] Where proclamation and attachment were issued against an absconder attaching some undivided land of the joint family to which the absconder belonged, and one of the other members of the family cultivated the lands in spite of the order, it was held that he could not be convicted under this section.[5] But if the act of disobedience hastened to cause annoyance it is sufficient under the section. Objectionable language near a liquor shop, such as "if you drink, you will be drinking the blood of your children," speaks for itself and no more evidence than the words used is required.[6] The accused sold drink in his shop during a festival day in contravention of an order promulgated by the District Magistrate and he was convicted under this section. It was held that the conviction was illegal as there was no question or proof of causing or tending to cause obstruction, annoyance or injury, to any one and as it does not follow as a matter of course that selling drinks will lead to riots or disturbance.[7]

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[3] *Shyamanand Das Paharaj*, (1904) 31 Cal. 990; *Ram Gopal Daw*, (1905) 32 Cal. 793; *Parmeshwar Rai*, (1922) 3 P. L. T. 268. See *Nand Kumar Bose*, (1869) 3 Beng. L. R. App. 149, in which a conviction for disobeying an order prohibiting the carrying of fire-arms was set aside in the absence of evidence to show that the disobedience would cause or tend to cause annoyance, obstruction, or injury to human life, health or safety; *Shabuckram Halooder*, (1865) 2 W. R. (Cr.) 32, where the conviction was set aside for refusal to remove and reconstruct roof drains; *Harilal*, (1889) Unrep. Cr. C. 433, where a man held a caste feast contrary to orders of a Municipality when cholera was raging in the city.

[4] *Sujal Biswas* v. *Samiruddin Mandal*, (1917) 22 C. W. N. 599.

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[6] *Govind Venkatesh Valgi*, (1908) 10 Bom. L. R. 1047.

[7] *Yerlagadda Venkanna*, [1925] M. W. N. 396.

[8] *Chandrakanta De*, (1890) 6 Cal. 455; *Ulwapgonda*, (1896) Unrep. Cr. C. 861, Cr. R. No. 27 of 1896; *Hanmant Changlrao*, Per Aston and Heaton, JJ., in Cr. Rev. No. 157 of 1906, decided on the 10th September 1906; *Mallapa Tawarge*, (1915) 17 Bom. L. R. 676, 3 Bom. Cr. C. 89; *Nanabhai Sadanand* v. *Dwarkadas Dharamsi*, (1914) 8 Bom. L. R. 639 (n); *Naniamkandy* v. *Thazhibatha*, (1918) 17 M. L. T. 391. See, however, *Krishnarbet bin Narayanshet*, (1868) 5 B. H. C. (Cr. C.) 46; *Raghubir Singh*, (1901) 14 C. P. L. R. 174; *Hira Lal*, (1920) 21 O. C. 18.

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An order was issued by a Magistrate prohibiting shouting against drink near liquor shops and a person shouted from the verandah of a private [illegible] meant for persons using that road he was as much shouting in a public place as if he stood on the road itself and shouted.[11]

Invalid orders.—An order issued by a Magistrate, warning owners of cattle to take proper care of them[12]; an order preventing a house-holder from building a wall to his own house, because it might result in a breach of the peace[13]; an order to remove the banks of a tank in a dry river because they obstructed the current in rainy season[14]; an order to cut down trees because they impeded ventilation[15]; an order under s. 144, Criminal Procedure Code, prohibiting a person from collecting rents from tenants[16]; a general order under s. 144, Criminal Procedure Code,

[1] *Yaung Hon*, (1909) U. B. R. (P. C.) 23

[2] See, however, *Ravji Khandu* v. *Fraser*, (1906) 8 Bom. L. R. 638.

[3] *Lakshan Bor* v. *Naranarain Hazra*, (1921) 25 C. W. N. 617.

[4] *Hiraisingh*, (1920) 17 N. L. R. 88.

[5] *Bykuntram Shaha Roy*, (1872) 10 Beng. L. R. 434, 18 W. R. (Cr.) 47, F. B.

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[10] *Abdul Ghafur*, (1914) 18 O. C. 70.

[11] *Govind Venkatesh Yalgi*, (1908) 10 Bom. L. R. 1047.

[12] [illegible] Cr. J.)

[13] [illegible] Beng. L.

[14] *Gholam Durbesh*, (1868) 10 W. R. (Cr.) 36.

[15] *Uttam Chunder* v. *Ram Chunder*, (1870) 13 W. R. (Cr.) 72.

[16] *Prem Chand Singh Roy* v. *Dharamadas Singh Roy*, (1905) 9 C. W. N. 392.

restraining the holding of a *hat* or market[1]; a notice under Mad. Act V of 1884 calling upon a person to remove certain encroachments on a public road[2]; an order directing that all music should cease when any procession is passing a certain place of worship[3]; an order not to place stake-nets in a river[4]; an order issued by a revenue officer directing certain persons to pay their assessment to a specified individual[5]; a notice issued under s. 98 (2) of the Madras Local Boards Act (V of 1884) as amended by Act VI of 1900[6]; a permit to cut and transport timber issued under ss. 26 and 35 of the Forest Act[7]; an order under s. 146 of the Criminal Procedure Code[8]; an order under s. 147, Criminal Procedure Code, directing a person to remove a fence so as to allow of the use of an alleged right of way[9]; an order prohibiting the use of public roads between 9 P.M. and sunrise[10]; an order which declared that, as between parties to a contention, certain land in dispute did not belong to the public[11]; an order forbidding the slaughter of cattle or sale of meat within a radius of three miles of a licensed slaughter-house[12]; an order directing a land-owner to find out a clue in a case of theft within fifteen days[13]; *an order forbidding persons to enter a railway station except for bona fide purposes* of travelling[14]; and an order directing a station-master to detain certain logs suspected to be stolen property[15] are all held to be not valid orders under this section.

Order to be directed to the accused.—Where the accused was convicted of disobeying an order posted at a certain place by a Magistrate prohibiting people from burying and burning corpses there, it was held that the order, not having been served individually upon the accused, the conviction was illegal.[16] The proprietor of a theatre, not in actual possession or management of the theatre at a time when a lawful order promulgated by a public servant was disobeyed, was held to have committed no offence under this section.[17]

PRACTICE.

Evidence.—Prove (1) the promulgation of the order.

(2) That it was promulgated by a public servant.

(3) That such public servant was lawfully empowered to promulgate the same.[18]

(4) That such order directed the accused to abstain from a certain act, or to take certain order, etc.

(5) That the accused knew of such direction to him.[19]

(6) That he disobeyed such direction.

(7) That such disobedience caused, or tended to cause, obstruction, annoyance or injury, or risk of the same to a person lawfully employed; or that such disobedience caused, or tended to cause, danger to human life, health, or safety; or that such disobedience caused, or tended to cause, a riot or an affray.[20]

[1] *Parmeshwar Rai*, (1922) 3 P. L. T. 268.
[2] *Subramanian*, (1896) 20 Mad. 1.
[3] *Muthialu Chetti v. Bapun Saib*, (1880) 2 Mad. 140; *Sundram Chetti*, (1883) 6 Mad. 203, F. B.
[4] (1878) 1 Weir 138.
[5] *Ramachendra Nayako*, (1884) 1 Weir 139.
[6] *Shunmugam Pillai*, (1902) 1 Weir 140.
[7] *Venuru Pichayya*, (1896) 1 Weir 140.
[8] *Nagoji Ramachandra*, (1898) 1 Weir 143.
[9] *Lutchmiah Maistry*, (1893) 1 Weir 143.
[10] *Komul Kisto Bonick*, (1883) 12 C. L. R. 231.
[11] *Unnoda Proshad Dutt v. Ranee Shama Soonduree*, (1875) 24 W. R. (Cr.) 20.
[12] *Nga Po Naing*, (1896) 1 U. B. R. (1892-1896) 179.
[13] *Bakhshi Ram*, (1880) 3 All. 201.
[14] *Rama*, (1913) 35 All. 136.
[15] *Bithal Nath*, (1913) 16 O. C. 371.
[16] *Sukar Budhia*, (1870) Unrep. Cr. C. 30. See for further cases Comment on the word 'order.'
[17] *Krishna Shet*, (1890) Cr. R. No. 59 of 1890, Unrep. Cr. C. 527.
[18] *Suhan Singh*, (1875) 23 W. R. (Cr.) 57; *Nagappa Thevan*, (1913) 38 Mad. 602.
[19] *Ramlonoo Singh*, (1869) 12 W. R. (Cr.) 49; *Abelakh Lall v. Sirnam Singh*, (1871) 15 W. R. (Cr.) 50.
[20] 4 M. H. C. App. 5; *Anant Shitaram*, (1899) 1 Bom. L. R. 524; *Nandkumar Bose*, (1869) 3 Beng. L. R. App. 149; *Shabuckram Bulcoolee*, (1865) 2 W. R. (Cr.) 32; *Ramlonoo Singh*, sup. *Harilal*, (1880) Unrep. Cr. C. 433; *Brojo Nath Ghose*, (1900) 4 C. W. N. 226; *Shyamanand Das Paharaj*, (1904) 31 Cal. 990; *Ram Gopal Daw*, (1905) 32 Cal. 793.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

In order to sustain a charge under this section the order disobeyed must be in writing and duly promulgated and directed to the accused.[1]

Where an executive officer makes an order or issues a notification it is not within the province of judicial authority to question the propriety or legality of such order or notification, until an attempt is made to enforce the exaction of a penalty against a person committing a breach of such order or notification. It then becomes the duty of the judicial authority to consider whether the order is properly made or not.[2] A Magistrate is not competent to try and convict a person under this section of disobedience to an order issued by himself as Magistrate under s. 144, Criminal Procedure Code.[3]

Order under appeal.—A Magistrate is not warranted in convicting and imprisoning a person for disobeying an order the legality of which is then under the consideration of an appellate Court.[4]

Complaint.—Complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate is required.[5] A prosecution under this section should not be launched unless all the elements necessary for a conviction are present.[6] The complaint for an alleged disobedience of an order under s. 144, Criminal Procedure Code, must show that the disobedience caused, or tended to cause, obstruction, annoyance or injury or a riot. Whether a complaint in writing is necessary where an order is promulgated by Government is open to question. Under the old s. 195 of the Criminal Procedure Code it was held that where the order was not promulgated by any public servant but by Government, no sanction was required as a condition precedent to prosecution for disobeying the order.[7]

Punishment.—Rigorous imprisonment can only be inflicted if the case comes within the latter part of the section.[8]

Threat of injury to public servant.

189. Whoever holds out any threat of injury[1] to any public servant,[2] or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Section 503 defines criminal intimidation. That section is general in its character: whereas this section deals with criminal intimidation of a public servant.

Under this section there must be 'a threat of injury either to the public servant or to any one in whom he (the accused) believes that public servant to be interested.' What the section deals with are menaces which would have a tendency to induce the public servant to alter his action because of some possible injury to himself or to some one in whom the accused believes he has an interest.[9] Where the accused more than once, and in a loud tone, said to the Magistrate and other police-officers that he and others would obstruct the carrying of a Hindu God

[1] *Mul Raj*, (1905) P. R. No. 36 of 1905.

[2] [illegible] Cr.C. [illegible] H. C. 384.

[3] Criminal Procedure Code, s. 195.

[4] *Parmeshwar Rai*, (1922) 3 P. L. T. 268.

[5] *South*, (1900) 24 Mad. 70.

[6] *Ratanrar Mahadevrar Charan*, (1866) 3 B. H. C. (Cr. C.) 32.

[7] *Amirkhan*, (1886) Unrep. Cr. C. 273; *Projapet Jha*, (1909) 14 C. W. N. 234; *Kuppuswami Aiyar*, (1915) 28 M. L. J. 505.

[8] [illegible]

along the road, even though a riot might take place, it was held that he was guilty of an offence under this section.[1] It is essential to prove the exact words used by an accused in threatening a public servant in order to enable the Court to ascertain whether in fact a threat of injury to the public servant was really made by the accused.[2]

Mere empty threats, which are often effusions of passion unattended with any formal intention of harm, should be distinguished from threats really calculated to cause the person to whom they are held out to be in fear of the injury threatened.[3] Where the endorsement on a summons was to the effect that after tender of the summons to the witness, the accused, the son of the witness, and the owner of the house came up, abused the process-server and asked him to get out of the house and that the witness immediately after received the summons and *batta* and signed his name, it was held that no offence was committed.[4]

1. '**Injury.**'—See s. 44, *supra*.

2. '**Public servant.**'—See s. 21, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused held out the threat.

(2) That such threat was of injury.

(3) That the person threatened was a public servant, or some person in whom the accused believed such public servant was interested.

(4) That the purpose for which such threat was held out was to induce such public servant to do, or to forbear, or delay to do any act, connected with the exercise of his public functions.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, held out threat of injury to a public servant, to wit——, [*or* to——in whom you believed that a public servant, to wit——, was interested] for the purpose of inducing that public servant to do an act, to wit——, [*or* to forbear or delay to do——], connected with the exercise of the public functions of such public servant and thereby committed an offence punishable under s. 189 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Threat of injury to induce person to refrain from applying for protection to public servant.

190. Whoever holds out any threat[1] of injury[2] to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant[3] legally empowered, as such, to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

The object of this section is to prevent persons from [illegible] with a view [illegible] for any injur[illegible]

[1] *Amirkhan*, (1886) Unrep. Cr. C. 273; *Projapat Jha*, (1909) 14 C. W. N. 234.

[2] *Maheshri Bakhsh Singh*, (1886) 8 All. 380.

[3] 2nd Rep., s. 123.

[4] *Kuppusami Aiyar*, (1915) 28 M. L. J. 505.

person for the possession of certain church property, excommunicated him for withholding it, it was held that the clergyman had committed an offence under this section.[1]

1. **'Threat.'**—See s. 189, *supra*.
2. **'Injury.'**—See s. 44, *supra*.
3. **'Public servant.'**—See s. 21, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused held out the threat.

(2) That such threat was of an injury.

(3) That the purpose for which such threat was held out was to induce the person threatened, to refrain or desist from making a legal application for protection against some injury.

(4) That the person to whom such legal application was about to be made was a public servant.

(5) That such public servant was legally empowered, as such, to give the protection, or to cause the same to be given.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Charge—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, held out a threat of injury, to wit——, to——, for the purpose of inducing him to refrain or desist from making a legal application for protection against such injury to a public servant legally empowered to give such protection (*or* to cause such protection) to be given, and thereby committed an offence punishable under s. 190 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

[1] *De Cruz*, (1884) 8 Mad. 140.

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

THE Code treats the giving and the fabricating of false evidence *in exactly* the same way, and marks the grades of those offences on the principle that the law ought to make a distinction between the kind of false evidence which *produces* great evils and the kind of false evidence which produces comparatively slight evils. As plaints and written statements are verified by the civil suitors who present them, the Code renders punishable the deliberate assertion of falsehoods in pleadings.[1]

Giving false evidence.

191. Whoever being legally bound by an oath or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject,[1] makes any statement which is false,[2] and which he either knows or believes to be false, or does not believe to be true,[3] is said to give false evidence.

Explanation 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

ILLUSTRATIONS.

(*a*) A, in support of a just claim which B has against Z for one thousand rupees, falsely swears on a trial that he heard Z admit the justice of B's claim. A has given false evidence.

(*b*) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(*c*) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is merely as to belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(*d*) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence whether Z was at that place on the day named or not.

(*e*) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document, which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. A has given false evidence.

[1] Stokes, Vol. I, p. 30.

COMMENT.

The offence of giving false evidence is known as 'perjury' under the English law.

Scope.—The words of this section are very general, and do not contain any limitation that the false statement made shall have any bearing upon the matter in issue. It is sufficient if the false evidence is intentionally given, that is to say, if the person making the statement makes it advisedly knowing it to be false and with the intention of deceiving the Court and of leading it to be supposed that that which he states is true.[1]

English law.—According to common law a statement on oath or affirmation, [illegible] taken before [illegible] known by [illegible] to perjury is consolidated by 1 & 2 Geo. V., c. 6.

Difference between Indian and English law.—(1) According to common law the false statement must have reference to some judicial proceeding; and the false evidence must be given before a competent tribunal. In the Code this distinction only exists in reference to the degree of punishment imposed.[2]

(2) According to common law perjury must be proved by two witnesses, or by one witness with proof of other material and relevant facts substantially confirming his testimony. Under the Penal Code no particular number of witnesses in any case is required to prove any fact.

(3) The common law requires that the matter sworn to must be material to the cause depending in the Court. According to the Penal Code it is not necessary that the statement should be material, but that would be considered in awarding punishment.[3]

(4) In England, an oath, or an affirmation rendered equivalent to it by law, is an essential element of the offence. It is immaterial whether the fact which is sworn to be in itself true or false. In India, an oath is merely one of the forms by which a party may be bound to speak the truth. Even if an oath were improperly administered by an incompetent person, still the offence would be committed, if the party giving the false evidence were bound by an 'express provision of law to state the truth.'

Ingredients.—The offence under this section involves three ingredients:—

1. A person must be legally bound (*a*) by an oath, or any express provision *of law, to state the truth, or (b) to make a declaration upon any subject*;
2. he must make a false statement; and
3. he must know or believe it to be false, or must not believe it to be true.

1. **'Legally bound by an oath or by any express provision of law to state the truth...or to make a declaration upon any subject.'**—It is necessary that the accused should be legally bound by an oath before a competent authority. If the Court has no authority to administer an oath to a witness the proceeding will be *coram non judice* and a prosecution for false evidence will not stand.[4] Section 4 of the Indian Oaths Act of 1873 specifies the Courts and persons who have authority to administer oaths and affirmations *Section 5 enumerates the persons* by whom oaths or affirmations must be made

[1] *Mahomed Hossain*, (1871) 16 W. R. (Cr.) 37.

[2] See per Jenkins, C. J., in *Bal Gangadhar* [illegible]

[illegible] Cal. 653; *Radhika Mohan Kuri* v. *Lal Mohan Sha*, (1893) 20 Cal. 719; *Mata Dayal*, (1897) 24 Cal. 755; *Chota Jadub Chunder*, (1864) W. R. (Gap No.) Cr. 15; *Niaz Ali*, (1882) 5 All. 17; *Kandhaiya Lal*, (1899) 19 A. W. N. 87; *Luxumandas*, (1869) Unrep. Cr. C. 25; *Jibha Vaja*, (1874) 11 B. H. C. 11; *Fatteh Ali*, (1894) P. R. No. 15 of 1894.

Oath under foreign law.—Perjury cannot be assigned on a foreign *affidavit* taken before a person not authorized to administer an oath by English law.[1] There is no provision in the Penal Code which constitutes it an offence to give false evidence before a Court in a Native State where the oath is not administered under the provisions of law in force in British India, but under the law of that State in relation to proceedings before that Court.[2]

Want of jurisdiction.—If the Court administering the oath is acting beyond its jurisdiction a conviction will not be sustained.[3] The test of jurisdiction is whether or not the Court had power to enter upon the inquiry.[4]

A pleader giving a false explanation on solemn affirmation, when asked to explain his conduct under the Legal Practitioners' Act[5]; an heir of an employee in the Telegraph Department, supporting his claim before the District Judge by false witnesses, under an oath, the Judge having no authority to administer it[6]; a Native Christian giving false evidence, though solemnly affirmed under Act V of 1840, the Act not being applicable to him, but only to Hindus and Mahomedans[7]; a person making a false statement before a person purporting to act under the Registration Act but not legally authorized to do so[8]; a person making a false statement in an application for a new trial,[9] or in a verified petition presented under s. 19 of the Income-tax Act to a Tahsildar, who was not an officer competent to receive such a petition[10]; and a person making false accounts with the intention of producing them before a Forest Officer not empowered by law to hold an investigation,[11] were all held to have committed no offence under this section.

By an oath.—An oath or solemn affirmation is not a *sine qua non* to the offence of giving false evidence.[12] The offence may be committed although the person giving evidence has neither been sworn nor affirmed.[13] By s. 14 of the Oaths Act[14] every person giving evidence on any subject, before any Court, is bound to state the truth. The idea of the oath, namely, that the person swearing renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth, the idea of binding the conscience of the witness, which still prevails in England, and which in former time led to the swearing of Hindus on the Tulsi and Ganges water, and of Mahomedans on the Koran, finds no place in the Oaths Act. The superstitious or religious sanction has been disregarded and the legal sanction alone is relied upon. See s 51, *supra*, for the definition of 'oath.'

'Any express provision of law.'—Under this clause sanction of an oath is not necessary, but there must be a specific provision of law compelling a person to state the truth. It must be proved that the false statement was made under the sanction of law.[15] Where the accused is not bound by any express provision of law to state the truth he cannot be charged for giving false evidence. Thus, where a person after acquittal was examined on oath to enable the Court to take cognizance of an offence under s. 190 (c), Criminal Procedure Code, it was held that though the Magistrate might examine the person for that purpose, yet he could not

1 [illegible]

2 [illegible] 25 Bom [illegible]

3 *Chait Ram*, (1883) 6 All. 103; *Bharma bin Ningappa*, (1886) 11 Bom. 702, F. B.; *Shet-* [illegible] 531.

4 *James Bolton*, (1841) 1 Q. B. D. 66.

5 *Kotha Subba Chetti*, (1883) 6 Mad. 252.

6 *Chait Ram*, sup

7 *Vedamuttu*, (1868) 4 M. H. C. 185.

8 *Radhika Mohan Kuri* v. *Lal Mohan Sha*, (1893) 20 Cal. 719.

9 *Haran Mandal*, (1868) 2 Beng L. R. (A. Cr. J.) 1.

10 *Mooneppa Oodian, Subbroya Oodian*, (1870) 5 M. H. C. 326.

11 *Ramajirav Jivbajirav*, (1875) 12 B. H. C. 1.

12 (1865) 2 W. R. (Cr. L.) 9.

13 [illegible] 355; [illegible] 94, 23 [illegible] Bom. [illegible] See [illegible] ma v. [illegible] umal. [illegible] 24.

examine him on oath under the Oaths Act, as he was not a witness in any case at the time, and that he was not legally bound to state the truth.[1] Intentional omission to make statements required by s. 235 of the Code of Civil Procedure amounts to an offence under s. 193.[2]

Criminal Procedure Code, s 161.—Under s. 161, cl. (2), of the Criminal Procedure Code, 1898, which reverts to the language of the Code of 1872, a person is no longer bound by law to tell the truth when questioned by a police-officer, and he will not be liable to be prosecuted for giving false evidence.[3] The Code of 1882 contained the word 'truly' after the word 'questions' in this clause, but this word has been omitted in the present Code.[4]

A statement made to an investigating police-officer under s. 161 and recorded by him under the provisions of s. 162 of the Criminal Procedure Code cannot be made the foundation of an order for the prosecution under s 193 of the Penal Code of the person making it.[5] But it is submitted that a person making such a statement may come within s. 203 of the Penal Code.

Declaration upon any subject.—In certain cases the law requires a declaration from a person of verification in a pleading—and if such declaration is made falsely it will come under this clause. The words "any subject" denote that the declaration must be in connection with a subject regarding which it was to be made.

'Any statement.'—It is not necessary that the false evidence should be material to the case in which it is given.[6] "The framers of the Code used the word 'material,' where it was intended to be an essential of the offence, and advisedly omitted it when such was not their intention... I do not say that the question of materiality may not be matter for the consideration of the jury. For the giving false evidence, to come within s. 193, must be an intentional giving; and in deciding whether or not it was intentional, the jury would have to consider whether or not the subject-matter of the statement were material to the result of the proceeding, inasmuch as if that subject-matter were wholly immaterial, they might well attribute the statement to indifference or carelessness on the part of the prisoner."[7] Where the act

made essential, and need not therefore be averred. Cases may arise in which materiality may not be essential to the offence, but it must be taken into consideration in arriving at the intention with which the false statement was made.[8]

2. **'Makes any statement which is false.'**—It must be shown that the statement said to have been false, could not but be false. It is not sufficient to show that the probabilities are that the statement was false[9] The accused stated on oath that he wrote a certain document. Another person swore that he and not the accused had written the document. The handwriting expert gave his opinion that the handwriting on the document was not similar to the acknowledged handwriting of the accused and the trial Court after comparing the various handwritings had come to the conclusion that the handwriting on the document resembled that of

[1] *Hari Charan Singh*, (1900) 27 Cal. 455.

[2] *Bapuji Dayaram*, (1886) 10 Bom. 288, *Paupayya* v. *Narasannah*, (1880) 2 Mad. 216

[3] *Kasim Khan*, (1881) 7 Cal. 121, F.B.

[4] The following cases decided when the Code of 1882 was in force are no longer of any authority: *Parshram Raysingh*, (1883) 8 Bom. 216; *Ismal valad Fataru*, (1887) 11 Bom. 659; *Nathu Sheikh*, (1884) 10 Cal. 405; *Bailanta Baurs*, (1889) 16 Cal. 349; *Bhagwantia*, (1892) 15 All. 11; *Bhajan*, (1893) 13 A. W. N. 124.

[5] *Muhammad Usman*, (1908) 28 A. W. N. 22.

[6] *Parbutty Churn Sircar*, (1866) 6 W. R. (Cr.) 84; *Shib Prosad Giri*, (1873) 19 W. R. (Cr.) 69; *Damodar Ramchandra Kulkarni*, (1868) 5 B. H. C. (Cr. C) 68.

[7] Per Scotland, C. J, in *Aidrus Sahib*, (1862) 1 M. H. C. 38, 41, 42.

[8] *Tookaram*, (1862), Unrep. Cr. C. 2; *Brahmdeo Singh*, (1920) 2 P. L. T. 380.

[9] *Hira Nand Opha*, (1906) 10 C. W. N. 1099; *Lalmoni Nonia*, (1922) 4 P. L. T. 583, 1 Pat. L. R. (Cr.) 142.

the other person and not of the accused. It was held that a conviction under s. 193 could not stand.[1]

Direct proof of the falsity of the statement on which the perjury is assigned is essential. But, as legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement and the contradictory statement of the person charged although not made on oath. Such a statement, when satisfactorily proved, is quite as good evidence in proof of the charge as the criminatory statement of a person charged with any other offence and on precisely the same ground,—that it is an admission of the accused person inconsistent with his innocence.[2]

See the heading 'Nature of proof' in the Commentary on s. 193, p. 406.

3. **'Which he either knows or believes to be false or does not believe to be true.'**—The false evidence must be intentionally false to the knowledge or belief of the person giving it.[3] The matter sworn to must be either false in fact, or, if true, the accused must not have known it to be so.[4] A man may be guilty of this offence if he swear that he believes or thinks a fact to be true when it is not.[5]

It is a false statement made under a verification that constitutes an offence and not a verification on oath or by solemn affirmation.[6]

'Does not believe to be true.'—The making of a false statement, without knowledge as to whether the subject-matter of the statement is false or not, is legally a giving of false evidence.[7] Where a man swears to a particular fact without knowing at the time whether the fact be true or false, it is as much perjury as if he knew the fact to be false, and equally indictable.[8] But a man cannot be convicted of perjury for having acted rashly and credulously and having failed to make reasonable enquiry with regard to the facts alleged by him to be true. It must be found that he made some statement which he knew or believed to be false or which he did not believe to be true.[9]

Written statements.—A person filing a written statement in a suit is bound by law to state the truth and if he makes a statement which is false to his knowledge or belief, or which he believes not to be true, he is guilty of giving false evidence.[10] [illegible] ng contrary to fact, but merely made for the purpose [illegible] of his case, cannot be made the subject of a pro- [illegible] But a litigant in making allegations as to material and substantial facts which go to support his claim as a plaintiff, on the one hand, or to meet a claim against him as a defendant on the other, is bound to truly state them, and if he does do so, and if it can be shown that he has intentionally asserted things which are false to his knowledge, he is within the scope of this section The very essence of crimes of this kind is not how they may injure this or that party to the litigation, but how they may deceive and mislead the Court, and thus produce the most mischievous consequences to the administration of civil and criminal justice.

The verification of an application, in which the applicant makes a false statement, does not subject him to punishment for this offence, if such application does not require verification.[11]

Criminating statement is no justification.—When a party makes a false statement while legally bound by solemn affirmation, the fact that the statement was

[1] *S. C. Gupta*, (1923) 1 Rang. 290.
[2] *Ross*, (1871) 6 M. H. C. 342.
[3] [illegible]
[4] [illegible]
[5] [illegible] 0.
[6] [illegible] l. 820.
[7] [illegible] 47.
[8] [illegible]
[9] [illegible] 362.
[10] [illegible] urs-
[11] [illegible] R.
[12] [illegible] Cr)
[13] [illegible] Cal.
[14] [illegible]

one tending to criminate himself will not justify his acquittal on a charge of giving false evidence.[1]

Illegality of trial does not purge perjury.—The fact that the trial in which false evidence is given is to be commenced *de novo* owing to irregularity does not exonerate the person giving false evidence in that trial from the obligation to speak the truth, and he is liable for giving false evidence.[2]

But in a Bombay case the proceedings in the trial in which false evidence was given were subsequently annulled in consequence of the sanction for the prosecution being insufficient and the High Court held that the conviction of the accused must be reversed as the false statement was not made in a stage of a judicial proceeding.[3]

[illegible] himself liable to punishment by refusing to answer...questions [put by the Court] [illegible] with giving or [illegible] from himself [illegible][6]

Abetment.—There can be no offence of the abetment of giving false evidence unless the person charged with abetment intended, not only that the statement should be made, but that the statement should be made falsely.[7]

Where an accused asked a witness to suppress certain facts in giving his [illegible] of abetment of giving [illegible] larly, where a person [illegible] statements which he *himself knew to be false, he was held guilty under ss. 109 and 193.*[9] *Where* C falsely represented himself to be U, and the writer of a document signed by U, and T, knowing that C was not U, and had not written such document, adduced C as U as the writer of that document, it was held that T was guilty of abetment of giving false evidence[10]

CASES.

False evidence.—A person making a false statement before a Police Patel acting under s. 13 of Bom. Act VIII of 1867[11]; before a Sub-Registrar[12], and before a Registrar of Deeds, even though no oath or affirmation be administered to him[13]; a witness falsely deposing in another's name[14]; a person falsely verifying his plaint[15]; a person in an application for execution of a decree intentionally omitting to state an adjustment between the parties after decree, whether such adjustment has or has not been previously certified to the Court[16]; a person making a false statement on oath before a Magistrate acting under s. 164 of the Criminal Procedure Code[17]; a person making false statements in an application for mutation

[1] (1867) 3 M. H. C. App. xxxix.
[2] *Virasami*, (1896) 19 Mad. 375; *Batesar Mandal*, (1884) 10 Cal. 604.
[3] *Ravji valad Taju*, (1871) 8 B. H. C. (Cr.C.) 37.
[4] Note G, p. 131.
[5] Criminal Procedure Code, s. 342 (2).
[6] *Ram Khilawan*, (1906) 28 All. 705.
[7] *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41.
[8] *Andy Chetty*, (1863) 2 M. H. C. 438.
[9] *Ravji*, (1893) Unrep. Cr. C. 632.
[10] *Chundi Churn Nauth*, (1867) 8 W. R. (Cr.) 5.
[11] *Irbasapa*, (1880) 4 Bom. 479.
[12] *Juggut Chunder Dutt*, (1866) 6 W. R. (Cr.) 61. See *Narayanaswamy Iyer*, (1912) M. W. N. 1107.
[13] (1865) 2 W. R. (Cr. L.) 9.
[14] *Prema Bhika*, (1863) 1 B. H. C. 69.
[15] *Luxumandas*, (1869) Unrep. Cr. C. 25.
[16] *Bapuji Dayaram*, (1886) 10 Bom. 288.
[17] *Alagu Kone*, (1892) 16 Mad. 421; *Suppa Tevan*, (1905) 29 Mad. 89.

of names under s. 42 of the Bengal Land Registration Act[1]; an official making a false return of the service of summons[2]; and a false return to a warrant of sale[3] were held guilty of giving false evidence.

False statement in the application of an accused.—The Allahabad High Court has held that a person seeking by an application in revision to get rid of a conviction standing against him is incapable of tendering his own affidavit in support of such application, and consequently if he did tender such an affidavit, he could not be prosecuted for false statements which might be contained therein.[4] It has similarly held that where an accused person applies for the transfer of the case pending against him to some other Court, supporting his application by an affidavit, he cannot, or at least ought not to, be prosecuted under s. 193 in respect of statements made therein.[5] The Lahore High Court has dissented from this view. It has held that an application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by s. 342 of the Criminal Procedure Code upon answers to questions put to the accused by the Court.[6] Further, it has held that there is no law which confers upon an accused person immunity from prosecution in respect of a false statement in an affidavit tendered by him in support of his application for transfer; and that such statement can be the subject-matter of a charge for perjury.[7]

False balance-sheet.—The making of a false balance-sheet is not an offence within this section but s. 418.[8]

False darkhast.—Signing and verifying a *darkhast* containing false statements is an offence under this section; and it makes no difference that at the time when the signature and verification were appended the *darkhast* was blank.[9]

Evidence under illegal pardon.—Evidence of an accused person illegally pardoned, cannot be used against him, or subject him to a prosecution for giving false evidence.[10]

Irregular trial.—H, a Police Constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S, upon a charge of "assaulting and obstructing him, H, in the discharge of his duty." Upon such warrant S was arrested and brought before Justices, and was, without objection, tried by them and convicted H was afterwards indicted for perjury committed on the said trial of S, and convicted. It was held that H was rightly convicted, notwithstanding that there was neither written information nor oath to justify the issue of the warrant.[11]

Fabricating false evidence.

192. Whoever causes any circumstances to exist, or makes any false entry in any book or record, or makes any document containing a false statement,[1] intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant[2] as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the

[1] *Naloo Patra*, (1910) 38 Cal. 368.
[2] *Shama Churn Roy*, (1867) 8 W. R. (Cr.) 27.
[3] *Chenanna Gowd*, (1903) 1 Weir 155.
[4] *Barkat*, (1897) 19 All. 200.
[5] *Bindeshri Singh*, (1906) 28 All. 331.
[6] *Ghulam Muhammad*, (1922) 3 Lah. 46; *Allah Wasai*, (1925) 1 L. C. 522.
[7] *Pir Qadir Bakhsh Shah*, (1924) 1 L. C 475.
[8] *Moss*, (1893) 16 All. 88.
[9] *Ratanchand Dhanmram*, (1904) 6 Bom. L. R. 886.
[10] *Dala Jiva*, (1885) 10 Bom. 190.
[11] *Hughes*, (1879) 4 Q. B. D. 614.

evidence, to entertain an erroneous opinion touching any point material [3] to the result of such proceeding, is said "to fabricate false evidence."

ILLUSTRATIONS.

(*a*) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(*b*) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(*c*) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the police are likely to search. A has fabricated false evidence

COMMENT.

The wording of this section is so general as to cover any species of crime which consists in the endeavour to injure another by supplying false data upon which to rest a judicial decision.

Ingredients.—The offence defined in this section contains the following ingredients :—

1. Causing of any circumstance to exist, or making of
   (*a*) any false entry in a book or record, or
   (*b*) a document containing a false statement

2. That such circumstance, false entry, or false statement must have been intended to appear in evidence in
   (i) a judicial proceeding, or
   (ii) a proceeding taken by law before a public servant or an arbitrator.

3. That such circumstance, false entry or false statement so appearing in evidence, might cause any person, who, in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion.

4. The formation of opinion should be touching any point material to the result of such proceeding.

1. **'Causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement.'**—The person accused must be proved to have done any of these things A person commits the offence of fabricating false evidence, if he makes a document which, though it may not contain any false statement in express terms, yet contains false recitals which imply such a false statement. [1]

Mere indiscretion in signing a fabricated document without knowing its content will not render a person liable. [2] Intention is the gist of the offence under this section. See s. 193, *infra*.

2. **'That such circumstance, etc., may appear in evidence in a judicial proceeding or in a proceeding .before a public servant, etc.'—Judicial proceeding**—The Code of Criminal Procedure says that 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath [s. 4 (*m*)]. The power to take evidence on oath, which includes affirmation as well, [3] is the characteristic test of 'judicial proceeding.'

[1] *Mohadeo Misser* v. *Narayan Ram Sha*, (1905) 10 C. W. N. 220.

[2] *Jai Jai Ram*, (1919) 17 A. L. J. R. 574.

[3] The General Clauses Act (X of 1897), s. 3 (36).

Magistrate to discover the writer of a scandalous petition[1]; a preliminary inquiry by a subordinate Magistrate, under the direction of a District Magistrate, into the circumstances of a complaint against the police[2]; the recording of a statement by a third class Magistrate having no authority to carry on the preliminary inquiry in the case[3]; and a reference to a District Judge by the telegraph authorities of a letter for verification[4], were held to be not judicial proceedings.

The Calcutta High Court has held that execution proceedings subsequent to the trial of a suit are not judicial proceedings.[5]

The Bombay High Court has ruled that execution proceedings are judicial proceedings for the purpose of this section and s. 193. It is not essential for the purposes of these sections that the judicial proceedings in which the person intends to use the false evidence must be pending at the date of the fabrication.[6] It is enough that there is a reasonable prospect of such a proceeding having regard to the circumstances of the case and that the fabricated document is intended to be used in such proceeding.[7]

'Proceeding...before a public servant.'—As to the definition of 'public servant' see s. 21, *supra*. The provisions of this section are not confined to false evidence to be used in judicial proceedings. Where, therefore, the accused, in order to save an estate from forfeiture, made a false entry of rent received in a public book kept by him for the purpose of informing the Collector as to the rents which had been paid into the Collectorate and as to what estates the rents were in arrear, so that he might take steps to enforce payment, it was held that the accused had committed an offence under this section.[8] N, one of the accused, was proposing to sell some property to B. An agreement, dated 23rd May was written out by N on a stamp paper of Rs. 5. The sale having fallen through, it became necessary to apply to the Collector for a refund of the stamp duty. N took advice with regard to this and was told that no refund would be made after two months. M, the other accused, gave him this advice and also told him that he might alter the date in the document from 23rd May to 23rd September. This was unnecessary as the period was six months and not two. It was held that they were guilty of fabricating and abetting the fabrication of false evidence.[9]

No fabrication if public servant not authorized to hold investigation.—The making up falsely of accounts with the intention of producing them before a Forest Officer not empowered by law to hold an investigation and take evidence was held not to be a fabrication of false evidence.[10] If the proceedings in which evidence is given are not judicial proceedings or are *ultra vires*, no offence is committed[11]

The evidence fabricated should be admissible evidence.—If the evidence fabricated is not admissible in evidence then there is no fabrication of false evidence under this section.[12] The soundness of this view is doubted by the Calcutta High Court,[13] and the former Chief Court of the Punjab dissented from this view. The Chief Court held that a person was guilty of fabricating false evidence when he made a false entry in a document intending that it should appear in evidence

[1] *Jibhai Vaja*, (1874) 11 B. H. C. 11.

[2] [illegible] (1899) 22 Mad. 223.

[illegible] 150.

[illegible] 702,

[illegible] Poosia

[illegible]

[illegible] 1907) 35 Cal. 133.

[6] *Govind Pandurang*, (1920) 22 Bom. L. R. 1239.

[7] *Rajaram Bhavanishankar*, (1920) 22 Bom. L. R. 1229.

[8] *Juggun Lall*, (1880) 7 C. L. R. 356.

[9] *Mohesh Chandra Chaudhuri*, (1915) 28 C. L. J. 213.

[10] *Ramajirav Jivbajirav*, (1875) 12 B.H.C. 1.

[11] *Babu Ram*, (1911) 8 A.L.J.R. 674; *Phulel*, (1912) 11 A. L. J. R. 15.

[12] *Gauri Shankar*, (1883) 6 All. 42; *Zakir Hussain*, (1898) 21 All. 159; *Chandra Kumar Missir*, (1905) 2 C. L. J. 46; *Dabee Mahto*, (1882) 10 C. L. R. 433; *Keilasum Putter*, (1870) 5 M. H. C. 373.

[13] *Mahammad Kazem Ali* v. *Jorabdi Naskar*, (1919) 46 Cal. 986. See also *Baroda Kanta Sarkar*, (1915) 16 Cr. L. J. 620.

and mislead the Judge or Magistrate and the mere fact that the entry was not legally admissible in evidence could not affect his guilt.[1]

Cases.—Where a police-officer, who had suppressed a document, made a false entry in his diary [illegible] documents, intending that su[illegible] he had so forwarded the do[illegible] be admissible evidence and as the entry would not be admissible in his behalf, though contrary to his intention, he was not liable.[2] Where a police-officer made a false entry in the special diary relating to a case which was being investigated by him, but the document in which the alleged false entry was made was not one which was admissible in evidence, it was held that he was not guilty under this section.[3] Similarly, where a person made a false statement in the recital of title to property in a document when such statement was not admissible in evidence against the person or persons against whose interest such statement was made, it was held that he was not guilty.[4]

On an indictment for perjury committed on the hearing of a charge of assault by a husband on his wife, an assignment of perjury in a statement by the prisoner, as a witness for the husband, that he had seen the wife committing adultery (of which he had told the husband), was held bad for immateriality as the supported statement would not be legally relevant to the charge of assault as affording no ground of legal justification.[5]

3. 'That such circumstance...may cause any person who, in such proceeding is to form an opinion...to entertain an erroneous opinion.'—The false evidence must lead to the formation of an erroneous opinion. If a document does not lead to the forming of an erroneous opinion touching a particular point but leads rather to the forming of a correct opinion, then this offence is not committed.[6]

4. 'Touching any material point.'—False evidence under this section should be material to the case in which it is given though not so under s. 191.[7] The word 'material' means of such a nature as to affect in any way, directly or indirectly, the probability of anything to be determined by the proceeding, or the credit of any witness, and a fact may be material although evidence of its existence was improperly admitted.[8] Hawkins[9] says that he "cannot find this matter anywhere thoroughly settled or debated, and therefore shall leave it to every man's own *judgment, which, from the consideration of the circumstances of each particular* case, may generally, without any great difficulty, discern whether the matter in which perjury is assigned, were wholly impertinent, idle, and insignificant, or not, which seems to be the best rule for determining whether it be punishable as perjury or not."

All false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect of such statements.[10] Every question on cross-examination of a witness which goes to his credit is material.[11] Again, "if a witness is allowed to give evidence, though it may afterwards turn out that his testimony ought not to have been admitted, perjury may nevertheless be assigned upon his answer...It does not lie in the witness's mouth to say that this evidence was immaterial, especially

[1] *Amolak Ram*, (1917) P. W. R. (Cr.) No. [illegible]

[2] [illegible]

[3] [illegible] 46.

[4] *Badri Prasad*, (1917) 40 All. 35.

[5] [illegible]

[6] [illegible]

[7] [illegible]

[8] [illegible]

[9] [illegible]

[10] [illegible]

[11] *Tate*, (1871) 12 Cox 7.

when, if believed, it might most seriously have injured the party against whom it was given."[1]

The evidence fabricated must be 'material'. *English* [illegible] The accused had [illegible] sworn that, when [illegible] a plea of guilty to [illegible] vledge and against his will. It was held that, as such statements affected the accused's credit as a witness, they were material, and he was rightly convicted of perjury.[2] Upon the trial of one S for robbery, the accused, in support of an alibi, swore, first, that S was in a certain house at the time of the robbery; secondly, that S had lived in that house for the last two years; and, thirdly, that he had never been absent from it more than two or three nights together during that time. In fact S had been confined in prison during one out of those two years. It was held that the second and third allegations were material as tending to render more credible the truth of the first, and that the prisoner was rightly convicted of perjury assigned upon them.[3] On the trial of A for perjury, in an affidavit made by him, the signature to the affidavit was proved to be in A's handwriting, but there was no evidence that A was the person who swore to the truth of the affidavit. The defendant was then called as a witness, and swore that the affidavit was used before the taxing master when A was present, and that it was then publicly said that it was A's affidavit. The defendant was then indicted for perjury committed on A's trial, and the indictment alleged that it was a material question on such trial whether A was so present before the taxing master; and whether the affidavit was then used in A's presence, and whether it was then stated publicly that the affidavit was A's. It was held that the above questions were material on the trial of A.[4] The prisoner was sued for debt under the name of 'Burnard Edward Mullany.' The Judge asked the prisoner what his name was. The prisoner replied 'Edward.' To questions by the plaintiff's attorney the prisoner denied that his name was 'Burnard,' and said that his name was 'Edward' only. The Judge struck out the cause. The prisoner was indicted for perjury; and it was proved that his real name was 'Burnard,' but that he had latterly been known by the name of 'Burnard Edward.' It was held that the Judge having acted upon them, these statements were sufficiently material to sustain a conviction for perjury.[5] In an action by an executrix, for goods sold, she falsely swore on cross-examination, that she had never been tried at the Old Bailey and had never been in custody at the Thames Police Station. It was held, on the trial of an indictment for perjury, that this evidence was material.[6]

No fabrication if no erroneous opinion could be formed touching any point material to the result of a proceeding.—Where a person produced, as evidence in a suit, a registered deed of sale in which the property sold was wrongly numbered, and which was corrected by himself subsequent to registration[7]; where a Vakil presented a *vakalutnamah* falsely purporting to have been executed before an officer and to bear his signature[8]; where there was a dispute as to the ownership of articles in a box in the accused's house and he made a hole in the wall of the house, and removed the articles he claimed, his object being to make it appear that there had been a theft, but he did not charge anyone with having committed the theft[9]; where a *patwari*, knowing that certain documents were forged made entries in his papers corresponding to and based on those documents[10]; and where

[1] Per Cockburn, C. J., in *Gibbons*, (1862) 31 L. J. (M. C.) 98, 102; *Phillpotts*, (1851) 21 L. J. (M. C.) N. S. 18.
[2] *Baker*, [1895] 1 Q. B. 797.
[3] *Tyson*, (1867) L. R. 1 C. C. R. 107.
[4] *Alsop*, (1869) 11 Cox 264. See *Charles Naylor*, (1868) 11 Cox 13.
[5] *Mullany*, (1865) 34 L. J. (M. C.) 111.
[6] *Lavey*, (1850) 3 C. & K. 26.
[7] *Fateh*, (1882) 5 All. 217.
[8] *Keilasum Putter*, (1870) 5 M. H. C. 372.
[9] *Thewa Ram*, (1882) 10 C. L. R. 187.
[10] *Ram Chand*, (1890) P. R. No. 26 of 1890.

a kabuliat was made and signed by the lessees alone with the intention of causing it to be believed that an agreement to let, therein recited, had been made by the agent of the land-owner and with her assent,[1] it was held that there was no fabrication. Certain cattle were sold in a market on the 21st of March 1917. A clerk, whose duty it was to register sales of cattle held at that market and give receipts to the purchaser, gave a receipt on the 27th March, most probably, and dated it the 27th March, but subsequently altered the date to the 21st, the actual date of sale. It was held that there was no case of fabricating false evidence, for the alteration of the date was not intended to lead any one to form an erroneous opinion touching the date of sale, but the contrary.[2]

Punjab cases.—Where a witness being asked, whether such a sum of money [illegible] between the parties, answered that it was, [illegible] one of them by agreement, it was held that he could not be punished for perjury.[3] Where a witness being asked by a Judge [illegible] and that the manner of bringing them was only a circumstance.[4] Where a witness swore that a person drew his dagger and wounded J, whereas in truth he beat him with a staff, it was held he was not guilty of perjury because the beating only was material.[5] On the trial of one B, charged with garrote robbery on W, the prisoner cross-examined W, as to whether he had not met him the evening before the robbery along with one M, and proposed to them to commit a burglary. The prosecutor denying this, the prisoner called M as his witness, who swore that he did meet the prosecutor along with the prisoner the night before the burglary, and that the prosecutor did propose to them to commit a burglary. On the trial of M for perjury, it was held that the evidence was not material.[6]

Non-liability of the accused for fabricating false evidence.—The authors of the Code say "We do not propose to punish him for fabricating evidence with the view of escaping punishment, unless he also contemplated some injury to others as likely to be produced by the evidence so fabricated. . . If A, after having stabbed Z, in order to escape detection, disposes of Z's body in such a manner as is likely to lead a jury to think the death accidental, we do not propose to punish A as the fabricator of false evidence."[7]

Statutory application.—*Judicial proceedings.*—Proceedings held under certain Acts of Legislature have been enacted to be "judicial proceedings" within the meaning of this section.[8]

And, similarly, persons making false statements, in the course of enquiries conducted under certain Acts of Legislature are treated as having given false evidence within the meaning of this section.[9]

[1] *Jowahir Singh*, (1892) P. R. No. 16 of 1894.

[2] *Badri Prasad*, (1917) 40 All. 35.

[3] 1 Hawk. P. C., Perjury, c. 27, s. 8, p. 433, 2 Roll. 42, *Laiston's case.*

[4] 2 Roll. 41, 1 Hawk., P. C., c. 27, s. 8.

[5] 1 Hawk, P. C., Perjury, c 27, s. 8, pp. 433, 434.

[6] *Murray*, (1858) 1 F. & F. 80.

[7] Note G, p. 131.

[8] The Coroners' Act (IV of 1871), s. 8; the Broach and Kaira Encumbered Estates Act (XXI of 1881), s. 34; the Sindh Encumbered Estates Act (XX of 1896) s. 36; the Bombay Land Revenue Code (Bom. Act V of 1879), s. 196; the Bombay Salt Act (Bom. Act II of 1890), s. 53, the Oudh Talukdars Relief Act (XXIV of 1870), s 16; the Bundelkhand Encumbered Estates Act (U. P. Act I of 1903), s. 33; the Punjab Minor Canals Act (Punj. Act III of 1905), s. 62; the Indian Income-tax Act (XI of 1922), s. 37.

[9] The Government Savings Banks Act (V of 1873), s. 7, the Chota Nagpur Encumbered Estates Act (VI of 1876), s. 2; the Broach and Kaira Encumbered Estates Act (XXI of 1881), s. 6; the Indian Christian Marriage Amendment Act (II of 1891), s. 5, the Sindh Encumbered Estates Act (XX of 1896), s. 6; the Bundelkhand Encumbered Estates Act (U. P. Act I of 1903), s. 8.

Punishment for false evidence.

193. Whoever intentionally[1] gives false evidence in any stage of a judicial proceeding,[2] or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding,[3] shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case,[4] shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court-martial is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

ILLUSTRATION.

A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

ILLUSTRATION.

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

COMMENT.

This section specifies the punishment which should be inflicted for offences described in ss. 191 and 192. If the offences are committed in any stage of a judicial proceeding they are more severely punishable than when they are committed in a non-judicial proceeding.

1. 'Intentionally.'—Intention is the essential ingredient in the constitution of this offence.[1] Proof of corrupt intention is not necessary. It is enough to prove intention, and if the statement was false, and known or believed by the accused to be false, it may be presumed that in making that statement he intentionally gave false evidence.[2] False evidence is intentionally given if the person making the statement makes it advisedly, knowing it to be false, and with the intention of deceiving the Court and of leading it to be supposed that that which he states is true.[3] The Court may infer the corrupt intention from surrounding circumstances.[4] If, having regard to all the circumstances of the case, it appears

[1] *Munni Bulsh*, (1898) 3 C. W. N. 81; *Asibulla Sarcar* v. *Udoy Sonthal*, (1908) 13 C. W. N. 422; *Rattan Singh*, (1911) P. L. R. No. 72 of 1911, P.W.R. (Cr.) No. 14 of 1911.

[2] *Amere Ali Khan*, (1871) 3 N. W. P. 133; *Nga Yon*, (1918) 3 U. B. R. 84.

[3] *Babu Ram*, (1904) 26 All. 509.

[4] *Khutten Ram*, (1865) 2 W. R. (Cr.) 63.

that the falsehood was not wilful, but rather proceeded from inadvertence or a mistake as to the true nature of the question, the evidence could not be considered to be false evidence intentionally given. An inconsistent statement made during cross-examination is not perjury if it is the result of confusion or mistake.

A man cannot be convicted of perjury for having acted rashly, or for having failed to make reasonable inquiry with regard to the facts alleged by him to be true.[1]

2. 'Gives false evidence in any stage of a judicial proceeding.'—By 'any stage of judicial proceeding' is meant any step taken by the Court in the course of administration of justice in connection with a case pending.[2]

An inquiry under s 11 of the Frontier Crimes Regulation is not a 'judicial proceeding' within the meaning of this section.[3] This section does not apply to a false deposition given before a Court of a Native State[4]

3. 'Fabricates false evidence for the purpose of being used in any stage of a judicial proceeding.'—The word 'fabrication' refers to the fabrication of false evidence; and if the evidence fabricated is intended to be used in a judicial proceeding, the offence is committed as soon as the fabrication is complete; it is immaterial that the judicial proceeding has not yet been commenced.[5]

It is not essential to show that any actual use has been made of the evidence fabricated. The mere fabrication is punishable under this section: the use of the fabricated article is punishable under s. 196.

The misreading of a document for the information of the Magistrate by a witness does not amount to fabricating false evidence.[6]

4. 'Intentionally gives or fabricates false evidence in any other case.'—A conviction may be had under this section, even if the evidence be given in matters not judicial, but it must be proved that the false statement was made under the sanction of law.[7]

Explanation 2.—A Court holding a preliminary inquiry under s. 476 of the Criminal Procedure Code is a stage of a judicial proceeding under this explanation, and a person giving false evidence in the course of it commits an offence under this section.[8]

[illegible] Bench case, laid down that a statement [illegible] olice investigation under s. 164 of the [illegible] stage of a judicial proceeding within the meaning of this explanation.[9]

Amendment.—The words "or before a Military Court of Request" after "Court-Martial" were repealed by Act XIII of 1889.

PRACTICE.

Evidence.—Prove the following points for giving 'false evidence'.—

(1) That the accused was legally bound to state the truth, either by an oath or by an express provision of law,[10] or

That the accused made the declaration in question

(2) That be made such statement or declaration whilst so bound.[11]

(3) That such statement, or declaration, was made in a stage of judicial proceeding.[12]

(4) That the statement or declaration is false.

[1] *Muhammad Ishaq*, (1914) 36 All. 362.

[illegible] m.

[8] *Abdullah Khan*, (1909) 37 Cal 52.

[9] *Purshottam Ishvar Amin*, (1920) 23 Bom. L. R. 1, F.B.

[10] *Munwar Khan*, (1865) 4 W. R. (Cr.) 24.

[illegible] R. (A

(5) That the accused when making such statement or declaration, (*a*) knew it to be false, or (*b*) believed it to be false, or (*c*) did not believe it to be true.[1]

(6) That he made such false statement intentionally.

If the case falls under the second part of the section it is not necessary to prove (3).

Prove the following points for 'fabricating false evidence':—

(1) That the accused (*a*) caused a certain circumstance to exist, or (*b*) made the false entry, or (*c*) made the document to contain a false statement.

(2) That he did as in (1) intending that such circumstances, entry, or statement should appear in evidence (*a*) in a judicial proceeding, or (*b*) in a proceeding taken by law, before a public servant, or (*c*) in a proceeding before an arbitrator.

There must be a distinct finding to this effect. Where the accused by falsely representing to the Marriage Registrar that a certain marriage had been solemnized, induced the Registrar to make a false entry of the registration of the marriage, it was held that he could not be convicted of the offence of fabricating false evidence under this section in the absence of a finding that the intention of the accused was that the false entry in the marriage register might appear in evidence in a judicial proceeding or some other proceeding of a like nature as contemplated by s. 192.[2]

In the absence of a finding that the intention of the accused was that the false entry in the marriage register might appear in evidence in a judicial proceeding or some other proceeding of a like nature no conviction can be made.[3]

(3) That the person conducting the judicial or other proceeding had to form an opinion upon the evidence in which such false evidence appeared.[4]

(4) That the accused intended that person to entertain an erroneous opinion upon the evidence.

(5) That such erroneous opinion touched a point material to the result of such proceeding.[5] It should be distinctly shown whether the evidence on which perjury is assigned is material in respect of matters in issue in the cause.[6]

If the case fall under the second part of the section it is not necessary to prove (*a*) in (2).

Nature of proof.—"The true rule (in a case of giving false evidence) is that no man can be convicted of giving false evidence *except on proof of facts which, if* [illegible] *made on oath* [illegible] *s, it seems to* [illegible] conviction can stand; because, assuming all t[illegible] *possible* that no crime was committed."[7]

According to the Indian Evidence Act no particular number of witnesses is required to prove any fact, though perjury according to English law must be proved by two witnesses, or by one witness, confi[illegible] or by some material and relevant facts which [illegible] the perjury is assigned. It has been laid do[illegible] the provisions peculiar to the Indian law do[illegible] which is founded on substantial justice may wel[illegible] ave to administer the criminal law in India.[8]

[1] *Maharaj Misser*, (1871) 7 Beng. L. R. App. 66, 16 W.R. (Cr.) 47; *Amere Ali Khan*, (1871) 3 N. W. P. 133; *Bankatram Lachiram*, (1904) 6 Bom. L. R. 379; *Pralash Chandra Sarkar*, (1905) 2 C. L. J. 101.

[2] *Mohamed Siddiq*, (1907) 11 C. W. N. 911.

[3] *Ganeshi*, (1905) 25 A. W. N. 52.

[4] *Ganga Sahai*, (1902) 23 A. W. N. 68.

[5] *Ball*, (1854) 6 Cox 360.

[6] *Mohamed Siddiq*, sup.

[7] Per Norman, J., in *Ahmed Ally*, (1869) 11 W. R. (Cr.) 25, 27; *Padarath Singh* v. *Ratan Singh*, (1919) 5 P.L.J. 23; *Gupta*, (1923) 1 Rang. 290. The Judicial Commissioner of Oudh has held that to justify a conviction for perjury it is not necessary to prove that the statement is impossible, it is sufficient to prove it is incredible: *Mohammad Ismail* [illegible] Bom. L. R.

The statement which the accused is charged with having made before a Magistrate should be clearly proved to have been made by him.[1] No evidence which does not profess to give the exact words used by the accused can alone be a safe foundation for a conviction.[2] But it is sufficient if a witness states from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it.[3]

The prosecution should make out that there was on the day stated in the charge a judicial proceeding pending, and that the prisoner in the course of that proceeding made the statement alleged to be false.[4]

Proceedings in a trial.—The proceedings in a criminal trial, when necessary to be proved, should be proved by their production.[5]

The record of proceedings in the Small Cause Court is not admissible in evidence unless authenticated by the signature of the presiding Judge.[6]

Deposition.—When a person is charged with giving false evidence upon a deposi- [illegible] ve that he is the person who [illegible] roceeding, (*e.g.*, on the com- [illegible] and that he gave it on oath or [illegible] the memorandum signed by the Magistrate and the Magistrate's signature thereto is proved, then the deposition is proof of what the person charged with perjury stated, and he is concluded by it.[7] It is always necessary to prove the deposition alleged to contain the false statement.[8] If the deposition on which the prosecution is based is not properly taken the conviction cannot be sustained, *e.g.*, if it is not read over and interpreted to the witness in accordance with the provisions of O. XVIII, r 5, of the Civil Procedure Code before it is signed by him[9]; or if it is not read over to him in the presence of the accused or his pleader in accordance with the provisions of s 360 of the Criminal Procedure Code,[10] though it is read over by himself.[11] There can be no conviction under this section based on a false statement which is not made and recorded with all due formalities in the manner required by law.[12] The deposition [illegible] Act.[13]

Where the false evidence is alleged to have been given in a deposition in a case in which the law requires the evidence to be taken down in writing, a certified copy of the deposition must be placed on the record. The certified copy should also show on the face of it that it is a copy of part of the record in a specified proceeding. The mere production of a certified copy is not sufficient to show that the accused is the person who made the statement. There must be oral evidence of some [illegible] nor Vakils were present is not a valid deposition has been commented on in *Bogra*, (1910) 34 Mad. 141, where it is held that where a [illegible]

730*n*.

[7] (1867) 8 W. R. (Cr. L.) 16.

[illegible]

Mad. 308, that the deposition read over by a clerk at a place where neither the Judge [illegible]

one, who heard the deposition given, that the accused is the person whose evidence is therein recorded.[1]

The record of a previous deposition given by the accused is relevant and necessary evidence. Such record is not inadmissible under s. 145 of the Evidence Act.[2]

The failure of a civil Court to make a memorandum of the evidence of the accused when examined before it does not vitiate the deposition, if the evidence itself was duly recorded in the language in which it was delivered in such Court.[3]

Powers of appellate Court.—"*It is an unusual and not ... a proper procedure for* an Appellate Court which did not hear the evidence to order a prosecution for perjury in the lower Court on materials which were not before that Court and which the witness had no opportunity of explaining while in the box."[4]

Contradictory statements.—Where a person makes two contradictory statements, he may now be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.[5] Thus the confusion created by the vast array of conflicting rulings of the different High Courts is done away with.

A statement made by an approver, to whom a pardon has been tendered not in the course of any 'inquiry' under the Criminal Procedure Code, cannot form the basis of an alternative charge of an offence punishable under this section.[6]

If one of the statements is made before a Magistrate not having authority to carry on preliminary inquiry in the case and the other before a Magistrate having jurisdiction, there will not be a sufficient basis for an alternative charge of giving false evidence.[7] But where a witness had made one statement on oath before a Third Class Magistrate under s. 164 of the Criminal Procedure Code, and again another and totally inconsistent statement at the trial of the case before a First Class Magistrate, it was held that he could be convicted under the second—if not under the first—paragraph of this section.[8] A Full Bench of the Bombay High Court has held that although a statement which is made in the course of a police investigation under s. 164, Criminal Procedure Code, is not evidence in a stage of a judicial proceeding but comes within the words "evidence in any other case" [illegible]

[illegible] framed, under s. 236 of the Criminal Procedure Code.[9] Where an accused person is examined by a M[illegible] for the sole of obtaining information on which proceedings can be taken, [illegible] in the accused be said at [illegible] gh he were examined on t[illegible] giving [illegible] was bad and that a conviction and sen- [illegible] contrary to another statement made by the accused when examined as a witness at the trial, without any proof or finding that the second statement was false, could not be maintained.[10] It is not necessary

[1] *Mi Shwe Ke*, (1902) 1 L. B. R. 208.

[2] *Gannoo Mahto*, (1908) 9 C. L. J. 378.

[3] *Beharee Lall Bose*, (1868) 9 W. R. (Cr.) 60.

[4] Per Holmwood, J., in *Loke Nath Sahi*, (1906) 10 C. W. N. 1091, 1093.

[5] *Vide* ill. (*b*) to s. 236, Criminal Procedure Code.

[6] *Motilal Hiralal*, (1921) 23 Bom. L. R. 884, 6 Bom. Cr. C. 96.

[7] *Bharma Ningappa*, (1886) 11 Bom. 702, p. 8.; *Shettepa Satapa Mudenavar*, (1912) 14 Bom. L. R. 733.

[8] *Khem*, (1899) 22 All. 115; *Tasadduk Husain*, (1908) 28 A. W. N. 73. See *Kadir Meerah*, (1909) 5 M. L. T. 356, in which the statement made by the accused before a police-officer making investigation under s. 174, [illegible] that ma[illegible] was hel[illegible] respect [illegible] Magistrate was not invalid.

[9] *Purshottam Ishvar, Amin*, (1920) 23 Bom. L. R. 1, 6 Bom. Cr. C. 1, p. 8. overruling; *Muggapa*, (1899) 18 Bom. 377, p.B., *Patraj*; (1925) O. W. N. 637.

[10] *Hari Charan Singh*, (1900) 27 Cal. 455.

that the contradictory statements must have been made at different inquiries or trials to render a person liable to conviction.[1] The accused deposed before a Magistrate that he had seen P and others gambling in a certain place. The deposition was read over to the accused and acknowledged by him to be correct. In his cross-examination some days after he deposed that he did not know P and had never seen him gambling. He was charged and convicted under this section of having intentionally given false evidence in that he made two contradictory statements one of which he either knew or believed to be false or did not believe to be true. On the question being raised, on revision, whether the conviction was legal or illegal, by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial, it was held by two judges that the conviction was legal.[2] The fact of a witness having made contradictory statements before the committing Magistrate and in Court would not alone justify any step to prosecute him for perjury. Under exceptional circumstances such step may be taken.[3]

With respect to the kind or amount of confirmatory proof required, it must be considered in each case whether the particular evidence offered is sufficient [illegible]

conviction can be had upon the ground that one of them is necessarily false.[5] An opportunity should always be given to the accused to explain what he meant by two apparently contradictory statements.[6]

It is necessary to prove that both the contradictory statements were such [illegible] ence might have been made in regard [illegible] in the alternative[7] [illegible], although the Court "may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time."[8] "The Court dealing with them (contradictory statements) should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless he has on oath stated *facts* on which his first statement was based and then denied these *facts* on oath on a subsequent occasion"[9] Ordinarily it would be inadvisable to launch a prosecution for perjury under such circumstances as it compels a witness to adhere to his original he under penalty of a prosecution if he tells the truth.[10]

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or first class Magistrate.

[1] *Palani Palagan*, (1902) 26 Mad. 55, Bhashyam Ayyangar, J., *dissentiente*. The opinion of Bhashyam Ayyangar, J., is followed in *Lachhmi Narain*, (1913) 16 O. C. 81. See *Habibullah*, (1884) 10 Cal. 937.

[2] *Palani Palagan*, sup.

[3] *See Tripura Sankar Sarkar*, (1910) 14 C. W.N. 767.

[illegible]

2 P. L. W. 176; *Barkat Ram*, (1911) P. L. R No. 158 of 1911, P. W. R. No. 38 of 1911.

[6] *Fazal Din*, (1921) 3 L. L. J. 442.

[7] *Hari Charan Singh*, (1900) 27 Cal. 455, *Asa Nand*, (1904) 5 P. L. R. 261.

[8] Per Jenkins, C. J., in *Bankatram Lachsram*, (1904) 6 Bom. L. R. 379, 397, 28 Bom. 533.

[9] Per Chandavarkar, J., in *ibid.*, p. 382.

[10] *Dad*, (1901) P. R. No 21 of 1901.

the case.[1] Ordinarily it is inadvisable to launch a prosecution for perjury under such circumstances as will compel a witness to adhere to his original lie under penalty of a prosecution if he tells the truth.[2] Where a witness makes a statement which is false and at once admits this, and states what is the real truth, he should not be prosecuted for giving false evidence.[3]

No Court should entertain an application to prosecute made by persons who are not parties to the suit out of which the proceedings for giving false evidence arise.[4] A complaint should only be made after careful consideration, and having in view the ends of justice and not in order to assist the private ends of individuals. It is desirable in most cases that the Court should have all the facts before it.[5]

A prosecution for perjury should be instituted as soon as possible. An officer other than he who tried the case in which perjury was committed does not act without jurisdiction, if he files a complaint to prosecute, but it is very much more satisfactory that the complaint should be made by the very judge in whose Court an offence has actually taken place.[6]

A complaint for an offence under this section, must specify the false evidence the accused is charged with. The exact words upon which the prosecution is based, and the exact offences which the Magistrate is to investigate should be pointed out.[7] The particular words which constitute perjury should be specified,[8] so that the accused person should not be taken by surprise.[9] The accused should be in a position to know what statements alleged to be false are.[10]

Although notice is not invariably necessary, the grant of an order sanctioning prosecution is a judicial act, and there may be circumstances in which a proper discretion cannot be said to have been exercised unless the persons sought to be prosecuted have been given an opportunity to be heard.[11] Before taking action against a person for fabrication of false evidence, it is necessary that he should be given an opportunity to substantiate his allegations.[12] Before filing a complaint against a party he must be previously heard and a judgment formed upon legal evidence. In cases in which [illegible] upon a report from the Police, the [illegible] form his judgment. In cases, ho[illegible] complainant and hears the evidence and acquits or discharges the accused, no notice to the complainant is necessary.[13] When a civil Court takes action under s. 476 to prosecute a person for perjury such Court is bound to set forth in its order the specific assignments of perjury alleged against the accused. Failure to do so is a material irregularity within the meaning of s. 115 of the Code of Civil Procedure.[14]

Accused must have full notice of the case against him.[15] Complaint to prosecute should not be lightly launched in cases where the Court would have to determine the question by merely weighing the evidence on both sides.[16] The

[1] *Cherani Lal* v. *Ram Lal*, (1912) 9 A. L. J. R. 538.

[2] See *Dad*, (1901) P. R. No. 21 of 1901; [illegible]

[illegible]

Cr. Appeal No. 350 of 1910; *Daroga Jha*, (1920) 2 P. L. T. 311; *Trailokya Nath Banerji* v. *Radharanjan*, (1921) 25 C. W. N. 898.

[7] *Kartick Chunder Holdar*, (1868) 9 W.R. (Cr.) 58; *Dasappa Narappa*, (1921) 24 Bom. L. R. 45, 6 Bom. Cr. C. 153.

[8] *Gobind Chunder Ghose*, (1868) 10 W. R. (Cr.) 41; *Boodhun Ahir*, (1872) 17 W. R. (Cr.) 32; *Goberdhone Chowkidar* v. *Habibullah*, (1897) 3 C. W. N. 35; *Seshayya* v. *Subbarayudi*, (1925) M. W. N. 470.

[illegible]

(1896) 18 All. 358.

[13] *Seshayya* v. *Subbarayudi*, *sup.*

[12] See *Sheik Beari*, (1887) 10 Mad. 232.

[14] See *Kashi Shukul*, (1916) 38 All. 695.

[15] See *Rakhal Chandra Laha*, (1909) 36 Cal. 809, 9 C. L. J. 690.

[16] See *Padarath Singh* v. *Ratan Singh*, (1919) 5 P. L. J. 23.

prosecution for perjury is an exceptional measure and sanction ought not to be granted when material has only been provided by an unnecessary examination or oath. Magistrates should not be encouraged to make unnecessary examinations on oath in order to obtain material for a prosecution for perjury in case the approver should subsequently resile from his statement.[1]

A Court filing a complaint in respect of contradictory statements must be competent to file a complaint in respect of each of the statements.[2] When contradictory statements, forming the basis of an alternative charge of giving false evidence, are made before different Courts, the complaint of each of those Courts is necessary before the Court can take cognizance of the charge of giving false evidence.[3]

A Court should not file a complaint when the case in which perjury is committed has gone to a higher tribunal.[4]

Notice.—Where a Judge issues a notice to the accused to show cause why his prosecution under this section should not be launched, he must allow sufficient time for the notice to be served upon the accused and should not file a complaint before the notice has been served.[5]

Calcutta Rule.—When, during the investigation of a complaint under Chapter XX of the Criminal Procedure Code, it may appear to the Magistrate that a witness is giving false evidence, so that criminal proceedings against such witness are likely to be necessary, the Magistrate will exercise a sound discretion in taking down, under s. 359, at least the evidence of this particular witness at length in the manner prescribed in ss. 356, 357 and 360.[6]

The Punjab Rules.—The attention of all Magistrates is called to the law regarding 'giving or fabricating false evidence' contained in ss. 191 to 196 of the Indian Penal Code.

2. It may add too much to the already heavy work of Magistrates to prosecute every person who is guilty of these offences, but it is prejudicial to the interests of justice to allow any gross case to pass unnoticed. It is the duty, therefore, of every judicial officer to bring every case which happens in his Court to the notice of the Magistrate of the District The Magistrate of the District will decide whether a prosecution should be instituted.

3. It should be remembered that the provisions of s. 487 of Act V of 1891 make it clear that a Court before which the offence of giving false evidence has been committed is precluded from trying the offence itself.

4. Attention is also called to s. 195 of the Code of Criminal Procedure, which so far protects witnesses that no prosecutions are to be instituted in the Criminal Courts except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate. The offence is one against public justice, and the prosecution is not left to the discretion of individuals. Such sanctions remain in force for a period of only six months, but the Chief Court has power, on good cause being shown, to extend the time.

5. Sub-section 7 of s. 195, clearly defines, for purposes of this section, to what Court any Court is subordinate. Thus, a District Magistrate, (or any other Magistrate [illegible]

Collector of whatever grade is subordinate to the Collector.

[1] *Nga Bo Gyi*, (1925) 3 Rang 224.

[2] See *Reddi Rami Reddi*, (1914) 27 M. L. J. 586.

[3] See *Purshottam Ishvar Amin*, (1920) 23 Bom. L. R. 1, 6 Bom. Cr. C. 1, F.B.

[4] *Birendra Nath Das Gupta*, (1914) 18 C. W. N. 1342.

[5] See *Umarbhai*, (1888) Unrep. Cr. C. 404, Cr. R. No. 65 of 1888.

[6] C. H. C. R. & O., Ch. I, Rule 43, p. 16.

6. It has been noticed that Magistrates sometimes sanction the prosecution of witnesses for perjury in cases committed to the Court of Session; such action is improper and is likely to prejudice either the prosecution or the accused—generally the [illegible]
hands of
any steps

The above-mentioned rules will have to be amended in consonance with the amended s. 195 of the Code of Criminal Procedure.

When proceedings to be instituted.—Proceedings under s. 476, Criminal Procedure Code, should not be taken against a person for giving false evidence or fabricating a false document under this section until the case in which the said evidence was given or such document was used, has been finally decided.[2]

Charge.—In framing a charge for giving false evidence, the charge should be precise. The charge should show the particular matter in respect of which the accused is put upon his trial; and only so much of the prisoner's statements ought to be set out as is necessary in order to show the particular false statements relied on by the prosecution.[3] It should contain a distinct assertion with regard to each statement intended to be characterised as perjury.[4] It should specially [illegible] charged with having uttered, and in
[illegible] used by the accused
[illegible] se words.[6]
[illegible] vidence to put the
[illegible] viction on such a
charge could be properly had only on proof that the accused person had made each and every statement contained in the document.[7]

The charge should specify not only the judicial proceeding in the course of [illegible] but the parti-
[illegible]
and the occasion when the offence is committed is to give notice not only to the acc[illegible] [10]
[illegible] vidence
on different occasions, each occasion should form the [illegible] l in the charge.[11]

Central Provinces Circular.—In prosecutions for giving false evidence, under ss. 193, 194 and 195 of the Indian Penal Code, the particular statements alleged to be false must invariably be set out in the charge, to enable the accused to understand fully the offence with which he stands charged.[12]

Form.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused person*) as follows:—

That you, on or about the——day of——, at——, in the course of the trial of——, before——, stated in evidence that (*mention here the false statement*) which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

[1] P. C. C. R. & O Vol. II, No. 27, p. 187.
[2] *Gendan Singh*, (1905) 3 C. L. J. 302.
[3] *Soonder Mohooree*, (1868) 9 W. R. (Cr.) 25.
[4] *Kalichurn Lahoree*, (1868) 9 W. R. (Cr.) 4.
[5] *Doolut Moonshee*, (1867) 8 W. R. (Cr.) 95; *Moharaj Misser*, (1871) 16 W. R (Cr.) 47.
[6] *Boodhun Ahir*, (1872) 17 W. R. (Cr.) 32; *Mungul Dass*, (1875) 23 W. R. (Cr). 28; *Mi Shwe Ke*, (1902). 1 L. B. R. 268.
[7] *Isab Mandal*, (1900) 28 Cal. 348.
[8] *Falik Biswas*, (1868) 1 Beng. L. R. (A. Cr. J.) 12.
[9] *Moharaj Misser*, sup.
[10] *Ram Dhari Singh*, (1917) 4 P. L. W. 44.
[11] *Feojdar Roy*, (1868) 9 W R (Cr.) 14.
[12] C. P. Cr. C. No. 15 (4), p. 28.

And I hereby direct that you be tried by the said Court on the said charge.[1]

Punishment.—A false statement by a witness, as to his position or character ought not to be punished so severely as a false charge on a false claim.[2]

A deliberate mis-statement made in a Court of Justice, whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice, is not an offence which should be lightly passed over. But for a simple mis-statement from which no such inferences can be drawn, a comparatively light sentence will suffice, particularly where the prisoner pleads guilty and throws himself at the mercy of the Court.[3]

Although a person under examination as a witness is bound by his affirmation to tell the truth, if he is examined on a point on which he is likely to criminate himself, his position should be explained to him by the Magistrate, as otherwise [illegible] false [illegible] ment.[4]

I[illegible] under ss. 193, 194, 195, [illegible] dition to fine to be whipped, or to imprisonment not exceeding seven years, or to whipping and imprisonment not exceeding five years, or to transportation for not more than seven years.

Attempt.—The term of imprisonment for attempting to fabricate false evidence for the purpose of being used in a stage of judicial proceeding cannot extend beyond one-half of seven years.[6]

Giving or fabricating false evidence with intent to procure conviction of capital offence.

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely[1] that he will thereby cause, any person to be convicted of an offence[2] which is capital by the law of British India or England,[3] shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

If innocent person be thereby convicted and executed.

and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment herein before described.

COMMENT.

This is an aggravated form of the offence of giving or fabricating false evidence made punishable by s. 193.

To constitute an offence under this section the accused must give false evidence intending thereby, that is, by giving such false evidence, to cause or knowing it to be likely that he will thereby, that is, by giving such false evidence, cause some person to be convicted of a capital offence. It is not necessary under this section [illegible]

[1] Criminal Procedure Code, Sch. V, xxviii (5).

[2] *Rewah Goallah*, (1866) 5 W. R. (Cr.) 95; *Govind Sahoo*, (1864) W. R. (Gap. No.) Cr. 14.

[3] *Gurjoon Aheer*, (1867) 7 W. R. (Cr.) 37 (55)

[4] *Jaddoonath Dutt*, (1878) 2 C. L. R. 181.

[5] III of 1901, ss. 11 (3) (*d*) and 12 (2).

[6] *Soondur Putnaick*, (1865) 3 W. R. (Cr.) 59.

Court can infer that it was the intention of the accused to stick to the false evidence right up to the trial of the case.[1] But the Bombay High Court has held that as the words "in any stage of judicial proceeding" occurring in s. 193 are not repeated in this section, the latter, therefore, refers only to the final stage, that is, the trial of the case.[2] Where an accused had, in a preliminary inquiry before a Magistrate, made a deposition in which he falsely stated that he had seen the persons charged before the Magistrate in the act of committing a murder, it was held that this section was inapplicable, as the natural consequence of such false evidence would be nothing graver than a committal of the persons charged to the Court of Session, and not necessarily a conviction, and it must be presumed that the accused intended the natural, that is, the ordinary consequences.[3]

1. **'Intending thereby to cause or knowing it to be likely, etc.'**—When the proceeding in which evidence is given is one in which a conviction is not possible, it is difficult to affirm that the accused had such intention or knowledge as is necessary under this section. A person giving false evidence before a Magistrate holding a preliminary inquiry into a charge of murder does not commit the offence under this section. He may be guilty under s. 193.[4] The offence of a person accusing another falsely of murder to a police-officer in an enquiry under s. 174 of the Criminal Procedure Code would not fall under this section, the reason being that it is difficult to affirm the existence of an intention to cause, or of knowledge that the false evidence is likely to cause, a person to be convicted of a capital offence, when the proceeding in which the evidence is given is one in which such a conviction is not legally possible.[5]

Where a witness stated on oath before the Sessions Court, during the trial of a prisoner for murder, that another had committed the murder, whereas, before the Magistrate he had stated, as was the fact, that the prisoner had committed it, it was held that he was guilty under s. 193 and not under this section, as he did not know that he would cause a conviction for murder.[6]

2. **'Offence'** means a thing punishable under the Code or any special or local law (s. 40).

3. **'Capital by the law of British India or England.'**—The following offences are punishable with death under the Penal Code:—

(1) Waging war against the King (s. 121).
(2) Abetting mutiny actually committed (s. 132).
(3) Giving or fabricating false evidence upon which an innocent person suffers death (s. 194).
(4) Murder (s. 302).
(5) Abetment of suicide of a minor, or insane or intoxicated person (s. 305).
(6) Dacoity accompanied with murder (s. 396).
(7) Attempt to murder by a person under sentence of transportation, if hurt is caused (s. 307).

The following are capital offences under the English law:—

(1) High treason.[7]
(2) Murder.[8]
(3) Piracy with violence.[9]
(4) Burning or destroying ships of war, arsenals, magazines, etc.[10]
(5) Several offences relating to the army and navy.[11]

[1] *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41.
[2] *Gokaldas*, (1874) Unrep Cr. C. 80, Cr. R. of 1874.
[3] *Ibid.*
[4] *Muhammad*, (1886) P. R. No. 32 of 1886.
[5] *Muhammad Hayat*, (1921) P. W. R. (Cr.) No. 6 of 1922.
[6] *Hardyal*, (1869) 3 Beng. L. R. (A. Cr. J.) 35.
[7] 30 Geo. III, c. 48; 54 Geo. III, c. 146; 33 & 34 Vic., c. 23, s. 31.
[8] 24 & 25 Vic., c. 100, s. 1.
[9] 7 Will. IV, and 1 Vic., c. 18, s. 2.
[10] 12 Geo. III, c. 24.
[11] 44 & 45 Vic., c. 58, ss. 4, 6 (1) 7, 8 (1) 9 (1), 12 (1); 29 & 30 Vic., c. 109, ss. 2-7, 10. 13, 19, 30, 34 and 52 (1).

Amendment.—The words "by the law of British India or England" were substituted for the words "by this Code" by Act IX of 1890, s. 149.

PRACTICE.

Evidence.—Prove the same points as for s. 193 and further—

That the accused when giving or fabricating the same, intended thereby to cause, or knew that it was likely he would thereby cause, the person in question to be convicted of capital offence under the Indian Penal Code, or under the English law.[1]

For the second clause prove further—

(1) That capital punishment was carried into effect; and

(2) that the person executed was an innocent person.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which such Court is subordinate is required.[2]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, in the course of the trial of——, before——, gave false evidence (*or* fabricated false evidence) intending thereby to cause (*or* knowing it to be likely that you will thereby cause)——to be convicted of the offence of——which by the law of British India (*or* England) is capital, and thereby committed an offence punishable under s. 194 of the Indian Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As for whipping, see the Whipping Act (IV of 1909). As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2).

Giving or fabricating false evidence with intent to procure conviction of offence punishable with transportation or imprisonment.

195. Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence[1] which by the law of British India or England is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

ILLUSTRATION.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to such transportation or imprisonment, with or without fine.

COMMENT.

This section is similar to the preceding section except as regards gravity of the offence in respect of which the perjury is committed. It stands midway between s. 193 and s. 194.

1. 'Offence' means anything punishable under the Code or any special or local law (s. 40).

Amendment.—The words "by the law of British India or England" were substituted for the words "by this Code" by Act IX of 1890, s. 149.

[1] *Naurang*, (1906) 3, A. L. J. R. 110 (*n*). also ss. 476-478, 487.
[2] Criminal Procedure Code, s. 195. See

CASES.

Where the accused was convicted under this section for burning his house with the object of getting another convicted of the offence, and the act was done in a most open manner, and no complaint was made by the accused, it was held that the conviction could not be upheld, because there was no evidence of intention to convict.[1] In the case of a person who burnt his own house, and charged another with the act, it was held that he should not be convicted under this section, but under s. 211.[2] But where A, with a view to having B convicted, assisted in concealing stolen railway pins in his house and field, it was held that A was properly convicted of an offence under this section.[3] Where false coins were made by the accused only for the purpose of passing them secretly into the house of his enemy in order to get him into trouble, it was held that he had committed an offence under this section although he was guilty under s. 232 or 235.[4]

PRACTICE.

Evidence.—Prove the same points as for s. 193, and further—

That the accused when giving or fabricating the same, intended thereby to cause, or knew that it was likely he would thereby cause, the person in question to be convicted of an offence punishable with transportation for life (or imprisonment for a term of seven years or upwards) under the Indian Penal Code or the English law.

To sustain a conviction it is not only necessary to prove that the accused spoke falsely, but also that he knew he was speaking falsely.[5]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[6]

Charge.—Similar to one under s. 195 except that the offence is not capital but one punishable with transportation for life or imprisonment for a term of seven years or upwards.

Punishment.—As for whipping, see the Whipping Act (IV of 1909). As to the Frontier District, see the Frontier Crimes Regulation (III of 1901).

Using evidence known to be false.

196. Whoever corruptly uses or attempts to use as true or genuine evidence[1] any evidence which he knows to be false or fabricated,[2] shall be punished in the same manner as if he gave or fabricated false evidence.

COMMENT.

This section makes it an offence to corruptly use any evidence which the person using it knows to be false or fabricated. There must, therefore, be knowledge of its falsity and in addition the element of corruption.

The section applies to those who make use of such evidence as is made punishable by ss. 193, 194 and 195. "It must be read with ss. 191 and 192, and can only apply to the use of evidence which was false evidence within the meaning of s. 191 or fabricated evidence within the definition laid down in s. 192."[7]

The section may include also the case of suborning false witnesses and attempting to use their evidence. There must be a use or an attempt or offer to use the evidence in a judicial proceeding or on some other occasion.

[1] *Shib Dyal*, (1873) 5 N. W. P. 168.
[2] *Bhagwan Ahir*, (1867) 8 W. R. (Cr.) 63.
[3] *Ramchar Rai*, (1877) 1 All. 379.
[4] *Lal Chand*, (1912) P. W. R. (Cr.) No. 17 of 1912.
[5] *A. Gopalaswami Naidu*, (1909) 6 M.L.T. 91.
[6] Criminal Procedure Code, s. 195.
[7] *Per Hutchins, J., in Lakshmaji*, (1884) 7 Mad. 259, 260.

The section does not apply to subornation of perjury. It must be shewn that the accused made some use of the false evidence after it was in existence.[1]

If a person calls witnesses in support of a statement which he makes, and causes those witnesses to come into the box for the purpose of giving evidence which he knows to be untrue, and they give that evidence, and the jury find that they knew it to be untrue, that is evidence on which a jury may find that he solicited them; but the jury must be satisfied that he knew that the statement which they were called to make must be untrue to their own knowledge.[2]

1. **'Corruptly uses or attempts to use as true...evidence.'**—The word 'corruptly' is applied to the doing of acts with the intent of gaining some advantage inconsistent with official duty or the rights of others.[3] It is not intended to connote a motive necessarily connected with the passing of money as an inducement to the person impugned to use or attempt to use the fabricated evidence. An intention to procure a false conviction is a corrupt intention.[4] The desire to screen an offender from the legal consequences of his act could well be designated a corrupt motive, and it would not require evidence to satisfy the Court that the witness in giving false evidence had that desire. The use of false evidence with the knowledge that it is false must ordinarily be corrupt from its very nature, and the onus lies on the accused to show that there are circumstances in the case which prevent its being corrupt. The fact that he was defending himself against a criminal charge is not enough. An accused person who uses fabricated evidence as genuine in his defence may be liable for using it corruptly. In support of an *alibi* on a charge of assault the accused produced a cattle-pound receipt and called the Patil of another village to prove that he was there at the time of the offence. The defence was not believed, and the accused was tried for corruptly using false evidence as true. It was held that the accused was guilty of an offence under this section.[5]

The word 'corruptly' occurs in this section, and ss. 198, 200, 219 and 220. It is used to denote that those whose duty it is, not to judge of the credibility of evidence, but to submit it for the consideration of judicial and other functionaries, on behalf of their clients, do not incur the penalties for using false evidence.[6]

The word 'corruptly' is not used in the sense of 'fraudulently' or 'dishonestly.' Where the accused used the evidence of an Hospital Assistant and a compounder for the purpose of producing the out-door Register of a dispensary containing false entries to the effect that he was present and treated there on certain days when in reality he was not, it was held that in order to bring him within the section there should have been evidence that the two witnesses had been induced to come forward by some corrupt motive, *e.g.*, bribery.[7]

2. **'Any evidence which he knows to be false or fabricated.'**—The word 'evidence' does not include a document. Where the accused used in a civil suit a document as genuine which he knew to be a forged document, it was held that he should be charged under s. 471 and not under this section.[8] Where a person used in Court false documents as true besides swearing to their authenticity, he was held guilty of this offence[9]. Where a prisoner produced as evidence an account book, one page of which had been fraudulently abstracted, and another substituted for it, it was held that he was not guilty of the offence of attempting to use, as genuine, fabricated evidence, unless he knew of the forgery and intended to use the forged evidence for the purpose of affecting the decision on the point at issue when

[1] *Sheik Suffurruddee*, (1862) 1 Ind. Jur. (O. S.) 122.

[2] *Gungammah*, (1860) 3 Mad. Sec.

[3] Livingstone.

[4] *Faza Ahmad*, (1913) P. R. No. 1 of 1914, P. L. R. No. 139 of 1914.

[5] *Rama Nana Hagarne*, (1921) 23 Bom. L. R. 987, 6 Bom. Cr. C. 112.

[6] M. & M. 164.

[7] *Bhausing Jalamsing*, (1909) Criminal Application for Revision No. 26 of 1909, decided on the 31st March 1909, per Scott, C. J., and Chandavarkar, J. Unrep Bom.

[8] *Kherode Chunder Mozumdar*, (1880) 5 Cal. 717.

[9] *Oodun Lall*, (1865) 3 W. R. (Cr.) 17.

the book was tendered.[1] A brought a suit upon a bond and at the trial sought to support his claim by a letter fabricated probably for the purpose of enabling him to get the bond registered. A was convicted under this section. It was held that if the letter was fabricated for use before the Registrar, it was no valid objection to the conviction.[2]

PRACTICE.

Evidence.—Prove (1) that the piece of evidence in question is false or fabricated.

(2) That the accused used, or attempted to use, such false or fabricated piece of evidence.

(3) That he used, or attempted to use, such evidence, as true or genuine evidence.

(4) That when the accused used such evidence, or attempted to do so, he knew it to be false or fabricated.

(5) That when the accused so used, or attempted to do so, he acted corruptly.

Procedure.—Not cognizable—Warrant—Bailable or not according as the offence of giving such evidence is bailable or not—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[3]

The complaint must state that the accused knowing that a particular document was false used the same as genuine evidence.[4]

Charge.—The charge should contain the words "punishable under ss. 193 and 196 of the Indian Penal Code, etc.," as the section does not specify accurately the amount of punishment.[5]

Using or attempting to use false evidence are distinct offences and should be charged separately.[6]

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901).

Issuing or signing false certificate.

197. Whoever issues or signs any certificate required by law to be given or signed,[1] or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point,[2] shall be punished in the same manner as if he gave false evidence.

COMMENT.

Several laws require a certificate of some matter to be given. The offence of certifying in any of these, knowing or believing that the certificate is false, is put on the same footing as the offence of giving false evidence.

The certificate must, however, be false in a material point. The issuing or signing must be by the officer, or person authorized to certify.

Ingredients.—This section has two essentials.—

1. Issuing or signing of a certificate—
   (a) required by law to be given or signed, or
   (b) relating to a fact of which such certificate is by law admissible in evidence.

[1] *Muddoo Soodun Shaw*, (1867) 7 W. R. (Cr). 23.

[2] *Lakshmaji*, (1884) 7 Mad. 289. See also *Sikandar Khan*, (1887) 7 A. W. N. 265.

[3] Criminal Procedure Code, s. 195.

[4] *Kalyanji v. Ram Deen Lala*, (1924) 21 L. W. 664.

[5] (1865) 2 W. R. (Cr. L.) 9.

[6] *Ibid.*

2. Such certificate must have been issued or signed knowing or believing that it is false in any material point.

1. **'Issues or signs any certificate required by law to be given or signed.'**—The word 'issues' means something different from using. It is the putting forth for the purpose of being used, and is preliminary to it.

'Certificate' is a testimony given in writing to declare or verify the truth of anything,[1] *e. g.*, a certificate of administration,[2] of marriage,[3] of adjustment of decrees,[4] or a certificate authorizing a judgment-debtor to mortgage land ordered to be sold,[5] or that a case is fit for appeal to the King in Council.[6]

The word 'certificate' does not mean certification under this section and s. 198. The certificate, in respect of which a man may be punished under this section and s. 198, if it is false to his knowledge or belief, must be either one (*a*) that is required by law to be given or signed, or (*b*) that relates to any fact of which such certificate is by law admissible in evidence. One or other of these requirements must be fulfilled before a man can be dealt with under this section and s. 198. A, purporting to represent a decree-holder in a certain suit, signed and filed a petition in the Court, stating, contrary to the fact, that B, the judgment-debtor, had paid off the decretal amount to the decree-holder through him. B was found

[illegible]

Acts is not a certificate within the meaning of this section.[8]

'Required by law to be given or signed.'—Several Acts require the giving of certificates by various functionaries, *e. g.*, the Christian Marriage Act (XV of 1872), ss. 17, 41, 61; the Indian Companies Act (VII of 1913), s. 262; the Indian Succession Act (XXXIX of 1925), s. 381, the Indian Registration Act (XVI of 1908), s. 60; the Civil Procedure Code (Act V of 1908), O. XXI, rr. 2, 94; O. XLV, r. 3; the Administrator-General's Act (III of 1913), s. 31; the Legal Practitioners' Act (XVIII of 1879), s. 7.

2. **'Knowing or believing that such certificate is false in any material point.'**—The certificate must be false in respect of a material point. Falsity in any other respect will be of no avail.

Intent to injure.—Under this section proof of intent to cause injury is not necessary.[9]

Statutory application.—The Burma Steam Boilers and Prime Movers Act, s. 12.[10]

CASES.

False declaration.—A person signed a notice of transfer of survey numbers in the character of his father who was dead, and the declaration to this notice was signed by the accused, who confirmed the assumed character. It was held that the accused could not be convicted under this section but could be convicted of giving false information to a public servant.[11]

Incorrect copy.—A copyist who made an incorrect copy of a document filed with a record was held to have committed an offence under this section.[12]

Abetment of the issue of a false certificate of summons.—Although there was no village-watchman in the village of the name appearing on the receipt

[1] Wharton, 12th Edn., p. 150.
[2] Act II of 1874, ss. 36, 37.
[3] Act XV of 1872.
[4] Civil Procedure Code O. XXI, r. 2.
[5] *Ibid*, r. 83.
[6] *Ibid*, O. XVI, r. 7.
[7] *Mahabir Thakur*, (1916) 23 C. L. J. 423, 20 C. W. N. 520.
[8] *Bal Krishna Gir*, (1917) 3 P. L. W. 201.
[9] *Dewa Singh*, (1878) P. R. No. 15 of 1879.
[10] Burma Act II of 1910.
[11] *Mulharji*, (1882) Unrep. Cr. C. 182.
[12] *Dewa Singh*, sup.

acknowledging due service, the prisoner was acquitted in the absence of proof of guilty knowledge or belief, it being probable that he (an utter stranger in the village) was deceived by the villagers.[1]

PRACTICE.

Evidence.—Prove (1) that the document in question purports to be a certificate.

(2) That such certificate is required by law to be given or signed, or that it related to some fact of which such certificate is by law admissible in evidence.

(3) That such certificate is false.

(4) That it is false in a material point.

(5) That the accused issued or signed the same.

(6) That he, when doing so, knew or believed, such certificate to be false.[2]

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, issued (*or* signed) a certificate [required by law to be given (*or* signed)] (*or*) [relating to——a fact of which such certificate is by law admissible in evidence] knowing or believing that such certificate is false in a material point, to wit——, and thereby committed an offence punishable under s. 197 of the Indian Penal Code and within my cognizance [*or* cognizance of the Court of Session.]

And I hereby direct that you be tried [by the said Court] on the said charge.

Using as true a certificate known to be false.

198. Whoever corruptly uses or attempts to use any such certificate, as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

COMMENT.

This section is connected with the last section just as s. 196 is connected with ss. 193, 194 and 195.

PRACTICE.

Evidence.—Prove points (1), (2), (3) and (4) as in s. 197, and further—

(5) That such false certificate was signed or issued.

(6) That the accused used or attempted to use such false certificate.

(7) That he did so corruptly.

(8) That he, when using such false certificate, knew it to be false in a material point.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, corruptly used (*or* attempted to use) as true a certificate [required by law to be given and signed] (*or*) [relating to a fact of which such certificate is by law admissible in evidence] but which is false in a material point, to wit——, and known by you to be the same, and thereby committed an offence punishable under s. 198 of the Indian Penal Code and within my cognizance [*or* cognizance of the Court of Session].

And I hereby direct that you be tried [by the said Court] on the said charge.

[1] *Hissamuddeen*, (1865) 3 W. R. (Cr.) 37. [2] *Ibid.*

False statement made in declaration which is by law receivable as evidence.

199. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence [1] of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true,[2] touching any point material to the object for which the declaration is made or used,[3] shall be punished in the same manner as if he gave false evidence.

COMMENT.

Object.—"It was intended by the section to make the penalty attached to the offence of giving false evidence applicable to declarations which, although not compellable, have, on being made, the same effect as the compulsory declarations referred to in ss. 51 and 191."[1] It subjects any person who makes a false declaration, which declaration may be used as evidence of the matters stated in it, to the penalties for perjury. Section 191 deals with compulsory declarations, this section treats of voluntarily false declarations.

Ingredients.—This section requires three essentials.—

1. Making of a declaration which a Court or a public servant is bound or authorized by law to receive in evidence.

2. Making of a false statement in such declaration knowing or believing it to be false.

[illegible] any point material to the object [illegible]

[illegible] **Court of Justice or public servant or other person is bound or authorized by law to receive as evidence.'**—'Declaration' means any statement of fact in the form simply of a declaration, which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or the solemn affirmation substituted for an oath; in short, a declaration receivable in lieu of personal testimony.[2] A statement made by a witness in a criminal trial not upon oath or solemn affirmation is not a declaration.[3]

See also Explanation to s. 200 as to the meaning of 'declaration.'

'Court of Justice.'—See s. 20, *supra*.

'Public servant.'—See s. 21, *supra*.

'Bound or authorized by law to receive as evidence.'—A declaration must be one which is admissible in evidence, and which the Court before which it is filed is bound or authroized by law to receive in evidence.[4] It includes as affidavit in cases in which evidence may be given by affidavit.[5] A person making on oath a false statement in the nature of an affidavit in the course of a criminal proceeding before a Magistrate [illegible]

[1] Per Scotland, C. J., and Ellis, J., in *A. Vedamuttu*, (1868) 4 M. H. C. 185.

[2] *Ibid*, p. 187; *Ismail*, (1914) 8 B. L. T. 82.

[3] *Ibid*.

[4] *Ram Prasad*, (1912) 35 All. 59.

[5] *Palaniappa Chetti* v. *Annamalai Chetti*, (1904) 14 M. L. J. 74.

[6] *Iswar Chunder Guho*, (1887) 14 Cal. 653; *Ramasawmy Chetty*, (1902) 1 Weir 176.

[7] *Chandi Pershad* v. *Abdur Rahman*, (1894) 22 Cal. 131.

[8] *Ram Biwaz Kuowar*, (1880) 7 C. L. R. 536.

unless his evidence be given under the sanction of an oath on the Holy Gospel.[1] If the Court or public servant is not authorized by any provision of the law, or any rules having the force of law, to receive a declaration in evidence but does receive one, the person making it will not be liable.[2] The accused made a false declaration before a Mamlatdar with a view to obtain a certificate of solvency for the purpose of securing a licence from the Abkari authorities. It was held that no offence was committed under this section inasmuch as no Court or public servant was either bound or authorized by law to receive the declaration in evidence.[3] Similarly, where the accused reported falsely to a Revenue Surveyor that his father had died, in order to have his own name entered in the revenue register as owner of a certain garden and lands, it was held that he had committed an offence under s. 182 and not under this section.[4]

2. **'Makes any statement which is false and which he either knows or believes to be false, etc.'**—There must be a deliberate false statement.

3. **'Touching any point material to the object for which the declaration is made.'**—This provision as to proving materiality shows that the section has no reference to the examination of the witness in a judicial proceeding.[5]

Applications for execution.—This section does not apply to applications for execution containing false averments.[6]

The Special Marriage Act III of 1872.—Every person making, signing or attesting any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in this section (s. 21).

PRACTICE.

Evidence.—Prove (1) that the accused made, or subscribed the declaration in question.

(2) That a Court of Justice, etc., was bound or authorized to receive such declaration as evidence.

(3) That the accused made the statement in question contained in such declaration.

(4) That such statement is false.

(5) That such false statement touched a point material to the object of such declaration.

(6) That when making such false statement, the accused knew that it was false, or believed it to be false, or did not believe it to be true.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.[7]

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[8] There must be proper materials before an action is taken.[8]

Charge.—The accused is entitled to know the exact words which are alleged to have been used by him and which are sought to be made the subject of a charge of perjury.[9]

The charge should run thus:

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

[1] *A. Vedamuttu*, (1868) 4 M. H. C. 185.
[2] *Abdul Majid* v. *Krishna Lal Nag*, (1893) 20 Cal. 724; *Iswar Chunder Guho*, (1887) 14 Cal. 653.
[3] *Rajappa Ramappa Kalal*, (1915) 17 Bom. L. R. 222, 3 Bom. Cr. C. 43.
[4] *Ismail*, (1914) 8 B. L. T. 82.
[5] *A. Vedamuttu*, sup.
[6] *Bapuji Dayaram*, (1886) 10 Bom. 238.
[7] Crim. P. C., s. 195 See ss. 476-478, 487.
[8] See *Abdul Wahid Khan* v. *Abdullah Khan*, (1923) 21 A. L. J. R. 211.
[9] *Ibid.*

That you, on or about the——day of——, at——, in a declaration made (*or* subscribed) by you before——, made a false statement, which you knew (*or* believed) to be false or did not believe to be true, touching a point material to the object for which the declaration was made, to wit—— , and which declaration was by law receivable as evidence, and thereby committed an offence punishable under s. 199 of the Indian Penal Code and within [my cognizance] (*or*) [cognizance of the Court of Session].

And I hereby direct that you be tried [by the said Court] on the said charge.

Using as true such declaration knowing it to be false.

200. Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

COMMENT.

This section bears the same relation to the last section as s. 198 does to s. 197 or s. 196 to ss. 193, 194 and 195. The person who uses a false declaration is made liable as one who makes it.

PRACTICE.

Evidence.—Prove (1) that the declaration is false.

(2) That a Court of Justice, etc., was bound or authroized by law to receive the same in evidence.

(3) That such declaration is false in a material point.

(4) That the accused made such false declaration, or attempted to do so.

(5) That he did as in (4) corruptly.

(6) That when he so used or attempted to use the same, he knew of the falseness thereof.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Complaint.—Complaint in writing of the Court before which the offence is committed or some other Court to which it is subordinate is required.[1]

Charge.—See s. 199.

Punishment.—As for whipping, see the Whipping Act (IV of 1909).

Causing disappearance of evidence of offence, or giving false information to screen offender—

if a capital offence;

201. Whoever, knowing or having reason to believe that an offence has been committed,[1] causes any evidence of the commission of that offence to disappear, with the intention of screening the offender[2] from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

[1] See Criminal Procedure Code, s. 195.

unless his evidence be given under the sanction of an oath on the Holy Gospel.[1] If the Court or public servant is not authorized by any provision of the law, or any rules having the force of law, to receive a declaration in evidence but does receive one, the person making it will not be liable.[2] The accused made a false declaration before a Mamlatdar with a view to obtain a certificate of solvency for the purpose of securing a licence from the Abkari authorities. It was held that no offence was committed under this section inasmuch as no Court or public servant was either bound or authorized by law to receive the declaration in evidence.[3] Similarly, where the accused reported falsely to a Revenue Surveyor that his father had died, in order to have his own name entered in the revenue register as owner of a certain garden and lands, it was held that he had committed an offence under s. 182 and not under this section.[4]

2. **'Makes any statement which is false and which he either knows or believes to be false, etc.'**—There must be a deliberate false statement.

3. **'Touching any point material to the object for which the declaration is made.'**—This provision as to proving materiality shows that the section has no reference to the examination of the witness in a judicial proceeding.[5]

Applications for execution.—This section does not apply to applications for execution containing false averments.[6]

The Special Marriage Act III of 1872.—Every person making, signing or attesting any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in this section (s. 21).

PRACTICE.

Evidence.—Prove (1) that the accused made, or subscribed the declaration in question.

(2) That a Court of Justice, etc., was bound or authorized to receive such declaration as evidence.

(3) That the accused made the statement in question contained in such declaration.

(4) That such statement is false.

(5) That such false statement touched a point material to the object of such declaration.

(6) That when making such false statement, the accused knew that it was false, or believed it to be false, or did not believe it to be true.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.[7]

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[8] There must be proper materials before an action is taken.[9]

Charge.—The accused is entitled to know the exact words which are alleged to have been used by him and which are sought to be made the subject of a charge of perjury.[9]

The charge should run thus:

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

[1] *A. Vedamuttu*, (1868) 4 M. H. C. 185.
[2] *Abdul Majid v. Krishna Lal Nag*, (1893) 20 Cal. 724; *Iswar Chunder Guha*, (1887) 14 Cal. 553.
[3] *Rajappa Ramappa Kalal*, (1915) 17 Bom. L. R. 222, 3 Bom. Cr. C. 43.
[4] *Ismail*, (1914) 8 B. L. T. 82.
[5] *A. Vedamuttu*, sup.
[6] *Bapuji Dayaram*, (1886) 10 Bom. 288.
[7] Crim. P. C., s. 193. See ss. 476-478, 487.
[8] See *Abdul Wahid Khan v. Abdullah Khan*, (1920) 21 A. L. J. R. 211.
[9] *Ibid.*

That you, on or about the——day of——, at——, in a declaration made (*or* subscribed) by you before——, made a false statement, which you knew (*or* believed) to be false or did not believe to be true, touching a point material to the object for which the declaration was made, to wit——, and which declaration was by law receivable as evidence, and thereby committed an offence punishable under s. 199 of the Indian Penal Code and within [my cognizance] (*or*) [cognizance of the Court of Session].

And I hereby direct that you be tried [by the said Court] on the said charge.

Using as true such declaration knowing it to be false.

200. Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

COMMENT.

This section bears the same relation to the last section as s. 198 does to s. 197 or s. 196 to ss. 193, 194 and 195. The person who uses a false declaration is made liable as one who makes it.

PRACTICE.

Evidence.—Prove (1) that the declaration is false.

(2) That a Court of Justice, etc., was bound or authroized by law to receive the same in evidence.

(3) That such declaration is false in a material point

(4) That the accused made such false declaration, or attempted to do so.

(5) That he did as in (4) corruptly.

(6) That when he so used or attempted to use the same, he knew of the falseness thereof.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Complaint.—Complaint in writing of the Court before which the offence is committed or some other Court to which it is subordinate is required.[1]

Charge.—See s. 199.

Punishment.—As for whipping, see the Whipping Act (IV of 1909).

Causing disappearance of evidence of offence, or giving false information to screen offender—

201. Whoever, knowing or having reason to believe that an offence has been committed,[1] causes any evidence of the commission of that offence to disappear, with the intention of screening the offender[2] from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

If a capital offence;

shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

[1] See Criminal Procedure Code, s. 195.

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishable with transportation;

and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

if punishable with less than ten years' imprisonment.

ILLUSTRATION.

A, knowing that B [illegible] of screening B [illegible] for seven years [illegible]

COMMENT.

Object.—This section relates to the destruction of any evidence of the commission of an offence, and includes also the giving of false information with the intention of screening an offender. Sections 202 and 203 relate to the giving or omitting to give such information, and s. 204, to the destruction of documentary evidence. There are three groups of sections in the Code relating to the giving of information. Firstly, ss. 118-120 deal with conceal[illegible] offence; secondly, ss. 176, 177, 18[illegible] with giving of false information: [illegible] causing disappearance of evidence.

This section is intended to reach acts to which ss. 193-195 do not extend, and not to include acts falling under those sections.[1] This section is an attempt to define the position known in English law as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory after the fact.[2]

Principle.—Whenever an offence has actually been committed any [illegible], other than the offender, knowing or [illegible] [illegible]

Scope.—This section does not refer to cases where a person causes the disappearance of evidence of an offence committed by himself, nor can a person be convicted of abetting such.[3] But it applies to persons other than the actual criminals who, by their causing evidence to disappear, assist the principals in escaping the consequences of their offence.[4] It does not apply to a case where the person, who is the probable or possible offender, makes statements exculpating himself by inculpating another.[5] Where, notwithstanding circumstances of

[1] *Mussammat Sharina*, (1884) P. R. No. 42 of 1884.

[2] *Samanta Dhupi*, (1916) 23 C. L. J. 333, 20 C. W. N. 165.

[3] *Kashinath Diplar*, (1871) 8 B. H. C. (Cr. C.) 126; *Ghanasham Ramachandra Mantri*, (1906) 8 Bom. L. R. 538; *Ram Khilawan*, (1906) 28 All. 705; *Ghasia Kewat*, (1899) 12 C. P. L. R. (Cr.) 17.

[4] *Ramsoonder Shoolar*, (1867) 7 W. R. (Cr.) 52; (1866) 5 W. R. (Cr. L.) 6; *Kishna*, (1880) 2 All. 713; *Lalli*, (1885) 7 All. 749; *Dungar*, (1886) 8 All. 252; *Torap Ali*, (1895) 22 Cal. 638; *Fakir-ud-in*, (1877) P. R. No. 4 of 1877; *Mir Afzal*, (1881) P. R. No. 25 of 1881; *Ramaswami Goundan*, (1903) 27 Mad. 271; *Ahmed*, (1924) 1 L. C. 454; *Kudaon*, (1925) 21 N. L. R. 86. But see *Lambya*, (1895) Unrep. Cr. C. 799, Cr. R. No. 56 of 1895.

[5] *Behala Bibi*, (1881) 6 Cal. 789.

grave suspicion, it is impossible on the record, as it stands, to hold that a person is the murderer or one of the murderers, his conviction under this section and s. 203 is not vitiated by the existence of such circumstances.[1]

1. **'Knowing or having reason to believe that an offence has been committed.'**—It must be proved that an offence, the evidence of which the accused is charged with causing to disappear, has actually been committed,[2] and that the accused know, or had information sufficient to lead him to believe, that the offence had been committed.[3] Under the Code no man can be tried for any delusion or misconception of mind, however culpable and criminal such delusion or misconception may appear to be.[4] The words 'knowing or having reason to believe' conclusively negative and preclude the view that the provisions of this section are applicable in cases in which an offence has not been committed. For, it is impossible for any one to know, or to have reason, or sufficient cause, to believe that an offence has been committed when it has not been committed. A person may fancy that he knows or has reason to believe an offence to have been committed, when it has not been committed, but he is mistaken in so fancying. He may, under the influence of such a mistake, remove something which he supposes to have been committed, and he may be morally blamable for so doing. But it is beyond the province of criminal legislation to punish a man for a delusion, or even for an act which has not caused any actual harm to the public or any individual member of society.[5]

As to the word 'offence,' see Expln. to s. 203, *infra*.

2. **'Causes any evidence of the commission of that offence to disappear with the intention of screening the offender.'**—The expression 'any evidence of the commission of that offence' clearly refers, not to evidence in the extensive sense in which that word is used in the Indian Evidence Act, but to evidence in its primary sense as meaning anything that is likely to make the crime evident such as the existence of a wounded corpse, or of blood stains, fabricated documents or similar material objects indicating that an offence had been committed. The statements of a witness and Panchnamas do not...constitute such evidence.[6] The act committed must have been done with the intention of screening the offender from legal punishment: mere knowledge that it is likely to do so is not sufficient.[7] A person cannot be convicted of screening an offender when the offender himself has been tried and acquitted of the offence,[8] or when the offence is that of suicide.[9]

Where a person, through fear, did not interpose to prevent the commission of a murder, and afterwards helped the murderers in concealing the body, it was held that he was not guilty of abetment of murder, but was guilty of an offence under this section.[10] A person who assists the actual murderers in removing the corpse of their victim to a distance from the place where the murder was committed is *prima facie* guilty of an offence under this section, until he can establish that he acted under compulsion.[11] But where the accused, finding in her house the dead body of a girl, who had been murdered by her son, locked the outer door without moving the corpse or concealing it, it was held that she was not guilty of an offence under this section.[12]

Offender himself causing the disappearance of evidence not liable.—Where a person pushed a woman, and she fell into a boat and died instantaneously, and afterwards the prisoner set the boat with the corpse in it afloat down the river, and so concealed the evidence of his offence[13]; and where A and B, after causing the death

[1] *Teprinessa*, (1918) 46 Cal. 427.
[2] *Abdul Kadir*, (1880) 3 All 279, F. B.
[3] *Matuki Mister*, (1885) 11 Cal. 610.
[4] *Abdul Kadir*, sup.
[5] *Ibid.*
[6] *Anverkhan Mahamadkhan*, (1921) 23 Bom. L. R. 823, 6 Bom. Cr. C. 72.
[7] *Toolshee Rai*, (1873) 5 N. W. P. 186; *Pelkoo Nushyo*, (1865) 2 W. R. (Cr.) 43.
[8] *Abdul Kadir*, sup.
[9] *Thakri*, (1911) P. W. R. (Cr.) No. 17 of 1911.
[10] [illegible]
[11] [illegible]
[12] [illegible]
[13] [illegible] 52.

of C in B's field, removed C's body to C's field,[1] it was held that no offence under this section was committed.

Keeping out of the way a witness to the commission of an offence is not causing disappearance of evidence.—Where the accused having reason to believe that a murder had been committed and that B, the wife of the murdered man, was aware of the fact, took B away from the village where it was likely that inquiries would be made, and kept her out of the way lest she should give information, it was held that the taking of measures to keep a person out of the way who was possessed of knowledge of the occurrence of a crime and who was likely to communicate that knowledge to others, did not amount to causing disappearance of evidence within the meaning of the law.[2]

Accessory offence.—A conviction of the accessory offence under this section is not illegal merely because it is suspected, but not proved or admitted, that the accused committed, or was one of the several persons who committed, the principal offence.[3] A person can be charged with the offence of murder, and, in the alternative, with the offence of causing evidence to disappear with the intention of screening the offender.[4] The mere fact that the accused is probably or possibly the principal offender does not prevent his conviction.[5] Where an accused person has been acquitted of a charge of committing a crime, the fact that he had been suspected and tried of the principal offence would not prevent his conviction under this section, if there is clear proof that he has caused evidence to disappear in order to screen some unknown offender from legal punishment.[6]

The Calcutta High Court does not share this view. It has held that this section applies merely to the person who screens the principal or actual offender and not to the principal or actual offender himself. The accused in that case were charged with murder, and also with causing the disappearance of the corpse of the deceased with the intention of screening the murderer from punishment under this section. The evidence for the prosecution pointed conclusively to one or other of them being the actual murderer; but it was impossible upon the evidence to say which of them caused the death. They were acquitted of the charge of murder, but convicted of the charge under this section. It was held that the conviction could not stand.[7]

PRACTICE.

Evidence.—Prove (1) that an offence has been committed.[8] Mere rumour of suspicion is not sufficient.[9]

(2) That the accused knew, or had reason to believe, that such offence has been committed.[10]

(3) That the accused caused evidence thereof to disappear; or gave false information respecting such offence, knowing or having reason to believe, the same to be false.[11]

(4) That the accused did as in (3) with intent to screen the offender from legal punishment.[12]

The following must be proved as an aggravating circumstance:—

(5) That the offence in question was punishable with death, or transportation for life, or with imprisonment extending to ten years.

[1] *Kishna*, (1880) 2 All. 713.

[2] *Muhammad Baksh*, (1882) P. R. No. 21 of 1882.

[3] *Lumbya*, (1895) Cr. R. No 56 of 1895. Unrep. Cr. C. 799. *Muddun Mohun Bose*, (1867) 7 W. R. (Cr.) 22; *Nasru*, (1902) P. R. No. 6 of 1902.

[4] *Hanmappa Rudrappa*, (1923) 25 Bom. L. R. 231, 7 Bom. Cr. C. 58.

[5] *Nga Aung Kyaw Zan*, (1902) 1 L.B.R.316.

[6] *Bucha*, (1903) P. R. No. 1 of 1904.

[7] *Torap, Ali*, (1895) 22 Cal. 633; *Sumanta Dhupi*, (1915) 20 C. W. N. 165, 23 C. L. J. 333

[8] *Mula Singh*, (1895) P. R. No. 19 of 1895.

[9] *Kandipuri Lakshmanna*, (1883) 1 Weir 180.

[10] *Tara Chand*, (1867) P. R. No. 7 of 1867.

[11] (1865) 2 W. R. (Cr. L.) 1; *Hurdut Surma*, (1867) 8 W. R. (Cr.) 68.

[12] *Subbramanya Pillai*, (1866) 3 M. H. C. 251; *Mir Afzal*, (1881) P. R. No. 25 of 1881.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, in cases falling under the first clause; by Court of Session, or Presidency Magistrate, or first class Magistrate, in cases falling under the second; and by Magistrate, Presidency or first class, or by Court by which the offence is triable in cases falling under the third.

Five persons were charged under s. 302 with murder, and two of them were convicted. The evidence established that the other three had assisted in removing the body, knowing that a murder had been committed. Without any further charge being made, they [illegible] disappearance of evidence. It was [illegible] having been made was warranted [illegible].

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, knowing (*or* having reason to believe) that certain offence, to wit——, punishable with——, has been committed, did cause certain evidence of the said offence to disappear, to wit——, [*or* knowingly gave false information, to wit——] with the intention of screening the said (*name of the person committing the offence*) from legal punishment, and thereby committed an offence punishable under s. 201 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court] (*in cases tried by Magistrate omit these words*) on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901).

Intentional omission to give information of offence by person bound to inform.

202. Whoever, knowing or having reason to believe that an offence has been committed,[1] intentionally omits to give any information respecting that offence which he is legally bound[2] to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENT.

This section punishes the illegal omissions of those who are by some law bound to give information, when such omissions are intentional. It is analogous to s. 176. The offence under it will generally be committed by public servants and private persons bound to give information under ss. 44 and 45 of the Criminal Procedure Code.

1. **'Knowing or having reason to believe that an offence has been committed.'**—Under this section, where the *corpus delicti* is not established, there can be no conviction for intentional omission to give information respecting an offence which has not been proved to have been committed.[3]

As to the definition of 'offence,' see Expln. to s. 203, *infra*.

Where a Police Patel failed to report the arrival at his village of dacoits and supplied them with food and drink, it was held that he could not be convicted under this section as there was nothing to show that an offence was committed by persons who visited the village.[3] Where, from the fact of the Police Patel ordering the *kulkarni* to write a report regarding a suspicious death in his village, his good faith was apparent, and it did not appear that he had an intention to omit the report, it was held illegal to convict him of an intention to evade the law about the first report.[4]

2. **'Legally bound.'**—See s. 43, *supra*.

[1] *Begu*, (1925) 6 Lah. 226
[2] *Bala*, (1881) Unrep. Cr. C. 160.
[3] *Ram Ruchea Sing*, (1865) 4 W. R. (Cr.) 29.
[4] *Mhatu Balaji*, (1895) Unrep. Cr. C. 782.

PRACTICE.

Evidence.—Prove (1) that the offence, which was not informed about, has been committed.[1]

(2) That the accused knew, or had reason to believe, that such offence had been committed.[2]

(3) That he omitted to give information thereof.

(4) That such omission was intentional.

(5) That the accused was legally bound to give the information which he omitted to give.[3]

Proc. [illegible] compoundable—Triable [illegible] ary trial.

See [illegible]

203. Whoever,[1] knowing or having reason to believe[2] that an offence has been committed[3] gives any information respecting that offence which he knows or believes to be false,[4] shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Giving false information respecting an offence committed.

Explanation.—In sections 201 and 202 and in this section the word 'offence' includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

COMMENT.

Principle.—A person who knowing that an offence has been committed volunteers information which he knows or believes to be false, obstructs justice, and is therefore punished whether any intention to screen the offender can be proved against him or not, and whatever be the offence which the latter has committed.

Object.—The object of the legislature is not to insure general veracity or the making of correct statements in regard to supposed offences, or offences the commission of which might be falsely or incorrectly reported, but to discourage and punish the giving of false information to the police in regard to offences which were actually committed, and which the person charged knew, or had reason to believe, had been actually committed.[4]

1. **'Whoever.'**—That is, a person other than the offender.

2. **'Reason to believe.'**—See s. 26, *supra*. A belief that an offence has very probably been committed is not enough.

3. **'An offence has been committed.'**—It must be proved not only that [illegible] been commit- [illegible] accused knew [illegible] mitted.[5]

[1] *Ramaswami Udayan*, (1894) 1 Weir 181.

[2] *Nga Saw, Nga Po On*, (1904) 11 Burma L. R. 8, 15.

[3] *Woodoy Chand Mookhopadhya*, (1872) 18 W. R. (Cr.) 31; *Sher Muhammad*, (1857) P. R. No. 20 of 1857; *Mir Afzal*, (1881) P. R. No. 25 of 1881.

[4] *Joynarain Patro*, (1873) 20 W. R. (Cr.) 66. See *Teprinessa*, (1918) 46 Cal. 427.

[5] *Joynarain Patro*, *sup.*; (1865) 2 W. R. (Cr. L.) 1.

The word 'offence' here denotes a thing punishable under the Code or any special or local law (s. 40).

4. **'Gives any information...which he knows or believes to be false.'**—Wilful giving of false information in respect of the commission of an offence is made punishable.

Where a body was found with wounds on the neck and throat which indicated that the deceased had met with foul play, and a village watchman having inspected the body informed at the *thana* that the deceased had died of cholera and there was nothing suspicious in the appearance of the body, he was convicted under this section.[1]

Statement to police.—This section does not apply to the case of a person who gives false evidence as a witness to the police in the course of their investigation in reply to questions put to him. It only contemplates information volunteered by some person. Where the accused, while being examined by the police in answer to questions put to him, falsely stated that certain persons had committed theft and melted stolen property, it was held that he could not be convicted under this section.[2]

Explanation.—The Explanation to this section was added by Act III of 1894, s. 6.

PRACTICE.

Evidence.—Prove (1) that an offence has been committed.

(2) That the accused knew, or had reason to believe, that such offence had been committed.

(3) That he gave the information.

(4) That such information was with respect to that offence.

(5) That the information so given is false.

(6) That when he gave such information he knew or believed it to be false.[3]

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, knowing that on or about the——day of——, at——the offence of——was committed by——gave information respecting the said offence, to wit—, which you knew or believed to be false, and thereby committed an offence punishable under s. 203 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Destruction of document to prevent its production as evidence.

204. Whoever secretes or destroys any document[1] which he may be lawfully compelled to produce as evidence in a Court of Justice,[2] or in any proceeding lawfully held before a public servant,[3] as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence[4] before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall

[1] *Cheetour Chowkeedar*, (1864) 1. W. R. (Cr.) 18.

[2] *Sarju Sonar*, (1910) 7 A. I. J. R. 1150; *Nga Bo Lwin*, (1920) 3 U. B. R. 204.

[3] (1868) 9 W. R. (Cr. L.) 2.

be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section may be compared with s. 175 as it is merely an aggravated form of the offence described in that section.

Scope.—The section applies whether the proceeding is of a civil or criminal nature. Special and local laws requiring production of documents and containing penalties for destruction or obliteration of such are not affected by it.

1. **'Secretes or destroys any document.'**—See s. 40, *supra*, as to the definition of 'document.'

Secreting a document.—Where the plaintiff in a suit referred to arbitration by consent, with a view to prevent a witness from referring to an endorsement on a bond snatched up the bond which was lying beside the arbitrator, ran away, and refused to produce it, it was held that he had committed this offence.[1]

Destroying document.—Where the Police Officer took down at first the report of the commission of dacoity made to him, but subsequently destroyed that report and framed another and a false report of the commission of a totally different offence, he was held guilty of this offence.[2] He had secreted or destroyed the first signed report.

The accused, a police-officer, drew up a *panchnama* and had it signed by a Panch. But finding that it was disfigured by interlineations and scratches, he had the document fairly written out again in textually the same form and had it signed by the same Panch. The rough document was thereupon destroyed. For doing this act, the accused was convicted of an offence punishable under this section. It was held that the accused committed no offence under it, for the fair document which the accused preserved and ultimately presented to the Court must be regarded as the only document which he was lawfully compelled to produce as evidence; and the former writing must be regarded merely as rough notes designed for the preparation of the fair document.[3]

The complainant purported to have committed an offence under s. 477, by wilfully and dishonestly destroying two documents, one said to be a written contract, by which the complainant's firm sold to the accused or to his firm certain quantity of shellac, and another spoken of sometimes as a tender and sometimes as a delivery order bearing endorsement in favour of the complainant's firm made by a certain person. It was held that if the documents were found not to be valuable security within the meaning of s. 477, still this section was applicable to the case.[4]

2. **'Court of Justice.'**—See s. 20, *supra*.

3. **'Public servant.'**—See s. 21, *supra*.

4. **'With the intention of preventing the same from being produced as evidence.'**—The act must have been done with the intention of preventing the [illegible] produced as evidence. Where a *patwari* was convicted [illegible] of the Register of Mutations of a village [illegible] produce in evidence, the conviction was set aside.[5]

There is no question here of the materiality of the evidence. Whether material or not, it must not be secreted or destroyed to evade production in a judicial or other proceeding, if the production may be lawfully compelled.

[1] *Subramania Ohanapati*, (1881) 3 Mad. 291.

[2] *Muhammad Shah Khan*, (1898) 20 All. 307.

[3] *Ganparam Tukaram*, (1912) 14 Bom. L.R. 1163, 1 Bom. Cr. C. 234.

[4] *Debendra Nath Upadhaya v. Bhagirathi Mahto*, (1921) 38 C. L. J. 168.

[5] *Amir Chand*, (1889) P. R. No. 24 of 1889.

PRACTICE.

Evidence.—Prove (1) that the accused secreted or destroyed the document; or that he obliterated, or rendered illegible, the whole, or any part of such document.

(2) That he was lawfully compellable to produce the same as evidence (*a*) in a Court of Justice; or (*b*) in proceedings lawfully held by a public servant.

(3) That he did as in (1), with the intention of preventing the same from being produced or used as such evidence; or that he did as in (1) after he had been lawfully summoned or required to produce the same for that purpose.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, [secreted (*or* destroyed) a document, to wit——, which you may be lawfully compelled to produce as evidence in a Court (*or* in any proceeding lawfully held before a public servant, to wit——)] (*or*) [obliterated (*or* rendered illegible) the whole (*or* a part) of such document with the intention of preventing the same from being produced (*or* used) as evidence before a Court (*or* in any proceeding lawfully held before a public servant, to wit——)] (*or*) [obliterated (*or* rendered illegible) the whole (*or* a part) of such document after you were lawfully summoned (*or* required) to produce the same] and thereby committed an offence punishable under s. 204 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

False personation for purpose of act or proceeding in suit or prosecution.

205. Whoever falsely personates[1] another, and in such assumed character[2] makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution,[3] shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The offence punishable under this section is not merely cheating by using a fictitious name, but by falsely assuming to become other real person and in that character making an admission, confessing judgment, or causing any process to be issued, etc.

The offence of false personation is dealt with in ss. 140, 170, 171, 416, and in this section.

1. **'Personates.'**—Personation is an assumption of the name and character of another, a pretence of being another. "To 'personate' means to pretend to be a particular person."[1]

Where A personated B at a trial with B's consent, which was given to save himself from the trouble of making an appearance in person before the Magistrate, it was held that A was guilty of an offence under this section, and B was guilty of abetment.[2] Where A presented a petition in the name of B who was ill, it was held that A was not guilty, because the mere fact as above disclosed was insufficient to show any intention on the part of A to falsely personate B.[3]

2. **'Assumed character.'**—It is necessary that the accused should have assumed the name and character of the person he is charged with having personated.[4]

[1] Per Crompton, J., in *Hague*, (1864) 4 B. & S. 715, 720.

[2] *Narain Acharj*, (1867) 8 W. R. (Cr. C.) 80.

[3] *Sappaiah*, (1868) 1 M. H. C. 450.

[4] *Ibid.*

3. **'Criminal prosecution.'**—A prosecution under Act III of 1852 is a criminal prosecution within the meaning of this section.[1]

Fraudulent gain.—This offence is committed, even though the individual personated consents to the personation. Any fraudulent gain or benefit to the offender is not an essential element of this offence.[2]

Personation of an imaginary person.—There is a conflict of decisions on the point whether a person commits an offence under this section by personating a purely imaginary person. The Calcutta High Court has in an old case held that a person by such personation commits this offence.[3] The Madras High Court, dissenting from the above ruling, has held that "it is not enough to shew the assumption of a fictitious name. It must also, we think, appear that the assumed name was used as a means of falsely representing some other individual. It is not an uncommon thing for men to pass under names not their own for the purpose of disguise, in some instances from blameless, and in other instances indifferent or bad motives—'*incog*,' as the disguise is often termed in the former, and 'with or under an *alias*' in the latter instances. But, whatever the motive, the use of an assumed name without more is not a criminal offence. It only becomes a crime when connected by proof with some other act or piece of conduct; and the gist of the offence of false personation under s. 205, we think, is the feigning to be another known person... There are sections of the Penal Code under which the false assumption of appearance or character may be an offence, though no individual is meant to be represented, or only an imaginary person. Such are the ss. 140, 170, 171 and 415; but they have no application to the present case, and the last section is made applicable to personation of an imaginary person by an express enactment."[4]

According to the English law such an assumption of an imaginary person does not amount to an offence. One Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin, in the presence of the prosecutor upon a bank at which he had no account, and gave it to the prosecutor as his own cheque drawn in his own name. At the time he drew the cheque he knew that it would be dishonoured. It was held that he was not guilty of forgery.[5]

Liability under other Acts.—False personation before a registering officer[6] and a Marriage Registrar[7] is punishable under this section.

PRACTICE.

Evidence.—Prove (1) that the accused falsely personated the person in question.

(2) That he made the admission, etc.

(3) That he made such admission, etc., in such assumed character.

(4) That such admission, etc., was made in a suit or a criminal prosecution.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[8]

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, falsely personated (*name*) in (*specify the suit or criminal proceeding*) before (*office of judge*) and in such

[1] *Ganga*, (1871) Unrep. Cr. C. 59.
[2] *Suppakon*, (1868) [illegible] 450; [illegible] *Servai*, (1863) 1 Weir [illegible] *Nara* [illegible] (1903) 5 Bom. L. R[illegible]
[3] *Bhitto Kahar*, (1[illegible] S. [illegible]
[4] *Kadar Ravuttan*, [illegible] 18, [illegible]
[illegible]*in*, (1879) 5 Q. B. D. 34.
[illegible] XVI of 1908, s. 82. See *Kalya Nara* [illegible]p.
[illegible] of 1872, s. 67.
[illegible] P. C. s. 195. See ss. 476-478, 487.

assumed character (*specify the admission of statement made, or judgment confessed, or process caused to be issued, or bail or security given, or any other act done*), and that you thereby committed an offence punishable under s. 205 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.[1]

Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution.

206. Whoever[1] fraudulently[2] removes[3], conceals, transfers[4] or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture[5] or in satisfaction of a fine under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice[6] or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made, by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section and ss. 207 and 208 have the effect of rendering criminal all collusive modes by which creditors, or lawful claimants, may be defeated of their just remedies. Sections 421-424 deal with fraudulent transfers.

The concealment or removal of property contemplated in this section must be to prevent the property from being taken. Where the property is already taken and the removal is subsequent, no offence under this section is committed.[2]

Object.—The section awards a punishment for fraudulently removing or concealing property to prevent its seizure as a forfeiture in satisfaction of a fine or from being taken in execution of a decree. The Law Commissioners observe: "If...it is an offence against justice in a culprit to escape from custody in order to avoid execution of a sentence of imprisonment, and an offence to harbour or assist him, and that such offences are fit subjects of punishment, we think he ought to allow upon the same grounds that the removal or concealment of property, or any dealing with it in order to prevent the execution of a sentence, of fine, for example, instead of imprisonment, is an offence against justice and a fit subject of punishment."[3]

1. 'Whoever.'—The offence may be committed by any one and not necessarily by the owners of the property.

2. 'Fraudulently.'—There must be a fraudulent removal, sale, or transfer of property, or of some interest therein, intending thereby to prevent that property from being taken as a forfeiture or in satisfaction of a fine.[4]

There is nothing to prevent a judgment-debtor from disposing of his interest in an attached debt. The Court should not presume a fraudulent intention because he does what he is entitled to do.[5] A person who, to protect his own property not legally liable for the decree from confusion with property which is so liable, makes it over to another person, does not commit an offence under this section.[6]

[1] (1867) 8 W.R (Cr. L.) 18; (1866) 5 W.R. (Cr. L.) 6.

[2] *Murli*, (1888) 8 A. W. N. 237.

[3] 2nd Rep. s., 162.

[4] *Balmokoond Brojobasi*, (1872) 18 W. R. (Cr.) 65.

[5] *Ram Narain* v. *Jokhi Ram*, (1905) 26 A. W N. 26.

[6] *Basappa Shivappa*, (1917) 19, Bom. L. R. 535, 4 Bom. Cr. C. 119.

A person who fraudulently removes property, intending thereby to prevent that property from being taken in execution of a decree made by a Collector, commits an offence under this section.[1]

As to the definition of 'fraudulently,' see s. 25, *supra*.

3. **'Removes.'**—The cutting and carrying of crops, which the accused knew to be under attachment, in execution of a certificate under the Public Demands Recovery Act,[2] was held to be an offence under the latter part of this section.[3]

4. **'Transfers.'**—This word is not defined in the Code, but it has the same meaning as 'transfer of property' defined in s. 5 of the Transfer of Property Act, IV of 1882. 'Transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, and 'to transfer property' is to perform such act. A creditor commits no fraud, who anticipates other creditors and obtains a discharge of his debt by the assignment of any property, which has not already been attached by another creditor.[4] Similarly, the assignment by the decree-holder of a decree obtained upon the basis of a debt which is under attachment does not *per se* amount to the commission of this offence inasmuch as such assignment cannot affect the rights of the attaching creditors.[5]

5. **'Forfeiture.'**—The forfeiture must be under a sentence pronounced by a Court of Justice or other competent authority. The distraint of property by a Collector in the collection of land revenue cannot be described as forfeiture under a sentence pronounced or likely to be pronounced. Two tents were distrained under the orders of a Revenue authori[illegible] of an arrear of land revenue, and were committed to the care of [illegible] r the sale of the property arrived, the accus[illegible] or value and concealed or removed those distrained. It was held that they were not guilty under this section.[6]

6. **'Court of Justice.'**—See s. 20, *supra*.

Statutory application.—The section is made applicable to the Bengal Public Demands Recovery Act,[7] s. 58; the Bihar and Orissa Public Demands Recovery Act,[8] s. 67.

PRACTICE.

[illegible] had been, or was, to the knowl- [illegible] that the decree or order had been, or was to the knowledge of [illegible] e, made.

(2) That it was a Court of Justice or other competent authority pronouncing or about to pronounce such sentence; or that it was a Court of Justice making or about to make such decree or order; such decree or order being in a civil suit.

(3) That the property in question or interest therein had become, or was likely to become, liable to be taken as a forfeiture of such fine, or taken in execution of such decree or order.

(4) That the accused removed, concealed, transferred or delivered such property or interest therein with intent thereby to prevent such property from being taken.

(5) That he did as above with intent to defraud.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

[illegible] v. *Krishna* S. N.) 388) 8 A. W. N. [illegible]

[1] Beng. Act I of 1895.

[2] *Sunder Dasadh* v. *Sital Mahto*, (1900) 28 Cal. 217.

[4] *Appa Mallya*, (1876) Unrep. Cr. C. 110.

[5] *Ram Narain* v. *Jolhi Ram*, (1905) 26 A. W. N. 26.

[6] *Murli*, sup.

[7] Act III of 1913.

[8] Act IV of 1914.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[1]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, fraudulently removed (*or* concealed, *or* transferred, *or* delivered to——) your property (*specify it*) intending thereby to prevent the said property from being taken as a forfeiture (*or* fine), under the sentence which had been pronounced (*or* which you knew to be likely to be pronounced) by (*specify the Court of Justice, etc.,*) in criminal case No.— {(*or* from being taken in execution of the decree which had been made by (*specify the Court*) in Civil Suit No.——)}, and that you thereby committed an offence punishable under s. 206 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Fraudulent claim to property to prevent its seizure as forfeited or in execution.

207. Whoever[1] fraudulently[2] accepts, receives or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced or which he knows to be likely to be pronounced by a Court of Justice[3] or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section deals with the receiver, acceptor, or claimer of property to prevent its seizure as a forfeiture. It punishes the accomplice just as the preceding section punishes the principal offender.

1. '*Whoever.*'—See s. 206, *infra.*
2. '*Fraudulently.*'—See s. 25, *supra.*
3. '*Court of Justice.*'—See s. 20, *supra.*

PRACTICE.

Evidence.—Prove (1) that the sentence of fine had been, or was to the knowledge of the accused likely to be, pronounced; or that the decree or order had been, or was to his knowledge, likely to be made.

(2) That it was a Court of Justice, or other competent authority, pronouncing, or about to pronounce such sentence; or that it was a Court of Justice making, or about to make, such decree or order in a civil suit.

(3) That the property in question or interest therein had become, or was likely to become, liable to be taken as a forfeiture for each such fine; or taken in execution of such decree or order.

(4) That the accused accepted, received or claimed such property or interest with intent to defraud; or that he practised a deception touching the right thereto.

(5) That he then had no right or rightful claim thereto.

[1] Criminal Procedure Code, s. 195. See *Lala Bahrumal.* (1893) Unrep. Cr. C. 803; *Sunder Dasadh* v. *Sital Mahto.* (1900) 28 Cal. 217. See also ss. 476-478, 487.

(6) That he then knew he had no right or rightful claim thereto.

(7) That he did as above in order to prevent such property or interest from being so taken.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[1]

Fraudulently suffering decree for sum not due.

208. Whoever[1] fraudulently[2] causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied,[3] or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

ILLUSTRATION.

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him for a larger amount [illegible] him, in order that B, either on his [illegible] in the proceeds of any sale of Z's [illegible]. Z has committed an offence under this section.

COMMENT.

This section prevents the abuse of getting some one to file a collusive suit for recovery of the whole property and suffering a decree to be passed. It punishes persons making fictitious claims in order to secure the property of the defendant against persons to whom he may become indebted in future.

1. 'Whoever.'—See s. 206, *infra*.

2. 'Fraudulently.'—See s. 25, *supra*. Fraud is the essence of the offence under this section.

3. 'Satisfied.'—See s. 214, *infra*.

PRACTICE.

Evidence.—Prove (1) that the accused caused, or suffered, the decree or order to be passed against him.

(2) That such decree or order was for a sum not due by the accused; or for a sum larger than was due; or for property or interest therein to which the decree-holder was not entitled.

(3) That the accused did as in (1) with intent to defraud.

Or prove the following points:—

(1) That a decree against the accused had been satisfied.

(2) That he, afterwards, caused or suffered such decree or order to be executed against him.

(3) That such execution was for that in respect of which it had been so satisfied.

(4) That the accused did as above with intent to defraud.

[1] Criminal Procedure Code, s. 195.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[1]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently caused (*or* suffered) a decree (*or* order), to wit——, in Suit No.—— of the Court of——to be passed against you, and which was for a sum not due [*or* for a larger sum than is due to such person *or* for any property or interest in property to which the decree-holder was not entitled *or* fraudulently caused (*or* suffered) a decree (*or* order), to wit——, decree No.——, in Suit No.——, decided by the Court——on——, to be executed against you after it had been satisfied] and thereby committed an offence under s. 208 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Dishonestly making false claim in Court.

209. Whoever fraudulently[1] or dishonestly,[2] or with intent to injure[3] or annoy any person,[4] makes in a Court of Justice[5] any claim which he knows to be false,[6] shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

COMMENT.

This section relates to false and fraudulent claims in a Court of Justice.[2] It is much wider than the last section as it applies to a person who is acting fraudulently or dishonestly. Not only the claim must be false within the knowledge of the person making it, but the object of it must be to defraud, to cause wrongful loss or wrongful gain, to injure or to annoy.[3] The section punishes the making of a false claim. The offence will be complete as soon as a suit is filed. If a person applies for the execution of a decree which has already been executed, his act will be an offence under the next section.

1. '**Fraudulently.**'—See s. 25, *supra.*

2. '**Dishonestly.**'—See s. 24, *supra.*

3. '**Injure.**'—See s. 44, *supra.*

4. '**Any person.**'—It is not necessary that the party to whom the offender intends to cause wrongful loss or annoyance should be the party against whom the suit is instituted (Explanation in the Draft Code).[4] The object of the suit may be to defraud a third party.

5. '**Court of Justice.**'—See s. 20, *supra.*

6. '**Any claim which he knows to be false.**'—A person who brings a claim in the Civil Court which he knows to be false commits an offence under this section. He does not by so doing, if he succeeds, commit the offence of extortion, or, if he fails, of attempting to commit extortion.[5] An attempt to execute a decree cannot correctly be described as a false claim.[6] The section is not limited to cases where the whole claim made by the defendant is false. The accused brought a suit against a person to recover Rs. 88-11-0, alleging that the whole of the amount was due from the defendant. The defendant produced a receipt purporting to have been

[1] Criminal Procedure Code, s. 195. See also ss. 476-478 and 487.

[2] *Beegun Mahtoon,* (1869) 12 W. R. (Cr.) 37. There appears to be a slip in the judgment reported, and consequently the latter part of the head-note is inaccurate.

[3] 2nd Rep., s. 170.

[4] *Ibid,* s. 166.

[5] *Khashal,* (1917) 20 O. C. 129.

[6] *Beegun Mahtoon,* sup.

made by the plaintiff for a sum of Rs. 71-3-3, and this amount was proved to have been paid to the accused. The accused was thereupon prosecuted and convicted under this section. It was contended on his behalf, in revisionary application, that because a part of the accused's claim was held to be well-founded and due and owing, he could not be convicted under this section. It was held that the conviction was right. Straight, J., said: "If that view were adopted, a man having a just claim against another for Rs. 5, may make claim for Rs. 1,000, the Rs. 995 being absolutely false, and he may escape punishment under this section."[1]

A person cannot be convicted both of fraudulently and dishonestly making a false claim in a Court of Justice and of falsely attesting the plaint in the false case, the latter being an essential ingredient of the former offence.[2]

PRACTICE

Evidence.—Prove (1) that the claim in question was made in a Court of Justice.
(2) That the accused made such claim.
(3) That such claim was a false one.
(4) That the accused when making such claim knew it to be false.[3]
(5) That he made such claim, intending to defraud, or to cause wrongful gain or loss, or annoy the person in question.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[4]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently (*or* dishonestly *or* with intent to injure *or* annoy any person) made a claim, to wit——(*state the particulars of the claim*) in Suit No.——of——in the Court of——and which you knew to be false, and thereby committed an offence under s. 209 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Fraudulently obtaining decree for sum not due.

210. Whoever fraudulently[1] obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed[2] against any person after it has been satisfied[3] or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section is a counterpart of s. 208 in respect of fraudulent decrees, just as s. 207 is the counterpart of s. 206 in respect of fraudulent transfers and conveyances; the object of the Code being to penalise both parties alike. This section taken together with s. 208 will enable both plaintiff and defendant to a fraudulent or collusive suit or execution to be dealt with alike. Section 208 punishes the fraudulent defendant, this section, the fraudulent plaintiff.

[1] *Bulaki Ram*, (1889) 10 A. W. N. 1.
[2] *Zar Muhammad Khan*, (1901) 21 A. W.N. 187.
[3] *Bansilal*, (1888) P. R. No. 38 of 1888.
[4] Criminal Procedure Code, s. 195.

1. **'Fraudulently.'**—See s. 25, *supra*, as to the definition of 'fraudulently.' In this and in the corresponding s. 208 the intention to defraud is essential. The offence is committed when decree is fraudulently obtained and the fact that the decree has not been set aside, though admissible to prove that there was no fraud, is not a bar to a prosecution under this section.[1] If there is a mistake through misunderstanding but not fraud, no offence under this section is committed.[2]

2. **'Causes a decree or order to be executed.'**—The mere presentation of an application for execution of a decree already executed will not be sufficient. The accused must have caused the decree to be executed against the opposite party 'after it has been satisfied.'[3] The 'decree or order' must be that of a civil or Revenue Court. The orders of a criminal Court are merely declaratory and do not, therefore, come within this section.

3. **'After it has been satisfied.'**—These words indicate only the fact of the satisfaction of the decree. The fact that the satisfaction is of such a nature that the Court executing the decree could not recognize it, not being certified to the Court, does not prevent the decree-holder from being properly convicted of an offence under this section.[4] The words 'any Court' in s. 258 (O. XXI, r. 2), Civil Procedure Code, have no application to a criminal Court, investigating a charge of fraudulently executing a decree under this section. Those words do not bar any criminal remedy which an injured judgment-debtor may have against a fraudulent decree-holder, whether by a prosecution under ss. 193, 210, 406, or any other section of the Code.[5]

The word 'satisfied' in this section is to be understood in its ordinary meaning and not as referring to decrees, the satisfaction of which has been certified to the Court.[6]

M obtained a decree for the sale of half of certain property. He executed the decree thrice. First, he applied for the sale of the half but in his second application, which was infructuous, he applied for the sale of the whole property and actually got the same sold by his third application. On the judgment-debtor's objection, part of the property was exempted and the decree-holder was put on his trial for an offence under s. 193 which in appeal was changed to this section. It was held that the facts proved did not establish a criminal intention.[7]

When offence is complete.—The offence of fraudulently causing a decree, wholly or in part satisfied, to be executed is completed when application for execution has been presented and upon it the judgment-debtor has been summoned to show cause why it should not be executed. In such a case the offence is not complete until either the judgment-debtor has appeared and made no objection, or has made an objection which has been overruled, and the Court has thereupon proceeded to order execution.[8]

PRACTICE.

Evidence.—Prove (1) that the accused obtained the decree or order or suffered or permitted the same to be done in his name.

(2) That such decree or order was for a sum not due; or that it was for a sum larger than what was actually due; or that it was for property, or an interest therein, to which he was not entitled.

(3) That the accused did as above with intent to defraud.

[1] *Molla Fuzla Karim*, (1905) 33 Cal. 193.

[2] *Daya Ram*, (1914) P. L. R. No. 64 of 1914, P.W.R. (Cr.) No. 11 of 1914.

[3] *Shama Charan Das* v. *Kasi Naik*, (1896) 23 Cal. 971. See *Beegun Mahtoon*, (1869) 12 W. R. (Cr). 37; *Lalu*, (1885) P. R. No. 7 of 1885.

[4] *Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit*, (1888) 16 Cal. 126; *Muttura-man Chetti*, (1881) 4 Mad. 325; *Pillala*, (1895) [illegible] v. *Dera* [illegible] n. 288.

[5] [illegible]

[6] [illegible]

[7] *Mangat Rai*, (1909) 7 A. L. J. R. 93.

[8] *Naurang Mal*, (1902) P. R. No. 13 of 1902.

Or prove the following points:—

(1) That the accused obtained the decree or order.

(2) That he obtained satisfaction thereof.

(3) That, after obtaining such satisfaction, he caused such decree or order to be executed, or suffered, or permitted the same to be so done in his name.

(4) That such execution was so obtained, etc., for that in respect of which it had been so satisfied.

(5) That the accused did as above with intent to defraud.

Procedure.—Not cognizable——Warrant—Bailable—Not *compoundable*—Triable by Magistrate, Presidency or first class.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[1]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently obtained a decree (*or* order) in Suit No.——of——against——for Rs.——which was not due (*or* was a larger sum than was due) [*or* for any property or interest in property to which you are not entitled] [*or* fraudulently caused a decree (*or* order) to be executed against——after it had been satisfied (*or* fraudulently suffered or permitted any such act to be done in your name)] and thereby committed an offence punishable under s. 210 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

False charge of offence made with intent to injure.

211. Whoever, with intent to cause injury to any person,[1] institutes or causes to be instituted any criminal proceeding against that person,[2a] or falsely charges any person with having committed an offence,[2b] knowing that there is no just or lawful ground for such proceeding or charge[3] against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

and if such criminal proceeding be instituted[4] on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The section includes two distinct offences, namely, (1) actually instituting or causing to be instituted false criminal proceedings, and (2) preferring a false charge.[2] The former assumes the latter, but the latter may be committed where no criminal proceedings follow. Difference is made in punishment according as the charge relates to offences punishable with imprisonment which may extend to seven years or more or otherwise. But under the second paragraph there should be an actual institution of a criminal proceeding on a false charge. The mere making of a false charge would be punishable under the first paragraph. Thus two conditions are necessary before the enhanced punishment provided in the second paragraph could be inflicted: (1) proceedings on the false charge should have been actually

[1] Criminal Procedure Code, s. 195.

[2] *Jan Muhammad Husen*, (1885) P. R. No. 1 of 1886; *Nobokisto Ghose*, (1887) 8 W. R. (Cr.) 87; *Rampat*, (1900) P. R. No. 26 of 1900.

instituted, and (2) the false charge must be in respect of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards.

Sections 182 and 211.—The Bombay High Court has held that the criminal law makes a clear distinction between a false charge which comes under s. 211 and false information given to the police, in which latter case the offence falls under s. 182. A person prosecuting another under s. 182 need not prove malice and want of reasonable and probable cause, except so far as they are implied in the act of giving information known to be false, with the knowledge or likelihood that such information would lead a public servant to use his power to the injury or annoyance of the complainant. In an enquiry under s. 211, on the other hand, proof of the absence of just and lawful ground for making the charge is an important element.[1] The action which s. 211 renders penal is the action entailing very serious consequences and therefore more serious consideration is required on the part of the individual who takes it. It is sufficient, therefore, in such cases, for the prosecution to establish that there w[illegible] taken and that the accused knew this. [illegible] 182. The prosecution must prove not m[illegible] cause for giving the information, but a positive knowledge or belief of the falsity of the information given.[2] If the information conveyed to the police amounts to the institution of criminal proceedings against a defined person or amounts to the falsely charging of a defined person with an offence, then the person giving such information is guilty of an offence under s. 211. In such a case, s. 211 is, and s. 182 is not, the appropriate section under which to frame a charge. Section 182, when read with s. 211, must be understood as referring to cases where the information given to the public servant falls short of amounting to an institution of criminal proceedings against a defined person and falls short of amounting to the falsely charging of a defined person with an offence as defined in the Penal Code.[3] Where a person specifically complains that another man committed an offence, and does so falsely with the object of causing injury to that person, he is guilty of making a false charge of an offence under s 211 and not under s. 182.[4]

A petition made by a person to the police falsely stating that the petitioner suspects another person of having committed an offence and praying for an inquiry, does not amount to an institution of criminal proceedings against that person within the meaning of s. 211. The petitioner should be charged under s. 182 with having given false information with intent to cause a public servant to use his lawful power to the injury of another person.[5] A First Class Magistrate cannot give himself jurisdiction to try an offence under s. 211 by treating it as an offence under s. 182.[6]

The Calcutta, Madras, and Allahabad High Courts differ from the view of the Bombay High Court. The Calcutta High Court has ruled that a prosecution for a false charge may be under s. 182 or s. 211 [illegible] Magistrate to proceed under either section, although, in cases of a more serious nature, it may be that the proper course is to proceed under s. 211.[8] Where a false charge is made to the police of a cognizable offence, the offence committed by the person making the charge falls within the meaning of s. 211 and not s. 182.[9]

[1] *Raghavendra* v. *Kashinath Bhat*, (1894) 19 Bom. 717.

[2] *Ramkrishna Yeshwant Adarkar*, (1906) 9 Bom. L. R. 33.

[3] *Apaya Tatoba Munde*, (1913) 15 Bom. L. R. 574, 2 Bom. Cr. C. 86

[4] *Arjun*, (1882) 7 Bom. 184; *Arjun*, (1863) 1 B. H. C. (Cr. C.) 87.

[5] *Gopal Bhikaji*, (1873) Unrep. Cr. C. 72

[6] *Lakshman*, (1893) Cr. R. No. 30 of 1893 Unrep. Cr. C. 670.

[7] *Sarada Prasad Chatterjee*, [illegible] Cal. 184.

[8] *Giridhari Naik*, (1901) 5 C. W. N. 727.

The Madras High Court has taken the same view as the High Court of Calcutta. It has held that there is no error in a conviction under s. 182, when the false charge made before the police is punishable under the final clause of s. 211. The High Court may quash the conviction and sentence for the minor offence and direct a trial before a tribunal having jurisdiction for the graver; but whether it will do so, or not, is a question not of law, but of expediency on the facts of the particular case.[1] A person making a false charge of theft to the police is liable to be punished both under ss. 182 and 211, though his primary object in making the charge may have been to protect himself rather than to injure the person falsely charged.[2] In a later case, however, it has held that for an offence under s. 182 it is only necessary that the information given by the accused to a public servant should be false to his knowledge, whereas to constitute an offence under s. 211, it is necessary that the accused should institute or cause to be instituted some criminal proceedings against another person or should falsely charge him with having committed an offence.[3]

The Allahabad High Court once held that where a specific false charge was made, the proper section, for proceedings to be adopted under, was s. 211.[4] But this view is modified in a subsequent case in which Edge, C. J., says that "although it is difficult to see what case could arise under s. 211 to which s. 182 could not be applied, yet s. 182 would apply to a case which might not fall under s. 211. The [illegible] information is given to a public servant [illegible] who intends thereby to cause such public [illegible] against a third person. The offence is [illegible] towards the institution of such [illegible] all necessary that the public [illegible] information before instituting [illegible] 182 against the person who had given such false information... In cases to which s. 211 especially applies, and in which a criminal proceeding has been instituted, a Court should,... as a rule, proceed to determine such criminal proceeding instituted in it and should give the [illegible] [illegible] minal Procedure Code of 1882 upon the prosecution of an offence under [illegible] ss. 182 or 211. It appears to us that it has been left to the discretion of the Court [illegible] charges preferred in Court to a Magistrate, and [illegible] information was given to the police.[6] [illegible] Punjab expressed its opinion similar to that of [illegible] se where A falsely, and with intent to injure, informed the police that B had stolen property in his house. The police searched B's house, and the information proved to be false. It was held that A had instituted criminal proceedings and he was guilty of an offence under this section and not under s. 182.[7]

The former Chief Court of Lower Burma adopted the view of the Calcutta, Allahabad and Madras High Courts.[8]

Ingredients.—The necessary ingredients to constitute a false charge under this section are three:

1. An intention to cause injury to a particular person.

[1] (1872) 7 M. H. C. App. 5.
[2] *Venkata Reddi*, (1898) 1 Weir 120.
[3] [illegible] W. N. 875.
[4] [illegible] 17, 338.
[5] *Hardwar Pal*, (1912) 34 All. 522, 527.
[6] *Mathra v. Roora*, (1870) P. R. No. 16 of 1870. See *Todar Mal v. Musammat Bholi*, (1882) P. R. No. 14 of 1882.
[7] [illegible]
[8] *Ma Saw Yin*, (1921) 11 L. B. R. 43.

2. Such injury should have been intended—

(a) by instituting or causing to be instituted criminal proceedings against that person, or

(b) by falsely charging him with having committed an offence.

3. Knowledge that there is no just or lawful ground for such proceeding or charge against that person.

1. 'Whoever with intent to cause injury to any person.'—The word 'whoever' indicates that this section applies to anyone who contravenes its provisions. The section applies not only to a private individual, but also to an officer who brings a false charge of an offence with intent to injure. 'Intent to cause injury' is an essential part of the offence.[1] The phrase is precisely the same as the English legal term 'maliciously.' 'Injury' denotes any harm whatever, illegally caused to any person in body, mind, reputation or property (s. 44.)

2a. 'Institutes or causes to be instituted any criminal proceeding.'—The term 'institution' means the institution either by the accused himself, or by the Police or others in consequence of the accused's action, in some criminal Court.[2] Institution of a criminal proceeding means laying of an information before a Magistrate.[3] Under this section 'instituting a criminal proceeding' may be treated as an offence in itself apart from 'falsely charging' a person with having committed an offence.[4] There are two modes in which a person aggrieved may seek to put the criminal law in motion: (1) by giving information to the police,[5] and (2) by lodging a complaint before a Magistrate.[6] A person who sets the criminal law in motion by mailing to the police a false charge in respect of a *cognizable offence* institutes criminal proceedings under the first part of this section; and it is not necessary that the complaint should be made to a Magistrate.[7] But as the police have no power to take any proceedings in *non-cognizable* cases without the orders of a Magistrate, a false charge of such offence, made to the police, is not an institution of criminal proceedings but merely a false charge.[8] The distinction between cognizable and non cognizable offences relates to the powers of the police only, and it will, therefore, seem that the false charge of any offence, whether cognizable or non-cognizable, before a Magistrate, is an institution of criminal proceedings.

If a person files an information before a Magistrate, disclosing circumstances of a civil nature, he cannot be proceeded with under this section if the circumstances alleged by him are found to be false.[10]

2b. 'Falsely charges any person with having committed an offence.'—"The words 'falsely charging' .. must be construed along with the words which speak of the 'institution of proceeding.' These latter words are obviously used in a technical and exclusive sense, and by parity of reasoning, the same restricted sense must be given to the words which relate to a false charge."[11] The words 'falsely charges' must be restricted to a charge made to some person in authority, that is to say, to some person who is in a position to get the offender punished. The charge must be embodied either in a complaint to a Magistrate or in a report of a cognizable offence to a police-officer.[12] The word 'charges' means something different from 'gives information.' The true test seems to be, does the person, who makes the statement which is alleged to constitute the 'charge,' do so with the

[1] *Nabadeep Chunder Sirkar*, (1869) 11 W. R. (Cr.) 2.

[2] *Gopal Dhanuk*, (1891) 7 Cal. 96

[3] *Muhammad Hayat*, (1921) P. W. R. No. 6 of 1922.

[4] [illegible] (Cr.) 87. [illegible] Code. [illegible] m. 596; [illegible] s.; *Bhika Lala*, (1890) Cr. R. No. 55 of 1890, Unrep. Cr. C. 524; *Bonomally Sohas*, (1866) 5 W. R. (Cr.) 32; *Parahu*, (1883) 5 All. 598; *Nanjunda Rau*, (1896) 20 Mad. 79; *Mt. Chhoti Bi*, (1906) 2 N. L. R. 119.

[5] *Karim Baksh*, sup

[6] *Raghoo*, (1865) Unrep. Cr. C. 3.

[7] Per Ranade, J., in *Karigowda*, (1894) 19 Bom. 51, 69.

[8] *Gaya Barhai*, (1922) 26 O. C. 44; *Chhedi Upadhya*, (1922) 4 P. L. T. 703

intention and object of setting the criminal law in motion against the person against whom the statement is directed? Such object and intention may be inferred from the language of the statement and the circumstances in which it is made.[1] A petition was presented with the object of bringing to the knowledge of the authorities certain matters regarding which the petitioner had received information, in order that there might not be a repetition of an alleged tutoring of witnesses, and not with the object that the authorities should institute criminal proceedings. It was held that the petition did not amount to a 'charge' within the meaning of this section.[2]

Two out of three Judges comprising a Full Bench of the Madras High Court have held that the words 'false charge' must not be understood in any technical or restricted sense, but in their ordinary meaning of a false accusation made to any authority bound by law to investigate it or to take any steps in regard to it, such as giving information of it to superior authorities; and the institution of criminal proceedings includes the setting of the criminal law in motion. A complaint to a Village Magistrate, in such a case, amounts to a 'charge' and is also an institution of criminal proceedings. It would be otherwise if the offence complained of is one in regard to which the information need not, under s. 45 of the Code of Criminal Procedure, be passed to the higher authorities.[3] A complaint made to an executive officer as such which contains certain imputations against a person is not making a false charge.[4]

In the first part of this section the expressions "institutes or causes to be instituted any criminal proceeding" and "falsely charges" are used, and in the [illegible] be instituted" is only used. [illegible] court that the [illegible] uting proceed- [illegible] and that only what fell within the former phrase was [illegible] Wilson, J., who delivered the judgment of the [illegible] reasoning in one sense and not in another. I agree that we must take it that the Legislature did not regard the two phrases as co-extensive in meaning, but considered that they were, or might be, cases to which the one would apply and not the other. But I do not think we are to suppose that the Legislature meant phrases to be mutually exclusive in meaning, so that the instituting of criminal proceedings must be by something which is not a charge, and a charge must be something which is not the institution of criminal proceedings. [illegible] First, because there is no mode by which [illegible] dings except by making a charge; [illegible] does it all, to whatever length the [illegible] And secondly, because the last part of the section speaks of [illegible] se charge.'"[5] [illegible] that the charge was deliberately made before an officer of [illegible] It is not necessary [illegible] that a false charge is made though no prosecution is [illegible] charge should not be pending at the time of the offender's trial.[6] It is not necessary

[1] *Rayan Kutti*, (1909) 26 Mad. 640, 643; *Solaimuthu Pillai* v. *Marangaih Moopan*, (1916) M. W. N. 272; *Zorawar Singh*, (1911) 8 A. L. J. R. 1106; *Nihala*, (1872) P. R. No. 14 of 1872.

[2] *Rayan Kutti*, sup.

[3] *Sivan Chetti*, (1909) 32 Mad. 258, F. B., per Benson and Munro, JJ., Sankaran Nair, [illegible] *Gowd*, (1908) [illegible] ular facts it [illegible] this section

[4] *Zain-ul-Abdin* v. *Mistri Nawab Din*, (1908) P. W. R. (Cr.) No. 2 of 1909

[5] *Karim Buksh*, (1889) 17 Cal. 574, 578, F. B.

[6] *Subbanna Goundan*, (1862) 1 M. H. C. 30; *Abul Hasan*, (1877) 1 All. 497; *Chenna Malli Gowda*, (1903) 27 Mad. 129; *Bhairab Chandra Barua*, (1919) 46 Cal. 807.

[6] *Subbanna Goundan*, sup.; *Salik*, (1877) 1 All. 527; *Gati Mandal*, (1905) 4 C. L. J. 88; *Bishoo Barik*, (1871) 16 W. R. (Cr.) [77] 67; *Hukam Singh*, (1886) P. R. No. 28 of 1886.

that summons should be issued upon such complaint[1]; or that the statement made by the accused to the police officer should be reduced to writing in accordance with s. 154 of the Criminal Procedure Code.[2]

Bare statement is not a false charge.—A statement to the police of a suspicion that a particular person has committed an offence is not a charge within the meaning of this section, nor does it amount to an institution of a criminal proceeding, and a conviction cannot be had on proof that the suspicion was unfounded.[3] A made a report to the police that his buffalo had been poisoned and that he suspected G of having administered the poison. The police made an inquiry and reported that there was no case of poisoning and the charge was struck out. G then brought a complaint under this section against A. It was held that the report to the police did not amount to a charge of a criminal offence.[4] One G sent a registered letter to the Superintendent of Police complaining that the Sub-Inspector had exacted a bribe. An enquiry was made by the prosecuting Inspector, after which he moved the Court by means of a letter to prosecute G under this section. It was held that no offence under this section was committed as the section contemplated that the charge should be made to some person in authority who was in a position to get the offender punished.[5] Something more is requisite than merely to falsely impute against a person that he has committed an offence. The 'charge' contemplated in this section appears both from the context and from the position of the section to be a charge made in order to the institution of criminal proceedings.[6] If the statement is followed up by active steps against the person said to be suspected that is a charge.[7]

False charge should be made to a Court or to an officer having jurisdiction to investigate.—The false charge must be made to a Court or to an officer who has power to investigate and send it up for trial.[8] It must be an accusation made with the intention to set the law in motion.[9]

A woman appeared before the Station Staff Officer and accused a non-commissioned officer of rape; and, after a military inquiry, the military authority held that the charge was false and directed the complainant to be prosecuted under this section. The conviction was set aside.[10] Where the petitioner laid a charge of mischief by fire at a *thana*, which was reported to be false, and the District [illegible] Prosecution under s. 211, Indian Penal Code, sanctioned. To Babu M. N. Mukerjee for trial." It was held that the order of the District Magistrate was bad as the matter of the false charge had not come before him in the course of a judicial proceeding.[11]

A person made a complaint to a District Registrar against the conduct of a subordinate officer, a Sub-Registrar, [illegible] the latter had misappropriated [illegible] a commission, and the District [illegible] was satisfied as to the falsity of the complaint and made a report to himself as District Magistrate, and in this latter capacity passed the following order: "Read report of District Registrar. Prosecution of EB under ss. 211 and 182 of the Indian Penal Code sanctioned. Summon EB: ss. 182 and 211, Indian Penal Code." It was held that it was

[1] *Hardeo Singh* v. *Hanuman Dat Narain*, (1903) 26 All. 214, F. B.

[2] *Mallappa Reddi*, (1903) 27 Mad. 127.

[3] *Bramanund Bhattacharjee*, (1881) 8 C.L.R. 233; *Kangowda*, (1894) 19 Bom. 51; *Karim Bakhsh*, (1904) P. R. No. 12 of 1905; *Saminatha Thevan*, [1912] M. W. N. 1125

[4] *Abdul Ghafur*, (1924) 6 Lah. 28.

[5] *Gaya Barhai*, (1922) 26 O. C. 44.

[6] *Ghulam Hussain*, (1878) P. R. No. 14 of 1879.

[7] *Hunooman Lall*, (1872) 19 W. R (Cr.) 5; *Muthra* v. *Roora*, (1870) P. R. No 16 of 1870.

[8] *Jamoona*, (1881) 6 Cal. 620; *Brojo Bashi Panda*, (1908) 13 C. W. N. 398.

[9] *Mathura Prasad*, (1917) 39 All. 715

[10] *Jamoona*, sup.

[11] *Haibat Khan*, (1905) 33 Cal. 30.

clear from the record whether the District Magistrate purported to act under s. 195 or s. 476 of the Criminal Procedure Code. If he purported to act under s. 195, then the sanction would be without jurisdiction as to s. 182, Indian Penal Code, inasmuch as he was not the public officer concerned or the public officer to whom he was subordinate; and so far as the sanction related to this section it was equally without jurisdiction as there was no offence committed in or in relation to any proceedings in Court.[1]

A peon sent a telegram to the Collector saying that the Tahsildar and certain others in his absence entered his house and forcibly inoculated his wife and children. The Collector sent the telegram to a Magistrate who examined the peon and certain witnesses who stated that they had heard that the complainant's house was forcibly entered into. Finding the statement false he directed the prosecution of the complainant and his witnesses. It was held that the complaint was no complaint in law and a prosecution could not be maintained against the peon under this section.[2]

Statement under s. 162, Criminal Procedure Code.—A statement under s. 162 of the Criminal Procedure Code in answer to questions put by a police-officer making an investigation under s. 161 of that Code cannot be made the basis of a prosecution under this section.[3] Such a statement is not a complaint or charge and cannot be made the basis of a prosecution for an offence under this section.[4]

'Offence' means a thing punishable under the Code or under any special or local law (s. 40). The criminal proceedings and false charges contemplated by this section mean proceedings instituted and charges made according to the provisions of criminal law in force in British India.[5]

3. **'Knowing that there is no just or lawful ground for such proceeding or charge.'**—This expression is the equivalent of the English technical phrase "without reasonable or probable cause," which means "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: first, an honest belief of the accuser [illegible] on an honest convic- [illegible] conclusion; [illegible] rounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reaso [illegible] the accused."[6] "Unless the person making [illegible] no just or lawful ground for it, he is not guilty of the offence, and cannot properly be convicted of it. It is not enough to find that he has acted in bad faith, that is, without due care or inquiry, or that he has acted maliciously, or that he had no sufficient reason to believe or did not believe the charge to be true. The actual falsity of the charge, recklessness in acting upon information without testing it, [illegible] charged, these are all [illegible] lusion must be, in order [illegible] knew that there was no just or lawful ground for proceeding. It may be difficult to prove this

[1] *Elahi Bux*, (1909) 11 C. L. J. 111.
[2] *Chedi*, (1910) 7 A. L. J. R. 618.
[3] *Chinna Ramana Gowd*, (1908) 31 Mad. 506; *Verupatti Penchalugaddi*, (1902) 6 M. L. T. 133.
[4] *Krishna Baipadithaya*, (1909) 8 M. L. T. 87, 20 M. L. J. 132.
[5] *Rambharthi Hirabharthi*, (1923) 25 Bom. L. R. 772, 7 Bom. Cr. C. 78.
[6] Per Hawkins, J., in *Hicks v. Faulkner*, (1878) 8 Q. B. D. 167, 171.

knowledge, but however difficult it may be, it must be proved, and unless it is proved the informer must be acquitted."[1]

A person may in good faith institute a charge which is subsequently found to be false, or he may, with intent to cause injury to an enemy, institute criminal proceedings against him, believing there are good grounds for them, but in neither case has he committed an offence under this section. To constitute this offence it must be shown that the person instituting criminal proceedings knew there was no just or lawful ground for such proceedings.[2] It is not a sufficient ground that a person to whom a wrong has been done, or who conceives that a wrong has been done to him, makes a charge or complaint upon evidence or a statement which is not or ought not to be sufficient to satisfy a reasonable mind, if in truth he did not know, at the time he made the complaint, that there was no just and lawful ground for making it.[3]

The failure to prove a case by the complainant is not the same thing as the institution of a maliciously false case, so as to make him liable for an offence under this section.[4]

In the absence of any special circumstances to rebut it, the judgment of one competent tribunal against the complainant, affords a very strong evidence of reasonable and probable cause.[5]

4. **'If such criminal proceedings be instituted.'**—There is a divergence of views between the Calcutta, Madras and Patna High Courts on the one hand, and the Allahabad High Court on the other, as to the question whether the latter part of this section applies to such cases of complaints to the police which are disposed of without a formal magisterial inquiry. A Full Bench of the Calcutta High Court[6] has held that the latter part of this section would apply to such cases when the charge related to the more serious offence. This Full Bench case is followed by the Madras High Court in *Nanjunda Rau's case*[7] in which it is said: "We are unable to find any warrant for holding that the words 'the institution of criminal proceedings' should be limited to the bringing of a charge before the Magistrate, or to action by the magistrate or police against the person charged [illegible]

the Magistrate." "The test to apply is,—did the person who makes the charge intend to set the criminal law in motion against the person against whom the charge is made?"[8]

The Patna High Court has followed the Calcutta ruling.[9] Where a person who gives false information as to the commission of an offence merely states that he suspects a certain other person to be the offender, it may be that he would not be liable under this section, but where it is clear that the informant's intention was not merely that the police should follow up a clue but that they should put the alleged offender on trial, the informant is guilty of an offence under this section.[10]

The Allahabad High Court has, on the other hand, held that to constitute the offence defined in the second paragraph of this section, it is necessary that criminal proceedings should be instituted. Where the offence committed does not go further than the making of a false charge to the police, the making of such

[1] Per Plowden, J., in *Murad*, (1893) P. R. No. 29 of 1894, p. 97.

[2] *Chidda*, (1871) 3 N. W. P. 327.

[3] [illegible]

[4] [illegible]

[5] [illegible]

[6] *Karim Buksh*, (1888) 17 Cal. 574, F. B., overruling *Karim Buksh*, (1887) 14 Cal. 633. See *Ram Lohan Lal*, (1903) 7 C. W. N. 556.

[7] (1896) 20 Mad. 79, 81.

[8] *Mallappa Reddi*, (1903) 27 Mad. 127, 128, F. B.

[9] *Parmeshwar Lal* (1925) 4 Pat. 472.

[10] *Ibid.*

a charge does not amount to an institution of criminal proceedings, and the offence committed will fall within the first paragraph, notwithstanding that the offence so falsely charged may be one of those referred to in the second paragraph.[1] The words "if such criminal proceeding be instituted on a false charge of an offence punishable with death, etc.," compared with the phraseology of the first part of the section, leave no doubt that the *actual institution* of criminal proceedings on a false charge is essential to the application of the latter part of this section and that if the offence of the accused stops at making a false charge, his case falls under the first part of the section irrespective of the fact that the false charge relates to 'an offence punishable with death, transportation for life, or imprisonment for seven years or upwards.'[2]

The former Chief Court of the Punjab held likewise: "The first part of s. 211 deals with two kinds of acts by an accused, (*a*) the institution, or causing the institution, (*not an attempt* to cause the institution) of any criminal proceeding; (*b*) the making of a false charge: and however grave may be this charge, it is only when criminal proceedings are actually instituted that a special punishment is provided by the latter part of the section. Any charge of a cognizable offence must be followed by some inquiry by the Police, and if such inquiry alone were to be considered a criminal proceeding within the first part of the section, there would seem to be no reason for the distinction between the institution of proceedings and the making of a false charge. It seems to us clear that the 'institution' referred to in this section is the institution, either by the accused himself, by the Police or others, in consequence of accused's action, in some *Criminal Court*. It also appears to us that although the moral guilt of the accused may be the same in each case, yet as regards the effect of his act, it makes the very greatest difference whether the persons whom he charges are disgraced by being dragged—probably in custody—before a Criminal Court, or whether they are merely put to the inconvenience of answering a few questions by the Police and supporting their answers by evidence ready to their hand."[3] Following this case the same Court held that the submission of a petition containing a false charge of bribery to the Inspector-General of Police against a Sub-Inspector is punishable under this section.[4]

False charge of arson.—Where a man burnt his own house and charged another with the act, it was held that he had committed an offence under this section and not under s. 195.[5]

False charge of dacoity.—Where a false charge of dacoity was made to a Police-officer, who referred it to a Magistrate as false, and the Magistrate ordered the charge to be dismissed without taking any action against the parties implicated, and the prisoner who preferred the charge was tried under this section, it was held that the person had instituted criminal proceedings within the meaning of this section.[6]

False charge of theft.—Where A falsely and with intent to injure B informed the Police that B had stolen property in his house, and the Police searched B's house, and the information proved to be false, it was held that A had instituted

[1] *Bisheshar*, (1893) 16 All. 124; *Niaz Ali*, (1907) 27 A. W. N. 149; *Barkatullah* v. *Sadho Kalwar*, (1912) 10 A. L. J. R. 429. See *Joymohan*, (1909) 6 A. L. J. R. 989, in which it is held, following these authorities, that if the Magistrate commits the accused for trial to the Court of Session only on the ground that the offence charged falls within the second paragraph of that section, and does not say that the fine or sentence which he can impose will not be adequate to meet the ends of justice, the commitment is bad in law.

[2] *Pitam Rai*, (1882) 5 All. 216, 216, approved of in *Paraku*, (1883) 5 All. 598 and *Bisheshar*, sup.

[3] Per Roe, J., in *Sultan*, (1887) P. R. No. 3 of 1888. See *Khan Bahadur*, (1888) P. R. No. 26 of 1888.

[4] *Hamayun*, (1907) P. R. No. 26 of 1908.

[5] *Bhagwan Akir*, (1867) 8 W. R. (Cr.) 65.

[6] *Nanjunda Rau*, (1896) 20 Mad. 70.

criminal proceedings, and that he was therefore guilty of an offence under this section and not under s. 182.[1]

False charge of hurt.—Where a charge of voluntarily causing hurt contained in a petition of complaint was wilfully false, and made with intent to injure another, the complainant was held guilty of this offence.[2]

False charge in a petition which is not a complaint.—Where the accused submitted a petition to the Deputy Commissioner while he was on tour making certain complaints against a manager of the Court of Wards, and the accused was convicted of an offence under this section for making a false charge against the manager of the Court of Wards, it was held that the petition submitted by the accused not being a complaint within the meaning of s. 4 (*h*) of the Criminal Procedure Code and there being no institution of criminal proceedings, the conviction was illegal.[3]

False report by a police-officer.—Where a Head Constable falsely reported to his superior that certain persons were in the habit of dealing with stolen goods and they were prosecuted but acquitted, it was held that he was guilty of an offence under this section.[4] But where a police-officer made a false report regarding a certain offence which the Magistrate found, after hearing the evidence, to be false, it was held that he could not be prosecuted under this section as he had not instituted criminal proceedings against any person.[5]

Partly false and partly true complaint.—The section contemplates a charge which is indivisible in its nature; to judge whether a complaint, part of which is true and part of which is false, falls under the section the nature of the complaint or charge made by the accused has to be considered: in other words, whether the complaint is substantially true or whether it is substantially false; no precise rule or principle can be laid down in respect of the question, and each case must depend upon its own circumstances.[6]

Vexatious charge.—To bring a vexatious charge is not an offence under this section.[7]

Compounding.—The fact that an offence alleged to have been committed had been compounded is no conclusive answer to a charge made against the prosecutor under this section.[8]

Abetment.—A person cannot be convicted of a false charge solely on the ground of his having given evidence in support of such charge.[9]

Civil remedy.—A person aggrieved by a false charge may, if he choose, sue in a civil Court for damages for malicious prosecution, instead of taking criminal proceedings under this section. (For civil remedy, see The authors' "Law of Torts," Ch. XV). A criminal prosecution for an offence under this section is not a condition precedent to the right to sue for damages.[10]

PRACTICE.

Evidence.—Prove (1) that the accused instituted or caused to be instituted criminal proceedings; or

That he made a charge of an offence.

(2) That there were no just or lawful grounds for such proceedings; or

That such charge was false.

[1] *Muthra* v. *Roora*, (1870) P. R. No. 16 of 1870. See *Hunooman Lall*, (1872) 19 W. R. (Cr.) 5.

[2] *Mata Dyal*, (1872) 4 N. W. P. 6.

[3] *Ahmad Khan*, (1904) P. L. R. No. 109 of 1904. See also *Jagobundhoo Karmakar*, (1902) 30 Cal. 415.

[4] *Rhedoy Nath Biswas*, (1865) 2 W. R. (Cr.) 44.

[5] *Thakur Tewary*, (1900) 4 C. W. N. 347.

[6] [illegible]

[7] [illegible]

[8] [illegible]

[9] [illegible]

Jugi. [illegible]

[10] *Viranna* v. *Nagayyah*, (1881) 3 Mad. 6; *Shama Churn Bose* v. *Bhola Nath Dutt*, (1866) 6 W. R. (Civ. Ref.) 9.

It is the duty of the prosecution to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge.[1]

(3) That the accused then knew such criminal proceedings or charge to be without just or lawful grounds.[2]

(4) That he did as above with intent to cause injury to the person in question.[3]

It is for the prosecution to make out a distinct case against the accused; not for the accused in the first instance to show that he had just or lawful ground.[4] It is for the prosecution to establish its case, and if it fail to supply that proof which is required to secure the conviction of the accused, the failure on the part of the latter to examine any particular witness will not imply the guilt of the accused.[5] The party accused should be allowed to show the information on which he acted and the Judge ought not only to be satisfied that the facts alleged as the ground for making the charge are in themselves untrue and insufficient, but also that they were known to be such to the accused when the charge was made by him.[6]

Failure on the part of the complainant to establish the truth of his allegation does not by any means justify the inference that the complaint was false; and to secure a conviction in this class of cases it must further be established beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence.[7]

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class: by Court of Session, and any such Magistrate if the offence charged is punishable with imprisonment for seven years or upwards; by Court of Session alone if the case falls under the second class.

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which such Court is subordinate is required for a prosecution under this section.[8] A false complaint made to the Police does not require any such sanction.[9]

The 'criminal proceedings' contemplated in this section are proceedings in Court.[10]

Where an information to the police is followed by a complaint to the Court, based on the same allegations and the same charge, and such complaint has been investigated by the Court, the complaint of the Court itself is necessary even for a prosecution of the informant under this section in respect of the false charge made to the police.[11] Where an information is lodged with the police and the police on enquiry report it to be false but the informant, by an application to the Magistrate, insists on a judicial investigation, he is deemed to have preferred a complaint to the Magistrate and a complaint by the Court itself is requisite before cognizance of an offence punishable under this section can be taken in respect of the false charge

[1] *Mirza Hassan Mirza* v. *Musst. Mahbuban*, (1913) 18 C. W. N. 391.

[2] *Vridachella Pillai*, (1883) 1 Weir 185; *Murad*, (1893) P. R. No. 29 of 1894; *Tomij* alias *Tomijuddin Pramanick*, (1897) 1 C. W. N. 301; *Chidda*, (1897) 20 All. 40; *Muthoorapershad Panday*, (1865) 2 W. R. (Cr.) 10.

[3] *Jan Muhammad Husen*, (1885) P. R. No. 1 of 1886.

[4] *Nobokisto Ghose*, (1867) 8 W. R. (Cr.) 87.

[5] *Mirza Hassan Mirza* v. *Musst. Mahbuban*, sup.

[6] *Navalmal valad Umedmal*, (1866) 3 B. H. C. (Cr. C.) 16

[7] *Ram Prosad*, (1912) 17 C. W. N. 379, 16 C. L. J. 453.

[8] Section 195, Criminal Procedure Code; *Khanderao Yeshwant*, (1912) 14 Bom. L. R. 362, 1 Bom Cr C. 125; *Hardwar Pal*, (1912) 34 All. 522.

[9] *Gokool Chunder Chowdry*, (1875) 24 W. R. (Cr.) 41; *Ram Ranjan Bhandari* v. *Madhub Ghose*, (1876) 25 W. R (Cr.) 33; *Putiram Ruidas* v. *Mahomed Kasem*, (1895) 3 C. W. N. 33; *Dharmadas Kawar*, (1908) 12 C. W. N. 575, 7 C. L. J. 373; *Jadu Nandan Singh*, (1909) 37 Cal. 250; *Todur Mal* v. *Mussammat Bholi*, (1882) P. R. No. 14 of 1882; *Muthra* v. *Roora*, (1870) P. R. No. 16 of 1870; *Ramasami*, (1884) 7 Mad. 292; *Ganpat*, (1894) Unrep. Cr. C. 704 No. Cr. R., 36 of 1894; *Mi Ngwe* v *Mi Chit*, (1911) U. B. R. 134; *Pa Hlaing* v. *Ba E.*, (1911) 6 L. B R. 50.

[10] See *Mi Wa*, (1915) 8 L. B. R. 534.

[11] See *Ananda Lal Mullick*, (1916) 44 Cal. 650.

made to the police, irrespective of whether the Magistrate has investigated the complaint or not.[1]

A prosecution of a charge under this section should not be launched as a matter of course, but only when the complainant can satisfy the Court that the interests of justice require a prosecution, and there is a strong *prima facie* case against the accused.[2] It is not in every case that a Magistrate should launch a prosecution under this section. Each case must be judged by its own facts. Where, therefore, the Magistrate and the Judge came to different conclusions upon the evidence, which was of a doubtful character, and the complainant was a boy of twelve years of age, it was held that the Magistrate should not have directed his prosecution, and his order was accordingly set aside.[3] The fact that the complainant fails to prove his case is by itself not sufficient.[4] Prosecution should only be instituted where the case is a deliberately false one,[5] and there is a reasonable probability of conviction.[6] It would be an abuse of the powers vested in a Court of Justice, if a complaint were made on the principle that though the conviction of the party complained against is a mere possibility it is desirable that the matter should be threshed out so that it may be decided whether or not an offence has been committed.[7] Before launching a prosecution there must be a reasonable belief in the mind of the Court that there was no foundation for the criminal charge, and that in instituting criminal proceedings the complainant acted knowingly without belief in the truth of the allegations made by him or recklessly without caring whether the allegations were true or false.[8]

Where the Court of first instance finds an instrument to be genuine and the Judge in appeal happens to take a different view of the matter, it is not desirable to file a complaint.[9]

[illegible]

him then he may determine whether the complaint is true or false. There is [illegible]

[illegible]

accused must be in a position to know what statements alleged to be false are.[12]

A Deputy Magistrate has no power to question an order made by his superior.[13]

Before making complaint the accused should be allowed to prove the truth of his complaint.—A Magistrate does not exercise a proper discretion who on the receipt of a police report that a complaint is false, forthwith makes a complaint under this [illegible]

[illegible]

police, but before the Magistrate. "If persons are to be prosecuted...upon the

[1] *Sharkh Muhammad Yassin*, (1924) 4 Pat. 323.

[2] See *Gauri Sahai*, (1883) 6 All. 114; *Veeraraghava Swami Naidu* v. *Bhagavatula*, [1911] 2 M. W. N. 172; *Ma Saw Kin* v. *Maung Tun Lin*, (1899) P. J. L. B. 542; *Chundra Kant Ghose*, (1888) 3 C. W. N. 3; *Prabh Dial* v. *Gurdit Singh*, (1922) 4 L. L. J. 89.

[3] *Gopal Baril*, (1906) 34 Cal. 42; *Jadu* [illegible] 365 [illegible] *Mohan* [illegible]

[7] *Ibid.*

[8] See *Kusum Sao* v. *Janak Lal*, (1919) 4 P. L. J. 374.

[9] See *Ram Prasad Roy* v. *Sooba Roy*, (1897) 1 C. W. N. 400; *Raghupat Sahay*, (1921) 3 P. L. T. 93.

[10] *Chundra Kant Ghose*, sup

[11] See *Rachappa Tippanna*, (1910) 12 Bom. L. R. 229.

[12] See *Bholu*, (1910) 7 A. L. J. R. 991.

[13] See *Irad Ally*, (1879) 4 Cal. 869.

[14] See *Lalji Gope* v. *Giridhari Chaudhury*, (1900) 5 C. W. N. 106; *Gubala Ram Reddi*, (1887) 1 Weir 188.

mere report of a Police officer that their complaints are not true, the Police are made the judges whether a complaint is true or false. Such a delegation of magisterial functions is not contemplated by the law, and it requires but little experience of this country to understand how dangerous it would be to the best interests of justice. Magistrates of all grades cannot understand too clearly that, while the police perform their proper duty in collecting evidence, it is the *function of the* Magistrate alone to decide upon the sufficiency or credibility of this evidence when collected."[1] All the witnesses whom the person accused of making the false charge wishes to produce must be heard.[2] A Full Bench of the Calcutta High Court has laid down that a Magistrate may take cognizance, under ss. 191 and 192, Criminal Procedure Code, of an offence brought to his notice by a police report which affords ground for a suspicion that an offence has been committed; but, as a matter of sound judicial discretion, a Magistrate should not so proceed and direct that the person suspected be tried until some person aggrieved has complained, or until he has before him a police report on the subject based on an investigation directed to the offence to be tried, and, in cases of alleged false charges, until it is clear that the original charge has been either heard and dismissed or abandoned. The person who made the original charge should be offered an opportunity of supporting it or abandoning it.[3] This Full Bench case has been unwillingly followed in a later case of the same Court in which it is said that when a person institutes before the police criminal proceedings, found on inquiry to be false, before he can be prosecuted under this section, he must first have an opportunity of proving his case; if he impugns the correctness of the police inquiry by a petition, he is entitled to have the persons complained against tried on the charge, or else his statement must be recorded on oath and his complaint dismissed under s. 203 of the Criminal Procedure Code.[4]

A different view has been taken by the Bombay, Madras and Allahabad High Courts. According to the Bombay High Court the fact that no opportunity was allowed to the accused by the Magistrate to substantiate his complaint before striking it off, is not a circumstance which will invalidate the commitment duly made, and the conviction otherwise good cannot be set aside on account of such omission.[5] A person who makes a false complaint to the police may be proceeded with under this section, and it is not competent to a Magistrate to refuse to entertain such a case on the ground that the accused is not afforded an opportunity of proving his original complaint in a Court of competent jurisdiction.[6]

A Full Bench of the Madras High Court has decided that the party to whose prejudice action under this section is taken must be previously heard and a judgment formed upon legal evidence. In cases in which the Magistrate dismisses the original complaint upon a report from the police there is no legal evidence before him on which to form his judgment. In cases, however, in which the Magistrate examines the complainant, and hears the evidence, and acquits or discharges the accused and then no notice to show cause is given, the case is different.[7]

The Allahabad High Court has also held that the complainant should be given reasonable opportunity of proving his case, and it is not sufficient to take

[1] Per Garth, C. J., and Field, J., in *Karimdad*, (1880) 6 Cal. 496, 498; *Grish Chunder Nundi, Sobhna Bibi*, (1881) 7 Cal. 87; *Gyan Chunder Roy v. Protap Chunder Dass*, (1881) 7 Cal. 208, 211; *Giridhari Mondul*, (1881) 8 Cal. 435; *Gangoo Singh*, (1878) 2 C. L. R. 389; *Mahadeo Singh*, (1900) 27 Cal. 921.

[2] *Shibo Behara*, (1881) 6 Cal. 384; *Mahadeo Singh*, sup.

[3] See *Sham Lall*, (1887) 14 Cal. 707, r. a.; *Jogendro Karmaker*, (1902) 30 Cal. 415; *Gunamoy Supui*, (1899) 3 C. W. N. 738; *Mukunda Behari v. Bikari Charan Mahonti*, (1897) 1 C. W. N. 452, *Vishnu Moreshwar Gadgil*, (1909) Criminal Application for Revision No. 71 of 1909. Unrep (Bom.). Decided on the 21st July 1909. Per Scott, C. J., and Batchelor, J.; *Abbas Ali, O. S. C.* 94; *Gangaram Sonar*, (1893) 7 C. P. L. R. (Cr.) 6.

[4] *Jogendra Nath Mookerjee*, (1905) 33 Cal. 1

[5] *Jijibhai Govind*, (1896) 22 Bom. 506, *Salik Roy*, (1881) 6 Cal. 582.

[6] *Bhika Lala*, (1890) Unrep. Cr. C. 524, Cr. R. No. 55 of 1890.

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action merely on the report of the police.[1] But where a Magistrate dismisses a complaint as a false one, and decides to proceed against the complainant for making a false charge, he is not bound before so proceeding to give the complainant an opportunity of substantiating the truth of the complaint, by being allowed to produce evidence before him.[2]

The former Chief Court of the Punjab held that notice to show cause is not always essential before taking action.[3]

False charge to the police and to the Magistrate.—Where a charge has been made to the police and on investigation found to be false, if the same charge is repeated to a Magistrate by a complaint upon which he takes action, the person aggrieved cannot then ignore the Magistrate's proceedings and institute a prosecution in respect of the charge made to the police.[4] A written complaint of the Magistrate will be necessary for the prosecution of the complainant. He can be prosecuted under s. 182, for although the offence under this section must always include that under s. 182, a Court can convict of the minor offence if it so chooses.[5]

Section 250 of the Criminal Procedure Code.—Where criminal proceedings have been instituted against a person with intent to cause injury to him, without lawful ground, the Magistrate should not dismiss the complaint as false and vexatious and direct the complainant to pay compensation to the person against whom the proceedings are instituted, but should take proceedings under this section.[6]

No pending proceedings.—It must be proved that the original proceedings are not pending at the time of the offender's trial.[7]

The original charge need not have been fully heard and dismissed, it is sufficient if it is not pending.[8]

Finding should state the nature of the charge.—Where a prisoner is convicted of having made a false charge of an offence, the nature of the false charge should be stated in the finding and entered in the calendar.[9]

Punishment under second clause.—A prisoner convicted under the second clause should be sentenced to imprisonment, with or without fine, and not to fine alone.[10]

Summary proceeding.—The conviction by a Magistrate of a person for an offence under this section in a summary proceeding is improper.[11]

Misdirection to jury.—In a case of bringing a false charge of dacoity under this section, the Sessions Judge concluded his charge to the jury in these words: "If you believe the charge of dacoity to be false, then you should find the prisoner guilty under s. 211; otherwise you should acquit him." It was held that the charge

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view of the Bombay, Madras and Allahabad [illegible]

95.

[5] *Daroga Gope*, (1925) 6 P. L. T. 515.

[6] *Kina Karmakar* v. *Preo Nath Dutt*, (1901) 29 Cal. 479.

[7] *Salik*, (1887) 1 All. 527; *Manga Ram*, (1886) P. R. No. 28 of 1883; *Gati Mandal*, (1905) 4 C. L. J. 88, following *Gunamony Sapui*, (1899) 3 C. W. N. 758.

[8] *Subbanna Goundan*, (1862) 1 M. H. C. 30.

[9] *Arjun*, (1863) 1 B. H. C. (Cr. C.) 87.

[10] *Rama bin Rabhaji*, (1863) 1 B. H. C. (C. Cr.) 34.

[11] *Parsi Hajra* v. *Bandhi Dhanuk*, (1900) 28 Cal. 251.

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[6] *Bhika Lala*, (1890) Unrep. Cr. C, 524, Cr. R. No. 55 of 1890.

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Section 250 of the Criminal Procedure Code.—Where criminal proceedings have been instituted against a person with intent to cause injury to him, without lawful ground, the Magistrate should not dismiss the complaint as false and vexatious and direct the complainant to pay compensation to the person against whom the proceedings are instituted, but should take proceedings under this section.[6]

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Finding should state the nature of the charge.—Where a prisoner is convicted of having made a false charge of an offence, the nature of the false charge should be stated in the finding and entered in the calendar.[9]

Punishment under second clause —A prisoner convicted under the second clause should be sentenced to imprisonment, with or without fine, and not to fine alone.[10]

Summary proceeding.—The conviction by a Magistrate of a person for an offence under this section in a summary proceeding is improper.[11]

Misdirection to jury —In a case of bringing a false charge of dacoity under this section, the Sessions Judge concluded his charge to the jury in these words : " If you believe the charge of dacoity to be false, then you should find the prisoner guilty under s. 211 ; otherw[illegible] was erroneous and defectiv[illegible] instead of directing as he [illegible] most essential elements of the charge under this section, namely, that in instituting the false charge of dacoity there was no just or lawful ground for the charge, and the jury should have been asked to say whether the charge was false and whether in instituting that charge there was no just or lawful ground.[12]

[illegible] (1908) 4 N. L. R. 136, which follows the view of the Bombay, Madras and Allahabad [illegible]

[illegible] 95.

[2] *Daroga Gope*, (1925) 6 P. L. T. 515.

[8] *Kina Karmakar* v. *Preo Nath Dutt*, (1901) 29 Cal. 479.

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[10] *Rama bin Rabhaji*, (1863) 1 B. H. C. (C. Cr.) 34.

[11] *Parsi Hajra* v. *Bandhi Dhanuk*, (1900) 28 Cal. 251.

[12] *Tomij* alias *Tomijuddin Promanick*, (1897) 1 C. W. N. 301.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, with intent to cause injury to one——(instituted criminal proceedings before——charging the said ——with having committed an offence, to wit——,] (*or*) [falsely charged the said ——before——with having committed an offence, to wit——,] knowing at the time that there was no just or lawful ground for such proceedings (*or* charge) against the said——; and that you thereby committed an offence punishable under s. 211 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 and 12.

Harbouring offender—

212. Whenever an offence has been committed,[1] whoever harbours or conceals a person whom he knows or has reason to believe to be the offender,[2] with the intention of screening him from legal punishment,[3]

if a capital offence;

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine;

if punishable with transportation for life, or with imprisonment.

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment which may extend to one year and, not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

"Offence" in this section includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception.—This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

ILLUSTRATION.

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to transportation for life, A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

COMMENT.

This section applies to the harbouring of persons who have actually committed some offence under the Penal Code or an offence under some special or local law, when the thing punishable under such special or local law is punishable with imprisonment for a term of six months or upwards. It supposes that some offence has actually been committed, and that the harbourer gives refuge to one whom he knows or has reason to believe to be the offender with the intention of screening him from legal punishment. It does not apply to the harbouring of persons, not being criminals, who merely abscond to avoid or delay a judicial investigation.

Harbouring escaped prisoners of war is punishable under s. 130 and harbouring a deserter from the Army or Navy is punishable under s. 136.

This section deals with that class of offenders who are known as 'accessories after the fact' under the English law. An 'accessory after the fact' is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon.[1]

Ingredients.—The section has three essentials—

1. Commission of an offence.
2. Harbouring or concealing the person known or believed to be the offender.
3. Such concealment must be with the intention of screening him from legal punishment.

1. **'Offence has been committed.'**—It must be shown that the offence has been completed before the offender was harboured or concealed. Hawkins[2] says :—"A man shall never be construed an accessary to a felony, in respect of the receipt of an offender, who at the time of the receipt was not a felon, but afterwards becomes such by matter subsequent ; as where one receives another who has wounded a person dangerously, that happens to die after such receipt. For though the offender be for special reasons adjudged to some purposes guilty of homicide *ab initio*, yet he shall not be so esteemed in respect of any others but himself ; for fictions in law shall never be carried further than the reasons which introduce them necessarily require." Under the Penal Code such a person is liable to be convicted of harbouring one who had committed grievous hurt.

2. **'Harbours or conceals a person whom he knows or has reason to believe to be the offender.'**—See s. 216-B, *infra*, as to the meaning of 'harbour.' A person who employs another to harbour the offender may be convicted as 'accessory after the fact' though he himself did no act of relieving, etc.[3]

'Knows'—It is necessary that the harbourer at the time when he assists, comforts the offender, should have notice, express or implied, that he had committed a crime.[4]

'Reason to believe.'—See s. 26, *supra*.

3. **'Intention of screening him from legal punishment.'**—The harbouring or concealing must be with intent to save the offender from punishment.

Exception.—The exception only extends to the cases where harbour is afforded by a wife or husband. No other relationship can excuse the wilful receipt or assistance of felons ; a father cannot assist his child, a child his parent, a brother his brother, a master his servant, or a servant his master. The law in England is to the same effect.

In a case in England a woman was charged with comforting, harbouring, and assisting a man who had committed a murder, and it appeared that she considered herself as his wife, and lived with him as such for years, it was held that she was

[1] 2 Hawk., c. 29, s. 1.
[2] *Ibid*, s. 35.
[3] *Jarvis*, (1837) 2 M. & Rob. 40.
[4] 2 Hawk, c. 29, s. 32.

entitled to be acquitted even though the marriage was in some respects irregular and probably invalid.[1]

Amendment.—The clause defining 'offence' under this section was introduced by Act III of 1894, s. 7.

PRACTICE.

Evidence.—Prove (1) that an offence has been committed by the person harboured.

(2) That such offence is punishable with (*a*) death, or (*b*) transportation for life or imprisonment not exceeding ten years, or (*c*) imprisonment from one to ten years.

(3) That the accused has harboured or concealed the offender.

(4) That the accused then knew him to be an offender, or had reason to believe him to be so.

(5) That the accused thereby intended to screen such offender from legal punishment.[2]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session or by Magistrate, Presidency or first class, if the case falls under the first or second clause; by Magistrate, Presidency or first class, or by Court by which the offence is triable, if the case falls under the third clause.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That on or about the——day of—— the offence of (*specify it*) was committed at (*specify the place*) by AB, and that you on or about the——day of—— at——, harbo[illegible] time c[illegible] offenc[illegible] of the Indian Penal Code and within my cognizance (*or* within the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901).

Taking gift, etc., to screen an offender from punishment—

213. Whoever[1] accepts or attempts to obtain, or agrees to accept, any gratification[2] for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment[3] for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

if a capital offence;

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine;

if punishable with transportation for life, or with imprisonment.

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

[1] *Mary Good*, (1842) 1 C. & K. 185.

[2] *Fateh Singh*, (1859) 12 All. 432; *Kala Singh*, (1867) P. R. No. 21 of 1867.

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

COMMENT.

The compounding of a crime by some agreement not to bring the criminal to justice, if the property is restored or a pecuniary or other gratification is given, is the offence punished by this and the following sections. This section does not apply where the compounding of an offence is legal. It is the duty of every State to punish criminals. No individual has, therefore, a right to compound any crime because he himself is injured and no one else.

Ingredients.—The section has two essentials—

1. A person accepting or attempting to obtain any gratification or restitution of property for himself or any other person.

2. Such gratification must have been obtained in consideration of (*a*) concealing an offence, or (*b*) screening any person from legal punishment for an offence, or (*c*) not proceeding against a person for the purpose of bringing him to legal punishment.

1. **'Whoever accepts...gratification for himself or any other person, or any restitution of property, etc.'**—The offence of compounding a larceny may be committed by a person other than the owner of the goods stolen or a material witness for the prosecution.[1]

'Gratification'.—See s. 161, *supra*.

2. **'In consideration of his concealing an offence, or of his screening any person from legal punishment.'**—See s. 214, *infra*. This section applies only where there has been an actual concealment of an offence, or screening of a person from legal punishment, or abstention from proceeding criminally against a person, and as consideration for the same, there has been an acceptance of, or attempt to obtain, or agreement to accept, any gratification or restitution of property. It has no application where only an acceptance of, or attempt to obtain, or agreement to accept, any gratification or restitution on a promise to conceal, screen, or abstain, is proved, and nothing more.[2]

This section is applicable only when it is proved that the person screened or attempted to be screened from legal punishment has been guilty of an offence,[3] and not when there is merely a suspicion of his having committed some offence.[4] A person complained to the accused, who were Panchayets, that A had stolen his fishing cage and concealed it in a tank near his house. The accused came to A's house and found the cage in the tank. They then took him into custody and threatened to send him up to the *thana*. Eventually they took from him Rs. 5 and did not proceed against him. The accused were charged with and found guilty of an offence under this section. It was held that the conviction was wrong as there was mere

jewellery to M,

such pledging

returned by S to G on the latter undertaking not to prosecute M for the offence of criminal breach of trust. M was accused of criminal breach of trust, but was acquitted. S and G were also charged with offences under this and the following

[1] *Burgess*, (1886) 16 Q. B. D 141.

[2] *Hemchandra Mukherjee*, (1924) 52 Cal. 151.

[3] *Sanalal Lalubhai*, (1913) 15 Bom. L. R. 694, 2 Bom. Cr. C. 101.

[4] *Girish Myti*, (1896) 23 Cal. 420.

[5] *Ibid.*

sections, in that they took and offered restitution of property in consideration of screening an offence. The trying Magistrate convicted S and G of the offences charged, on the ground that for the purposes of the present case M must be held guilty. On appeal it was held, acquitting the accused, (1) that there could be no screening of an offence, which offence was not proved to have been committed; (2) that the trying Magistrate was bound to proceed on the footing that no criminal breach of trust had been committed, since the prosecution could not make it appear that such an offence had been committed.[1]

The word 'offence' denotes a thing punishable under the Code or any special or local law (s. 40).

Exception.—See Exception to s. 214, *infra*.

PRACTICE.

Evidence.—Prove (1) the commission of the offence concealed.

(2) That the accused (*a*) concealed such offence; or (*b*) screened the offender from legal punishment; or (*c*) omitted to proceed against such offender so as to bring him to punishment.

(3) That the accused accepted, or attempted to obtain, or agreed to accept the gratification or restitution, as described in the section.

(4) That the accused so accepted, etc., in consideration of such concealment, etc., as (2).

Procedure.—*Cognizable*—*Warrant*—*Bailable*—*Not compoundable*—*Triable* by Court of Session if the case falls under the first clause; by Court of Session, or Magistrate, Presidency or first class, if it falls under the second; by Magistrate, Presidency or first class, or by Court empowered to try the offence screened, if it falls under the third.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That on or about the——day of——, at——, one AB committed the offence ——, punishable with——, and that you on or about the——day of——, at——, accepted (*or* attempted to obtain, *or* agreed to accept), a certain gratification, to wit——, [*or* certain property, to wit——] for yourself (*or* for——) in consideration of your concealing the said offence of——[*or* screening the said——from legal punishment for the said offence, *or* not proceeding against the said AB for the [illegible] you thereby committed an [illegible], and within my cognizance (*or* cognizance of the Court of Sessions).

And I hereby direct that you be tried [by the said Court (*in cases tried by the Magistrate omit these words*)] on the said charge.

Offering gift or restoration of property in consideration of screening offender—

214. *Whoever gives or causes*, or offers or agrees to give or cause, any gratification to any person[1], or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment[2] for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

if a capital offence;

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

[1] *Sanalal Lalubhai*, (1913) 15 Bom. L. R. 694, 2 Bom. Cr. C. 101.

and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishable with transportation for life, or with imprisonment.

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.—The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.[3]

COMMENT.

The last section punished the receiver of a gift in consideration of compromising an offence : this section punishes the offerer of the gift.

Scope.—The offence of giving a gratification to any person in consideration of that person concealing any offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, may be committed not only in respect of a completed offence, but also in respect of an offence, which it is proposed to commit.[1]

Ingredients.—This section has two essentials—

1. Offering any gratification or restoration of property to some person.
2. Such offer must have been in consideration of that person's (*a*) concealing an offence, or (*b*) of his screening any person from legal punishment for an offence, or (*c*) of his not proceeding against a person, for the purpose of bringing him to legal punishment.

1. **'Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, etc.'**—This section makes it an offence not only to give a gratification but also to agree to give it in consideration of the donee screening any person from legal punishment for any offence, and the use of the word 'agrees' involves the idea of something in the nature of a demand.[2] Such agreement is also void under the Indian Contract Act

'Gratification to any person.'—See s. 161, *supra*.

2 **'In consideration of that person's concealing an offence, or of his screening any person from legal punishment, etc.'**—The terms 'concealing an offence' and 'screening any person from legal punishment for any offence' appear to pre-suppose the actual commission of an offence, or the guilt of the person screened from punishment. It is not the intention of the legislature to punish the giving of gratifications, under a delusion that an offence had been committed or that a person was guilty of such an offence. The intention was to discourage malpractices, when offences have really been committed, or when persons really guilty are screened, and not to ensure general veracity on the part of the public in regard to imaginary offences or offenders. In this case the accused had agreed to give Rs. 10 to S in consideration of his not giving evidence against K, who was charged with the offences of house-breaking by night and theft in a building. S gave evidence against K who was acquitted. The accused was thereupon charged

[1] *Saya Po*, (1894) 1 U. B. R. (1892-1896) 196.

[2] Per Burgess, J. C., in *Ma Ka*, (1895) 1 U. B. R. (1892-1896) 158.

under this section; it was held that he had committed no offence under it.[1] When two of the accused offered a gratification to a public servant in consideration of his not proceeding against them and the other accused, whose books and papers he had seized, it was held that they were guilty under this section and not under ss. 109 and 161.[2]

This section includes the offer of a bribe by the person who has committed the offence that it is desired to screen.[3]

3. **'Compounded.'**—"Compounding an offence...supposes an arrangement by which the parties have settled their differences, and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue: unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition."[4] If the offence is a compoundable one, then even if the gratification is offered to a person who has no right to compound it is immaterial.[5]

Under the Criminal Procedure Code, s. 345 (1), the offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table:—

Offence.	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt ..	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use or criminal force ..	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour ..	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person	426, 427	The person to whom the loss or damage is caused.
Criminal trespass ..	447	The person in possession of the property trespassed upon.
House trespass ..	448	
Criminal breach of contract of service..	490, 491, 492	The person with whom the offender has contracted.
Adultery ..	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman.	498	

[1] 13 of 1881.
[2] Weir 194.
[3] *Murray*, (1893) L. R. 694, 2 Bom. Cr. C. 101. See s. 213 where the facts are set out.
[4] 21 Cal. 103, 115.
[5] *Kya Sone*, (1912) 6 L. B. R. 48.

Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Defamation ..	500	
Printing or engraving matter, knowing it to be defamatory.	501	The person defamed.
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	
Insult intended to provoke a breach of the peace	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.
Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the offence was committed.

(2) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table :—

Offence	Sections of Indian Penal Code. *applicable.*	Persons by whom offence may be compounded.
Voluntarily causing hurt by dangerous weapons or means.	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt ..	325	Do.
Voluntarily causing grievous hurt on grave and sudden provocation.	335	Do.
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	337	Do.
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Do.
Wrongfully confining a person for three days or more.	343	The person confined.
Wrongfully confining a person in secret.	346	Do.
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Dishonest misappropriation of property.	403	The owner of the property misappropriated.
Cheating ..	417	The person cheated.

Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Cheating a person whose interest the offender was bound, by law or by legal contract, to protect.	418	The person cheated.
Cheating by personation ..	419	Do
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	420	Do
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person.	430	The person to whom the loss or damage is caused.
House trespass to commit an offence (other than theft) punishable with imprisonment.	451	The person in possession of the house trespassed upon.
Using a false trade or property mark ..	482	The person to whom the loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another.	483	The person whose trade or property mark is counterfeited.
Knowingly selling, or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with a counterfeit trade or property mark.	486	Do.
Marrying again during the lifetime of a husband or wife.	494	The husband or wife of the person so marrying.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.	509	The woman whom it is intended to insult or whose privacy is intruded upon.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) [illegible] High Court acting in the exercise of its powers of revision under s. 439 [illegible] to compound [illegible]

(6) [illegible]

an acqui[illegible]

(7) [illegible]

Amendment.—The Exception was substituted by Act VIII of 1882, s. 6; and the illustrations to the section were repealed by Act X of 1882.

PRACTICE.

Evidence—Prove points (1) and (2) as in s. 213; and further—

(3) That the accused gave or caused or offered to give or caused the gratification, etc., as stated in the section.

(4) That he so gave or caused, etc., in consideration of such concealment, etc.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, if the case falls under the first clause; by Court of Session, or Magistrate, Presidency or first class, if it falls under the second; by Magistrate, Presidency or first class, or by Court empowered to try the offence screened, if it falls under the third.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That on or about the——day of——, at——, you gave (*or* caused *or* offered to give) gratification, to wit——, to AB in consideration of the said AB's concealing the offence of——under s.——of——and which offence is punishable with ——[or in the Court of——AB's or of his screening you (*or* ——)] from legal punishment for the said offence of——*or* of his screening you (*or* any person from legal punishment for the said (*or* any offence) (*or* of his not proceeding against you *or* ——) for the purpose of bringing you (*or* him) to legal punishment and thereby committed an offence under s. 214 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session.)

And I hereby direct that you be tried [by the said Court (*omit these words when tried by the Magistrate*)] on the said charge.

Taking gift to help to recover stolen property, etc.

215. Whoever takes or agrees or consents to take[1] any gratification under pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code,[2] shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence,[3] be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Object.—This section is primarily aimed at professional trackers and other persons who, being usually in league with thieves or well aware of their proceedings, obtain money, etc., for the recovery of stolen property, without making any effort to bring the offenders to justice.[1] It is not intended to apply to the actual thief but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover the stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence.[2] It would, however, apply to cases of persons taking rewards offered in advertisements for the return of stolen property; and such advertisements might amount to abetments of the offence punishable under this section.

Ingredients.—This section has three essentials—

[1] M. & M. 178.

[2] *Muhammad Ali*, (1900) 23 All. 81; *Nalli Veera Thevar*, (1914) 26 M. L. J. 598; *Kudumbam*, (1895) 1 Weir 196; *Twet Pe alias Shan Gale*, (1907) 4 L. B. R. 199, F. B.; *Nga Nyan U*, (1914) U. B. R. (1914-16) 43; *Kedar Nath*, (1925) 2 L. C. 25, 26 P. L. R. 303, 7 L. L. J. 477.

1. Taking or agreeing or consenting to take any gratification under pretence or on account of helping any person to recover any moveable property.

2. The owner of such property must have been deprived of it by an offence punishable under the Penal Code.

3. The person taking the gratification must not have used all means in his power to cause the offender to be apprehended and convicted of the offence.

1. '**Takes or agrees or consents to take, etc.**'—These words "imply that the person taking the gratification and the person giving it have agreed, not only as to the object for which the gratification is to be given, but also as to the shape or form the gratification is to take...if a person has actually taken a gratification from another, it must be assumed that he agreed to take, and the other to give it in that particular form or shape; but where the gratification has not actually passed and there is a disagreement as to the form or shape that the gratification is to take the idea of agreement or consent is negatived."[1]

2. '**Property of which he shall have been deprived by any offence punishable under this Code.**'—To constitute an offence under this section it is necessary that the moveable property should have been taken out of the possession of some person by means of an offence punishable under the Code. A lost a cow from his grazing ground. Some days later he heard that B had it. A went to him. B took Rs. 12 from him and promised to return the cow in ten days' time. He did not, however, keep his promise and subsequently refused to return either the cow or the money. It was held that A was not guilty of an offence under this section.[2]

Attempt.—"An attempt to take a gratification within the meaning of s. 215. necessarily includes the idea of a concurrence of wills between the giver and taker; with this much superadded thereto, that some act has been done preliminary to the act of taking. In other words, an attempt is a stage in the commission of the offence which is intermediate between the agreement or consent and the actual taking."[3] Thus, where two persons offered to secure the return of bullocks stolen from a third person for Rs. 30, and that third person refused but offered Rs. 15, which offer was rejected by the two persons, it was held that they had committed no offence.[4] This case has been dissented from in a later case where the Court observed: "I think that if an attempt to take a gratification within the meaning of s. 215 of the Indian Penal Code necessarily includes the idea of a giver and taker, it is no more an attempt to commit an offence but a substantive offence, on the language of the section. In an offence like the one specified in s. 215 of the Indian Penal Code, an attempt to commit it could only be under circumstances similar to those of the present case." In this case S had some of his buffaloes stolen. H proposed to S that if S gave him Rs. 200 and promised to take no steps to prosecute the thieves he would procure the restoration of the stolen cattle. S, however, would not agree to this proposal and reported the matter to the police. It was held that H was guilty of an attempt to commit the offence under this section.[5] The former Chief Court of Lower Burma, dissenting from *Chittar's case*, decided that in order to constitute an attempt to commit an offence under this section it is not necessary that the person who is willing to take and the person who is willing to give the illegal gratification should agree both as to the object for which the gratification is to be given and also as to the shape or form the gratification is to take. When once a proposal has been made for the payment of an illegal gratification whether it is completed by an agreement or not the offence of an attempt to commit an offence under this section is complete.[6]

[1] Per Dillon, J., in *Chittar*, (1898) 20 All. 389, 391.
[2] *Sharfa*, (1915) P. R. No. 9 of 1915.
[3] Per Dillon, J., in *Chittar*, sup.
[4] *Chittar*, ibid.
[5] *Hargayan*, (1922) 45 All. 159
[6] *Nga Nyo*, (1904) 2 L. B. R. 310.

3. **'Unless he uses all means in his power to cause the offender to be apprehended, etc.'**—The offence under this section is only committed if the person accepting gratification has failed to use all means in his power to cause the offender to be apprehended. A had her goods stolen. B, who knew the thieves, received money from A to endeavour to purchase the stolen property of the thieves for A, but not meaning to bring the thieves to justice. It was held that B was guilty of the felony of taking money on account of helping A to the return of the stolen goods.[1]

PRACTICE.

Evidence.—Prove (1) that the owner of the property was deprived of it by an offence under the Code.

(2) That the accused took, or agreed, or consented to take, the gratification.

(3) That such gratification was under the pretence of, or on account of, helping to recover such property.

(4) That the accused failed to use all means in his power to cause the offender to be apprehended and convicted.

It is not necessary to show that the prisoner had any connection with the commission of the previous felony; it is sufficient if the evidence satisfies the Court that the prisoner had some corrupt and improper design when he received the money; and did not *bona fide* intend to use such means as he could for the detection and punishment of the offender.[2]

Although this section is enacted to provide for a particular class of offence, there is no provision of law which forbids a conviction under s. 420 for an offence of that class, if the necessary facts which constitute an offence under s. 420 are proved.[3]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Charge.—Where the question is likely to arise whether a person who has accepted a gratification for the return of stolen property is the actual thief or not, alternative charges should be framed under s. 236 of the Code of Criminal Procedure.[4]

Harbouring offender who has escaped from custody or whose apprehension has been ordered—

216. Whenever any person convicted or or charged with an offence,[1] being in lawful custody for that offence, escapes from such custody,

or whenever a public servant,[2] in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence,[3]

whoever, knowingof such escape or order for apprehension, harbours[4] or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say,

if a capital offence;

if the offence for which the person was in custody or is ordered to be apprehended is punishable[5] with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[1] *John Pascoe*, (1849) 2 C. & K. 927, 18 L. J. (M. C.) N. S. 186.

[2] *John King*, (1844) 1 Cox 36.

[3] *Nga Shan*, (1922) 11 L. B. R. 422.

[4] *Twet Pe* alias *Shan Gale*, (1907) 4 L. B. R. 199, F. B.

if the offence is punishable[5] with transportation for life, or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine;

if punishable with transportation for life, or with imprisonment.

and if the offence is punishable[5] with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

"Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of British India, which, if he had been guilty of it in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition,[6] or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India; and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception.—This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

COMMENT.

This section should be compared with s. 212. Section 212 deals with the offence of harbouring an offender who having committed an offence absconds. This section deals with harbouring an offender who has escaped from custody, after being actually convicted or charged with the offence, or whose apprehension has been ordered; this latter offence is in the eye of the law more aggravated, and a heavier punishment is therefore awarded to it. It is thus an aggravated form of the offence punishable under s. 212.

1. **'Offence.'**—This word denotes here anything made punishable by the Code, or by any special or local law, when the thing made punishable by such law is punishable with imprisonment for six months or upwards (s. 40).

2. **'Public servant.'**—See s. 21, *supra*.

3. **'Orders a certain person to be apprehended for an offence.'**—This expression only means that the offence is the *causa sine qua non* of the apprehension. It is an offence under this section to harbour or conceal a person for whose apprehension an order has been passed by a public servant, even when such apprehension is sought to be made not for the purpose of trying him for an offence that he may have committed, but for enforcing a punishment already inflicted on him for having committed the offence.[1]

4. **'Harbours.'**—See s. 212, *supra*, and s. 216-B, *infra*. The word 'harbour' does not only mean to provide shelter, food and clothing but includes "the assisting of a person in any way to evade apprehension."[2] The mere giving of a meal to a gang of dacoits is not an offence within the meaning of this section, because in the

[1] *Satangi Koer*, (1909) 11 C. L. J. 109. [2] *Sarwan Singh*, (1922) 5 L. L. J. 320.

absence of any evidence to that effect it cannot be held that the intention of the accused was to prevent them from being apprehended.[1]

The word 'harbour' must be construed liberally. A man charged with an offence might to-day be found in the house of another, and although he might be [illegible] person, yet if for all practical purposes the [illegible] person not owning the house but visiting [illegible] erson harbouring the accused.[2]

5. 'Punishable.'—This word is used merely for the purpose of describing particular classes of offences in relation to which the punishment indicated in the section is to be inflicted; and it does not indicate that in a particular case the offence must have been punished.[3]

6. Any law relating to extradition.'—See p. 18 where the subject of extradition is discussed.

Amendment.—The paragraph above the Exception was inserted by Act X of 1886, s. 23.

PRACTICE.

Evidence.—Prove (1) that the person in question has been convicted of, or charged with, an offence.

(2) That such person was in lawful custody for the same.

(3) That such person escaped from such custody.

(4) That the accused knew of such escape.

(5) That he with such knowledge harboured, or concealed such offender.

(6) That he did so, with intent to prevent him from being apprehended

(7) That the offence in question was punishable with (*a*) death, or (*b*) transportation for life or imprisonment for ten years, or (*c*) with imprisonment from one to ten years.

Or prove the following points —

(1) That a person had been ordered to be apprehended.

(2) That such order was the order of a public servant.

(3) That such order was in the lawful exercise of his powers.

(4) That the accused knew of such order for apprehension.[4]

(5)
(6) As above.
(7)

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class, if the case comes under the first or second clause; by Magistrate, Presidency or first class, or by Court by which the offence is triable, if the case comes under the third clause.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That on or about the——day of——, at——, one AB was charged with or convicted of an offence under s.——by the Court of——[*or* one AB was ordered to be apprehended for an offence punishable under s.——by——a public servant in the exercise of his lawful powers as such public servant and that you knowing of the escape of AB (*or* knowing of the said order for apprehension) on the——or about——day of——, at——, harboured or concealed AB with the intention of preventing him from being apprehended, and that you thereby committed an offence punishable under s. 216 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court] on the said charge.

Punishment.—Under the Frontier Crimes Regulation[5] a person convicted of an offence under this, or the next, section may be sentenced, in lieu of or in addition to fine, to imprisonment or transportation for not more than seven years.

[1] *Hukam Singh*, (1924) 6 L. L. J. 481.
[2] *Bhujabali Akappa Gorwadi*, (1912) 14 Bom. L. R. 583, 1 Bom. Cr. C. 151.
[3] *Satanji Koer*, (1909) 11 C. L. J. 109
[4] *Harnam Singh*, (1924) 6 L. L. J. 478.
[5] III of 1901, s. 11, (3) (*d*) and 12 (2).

Penalty for harbouring robbers or dacoits.

216-A. Whoever, knowing or having reason to believe[1] that any persons are about to commit or have recently committed robbery[2] or dacoity,[3] harbours[4] them or any of them, with the intention of facilitating the commission of such robbery or dacoity, or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without British India.

Exception.—This provision does not extend to the case in which the harbour is by the husband or wife of the offender.

COMMENT.

This section was inserted by Act III of 1894, s. 8. It is specially enacted with a view to enable the Court to inflict enhanced punishment where the persons harboured are robbers or dacoits or where they intended to commit robbery or dacoity. Section 212 is a general provision; and an offence under s. 216-A will be an offence under s. 212. But in the case of robbers or dacoits this section must be applied.

To justify a conviction under this section both knowledge and intention are required.[1]

1. '**Reason to believe.**'—See s. 26, *supra.*
2. '**Robbery.**'—See s. 390, *infra.*
3. '**Dacoity.**'—See s. 391, *infra.*
4. '**Harbours.**'—See s. 216-B, *infra.*

PRACTICE.

Evidence.—*Prove (1) that the persons in question were about to commit or had recently committed robbery or dacoity.*

(2) That the accused knew this.

(3) That the accused harboured them or some of them.

(4) That the accused did so with the intention of (*a*) facilitating the commission of such robbery or dacoity, or (*b*) screening them or some of them from punishment.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, knew (*or* having reason to believe) that AB was about to commit robbery (*or* dacoity) [*or* that he had on or about the——day of——committed robbery (*or* dacoity) at——] harboured him, with the intention of facilitating the commission of robbery (*or* dacoity) by the said AB [*or* of screening him from punishment] and that you thereby committed an offence punishable under s. 216-A of the Indian Penal Code and within my cognizance [*or* the cognizance of the Court of Session].

And I hereby direct that you be tried [by the said Court] on the said charge.

[1] *Satharam,* (1895) Cr. R. No. 39 of 1895, Unrep. Cr. C. 775.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2).

Definition of "harbour" in sections 212, 216 and 216-A.

216-B. In sections 212, 216 and 216-A, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person in any way to evade apprehension.[1]

COMMENT.

This section was inserted by Act III of 1894, s. 8. It defines the word 'harbour' used in ss. 212, 216 and 216-A. Acts which rendered a person an accessory after the fact at common law are included in this definition.

1. 'Assisting a person in any way to evade apprehension.'—The Allahabad High Court has held that these words are meant to point to some method *ejusdem generis* with those specified in the earlier portion of the section. They will not, for instance, include the assisting of an accused person to escape by merely telling a bare lie to the police as to his whereabouts.[1] The Calcutta High Court has, however, held otherwise. It has laid down that these words are not restricted to methods which may properly be regarded as *ejusdem generis* or of a like nature with supplies of food or of other necessary articles.[2] Where, therefore, the accused replied in answer to the inquiry by the police that A was in the house and promised to produce him but returned with A's son saying that he had committed a mistake in telling that A was in and thus gave time to A to escape on the roof of the house, it was held that he had committed an offence under this section.[3]

Where a proclaimed offender was arrested in the act of cooking his meals at the place of a village Zemindar and the Zemindar was present at the time of the arrest, he was held to have harboured the offender with the knowledge that he was such and with the intention of preventing his apprehension within the meaning of this section.[4]

Where the accused had lent to some dacoits his pony merely to facilitate them in removing the loot, the Allahabad High Court held that the applicant could not be charged under this section with having harboured the dacoits.[5] This case does not seem to lay down sound law for the lending of the pony would come within the words "supplying a person with...means of conveyance."

Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.

217. Whoever, being a public servant,[1] knowingly disobeys any direction of the law[2] as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment,[3] or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely, thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[1] *Husain Baksh*, (1903) 25 All. 201.
[2] *Muchi Mian*, (1917) 26 C. L. J. 141, 21 C. W. N. 1062.
[3] *Ibid.*
[4] *Mathura Singh*, (1909) 6 A.L.J.R.127 (n).
[5] *Damri*, (1924) 22 A. L. J. R. 496.

COMMENT.

This section and the three following sections deal with disobedience on the part of public servants in respect of official duty. Their proper place would have been in Chapter IX.

1. 'Public servant.'—See s. 21, *supra*.

2. 'Direction of law' means "a positive direction of law, such as those contained in ss. 89 and 90 of the Criminal Procedure Code, and cannot be made to extend to the more general obligation by which every subject is bound not to stifle a criminal charge."[1] Before a person can be convicted under this section, it must be shown that there is a direction of law as to the way in which he is to conduct himself as such public servant, and this direction must be a direction to be found in some positive statute of some rules or regulations which are declared by statue to have the force of law.[2]

3. 'Intending thereby to save...any person from legal punishment.'—"It appears to me quite sufficient for the purpose of a conviction under s. 21,[7] that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he should have done this with the intention of saving a person from legal punishment, and that it is not further necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment...a public servant charged under that section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was founded upon a mistaken belief as to that person's liability to punishment."[3] Thus, the actual guilt or innocence of the alleged offenders is immaterial, if the prisoner believes they are guilty, and intends to screen them.[4]

'Legal punishment' does not include departmental punishment.[5]

Where several persons were apprehended at night time on suspicion of having committed culpable homicide, the police-officer tied them together by the hands, and kept them in the village in which they had been arrested, instead of at once taking them to the nearest police-station. The prisoners escaped in the course of the night. It was held that the police-officer did not commit an offence under this section, because his intention in keeping the prisoners in the village was merely to wait until it was more convenient to start, and the disobedience of the rule of law was, therefore, not such a disobedience as this section contemplates.[6]

The accused, a Police Patel, on a complaint having been made to him that an attempt had been made to commit rape on a girl, made some investigation, prepared a *panchnama* of the scene of the offence, and arrested the two persons against whom the accusation was laid. He sent them with a report to the police-station, but on the way the parties came to a settlement and all returned to the village The complainant informed the Patel that he had no desire to continue the proceedings, whereupon the Patel tore up the *panchnama* which he had made. For this destruction the Patel was convicted of an offence under this section. It was held, acquitting the Patel, that it could not be fairly said that he knowingly disobeyed any direction of the law as to the way, in which he should conduct himself or that he intended or knew it to be likely that by tearing up the *panchnama* he would save any person from legal punishment.[7]

A conviction under this section of a village *ventt* for allowing a person who had been sentenced by a Village Magistrate to escape on the way to the lock-up was held to be bad.[8]

[1] *Per Turner, C. J.*, in *Raminiki Nayar*, (1877) 1 Mad. 266, 267

[2] *Ram Prasad*, (1902) 22 A. W. N. 16.

[3] *Amiruddeen*, (1878) 3 Cal. 412, 413.

[4] *Hurdut Surma*, (1867) 8 W. R. (Cr.) 68.

[5] *Jungle Lall*, (1873) 19 W. R. (Cr.) 40.

[6] *Ootum Chund*, (1871) P. R. No. 18 of 1871.

[7] *Naranbhai Bhulabhai*, (1913) 15 Bom. L. R. 578, 2 Bom. Cr. C. 90.

[8] *Bodapati Pentadu*, (1882) 1 Weir 197.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he conducted himself in the particular manner charged.

(3) That such conduct was in the exercise of his duties as such public servant.

(4) That such conduct was in disobedience to a direction of law.

(5) That when the accused disobeyed such direction of law, he did so knowingly.

(6) That when he was guilty of such disobedience he intended to, or knew that it was likely that he would thereby, save (*a*) some person from punishment, or subject some person to a less punishment than that to which he was entitled; or (*b*) some property from forfeiture or a charge to which it was liable; or (*c*) that such punishment, etc., was legally enforceable, or that such forfeiture, or charge, was a legal liability.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Charge.—It should distinctly state what the direction of law was.[1] It should run as follows :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That on or about the——day of——, at——, you being a public servant knowingly disobeyed the direction of the law as to the way in which you were to conduct yourself as such public servant, to wit——, (*specify the direction of law*). intending thereby to save——(*or* knowing it to be likely that you will thereby save——) from legal punishment [*or* subject him to a less punishment than that to which he was liable *or* with intent to save or knowing that you were likely thereby to save some property, to wit——, from forfeiture (*or* any charge to which it is liable by law)] and that you thereby committed an offence punishable under s. 217 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.

218. Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing,[1] frames that record or writing in a manner which he knows to be incorrect,[2] with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person,[3] or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment,[4] or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section deals with the intentional preparation of a false record with the object of saving or injuring any person or property. The correctness of records is of the highest importance to the State and to the public. The intention with which the public servant does the acts mentioned in the section is an essential ingredient of the offence punishable under this section.[2]

[1] *Baban Khan valad Mhaskoji*, (1877) 2 Bom. 142.

[2] *Shama Churn Roy*, (1867) 8 W. R. (Cr.) 27.

Ingredients.—This section has three essentials—

1. The offender must be a public servant charged with the preparation of a record or writing.

2. He must have framed that record or writing incorrectly.

3. He must have done so with intent to cause or knowing it to be likely that he will thereby

(*a*) cause loss or injury to the public or any person, or

(*b*) save any person from legal punishment, or

(*c*) save any property from forfeiture or other charge to which it is legally liable.

1. **'Whoever being a public servant...charged with the preparation of any record, etc.'**—The word 'charge' is not restricted to the narrow meaning of "enjoined by a special provision of law." So where a District Superintendent of Police usually required a first information and special diary in gambling cases, it was held that a Sub-Inspector who was given a warrant to arrest certain persons but who framed the information and the diary incorrectly to save two persons from punishment was properly convicted of having committed an offence under this section as he was charged with the preparation of such record within the meaning of it.[1] The public servant framing an incorrect record must have been charged with the preparation of it.

A public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents with the intention of screening himself from punishment. It was held that such fabricated documents not being records or writings with the preparation of which such public servant as such was charged, he could not legally be convicted under this section.[2]

2. **'Frames that record or writing in a manner which he knows to be incorrect.'**—It is essential that the record must have been incorrectly made.

3. **'With intent to cause...loss or injury to the public or to any person.'**—The section contemplates the wilful falsification of a public document with intent thereby to cause loss or injury and this means by the document itself or by some transaction with which it is essentially connected. The accused must not be convicted on a remote and speculative chain of possibilities, otherwise the most innocent acts might, by the exercise of a little ingenuity, be perverted into [illegible] was not sufficient.[4] Where a *chowkidar* was charged with having made a false entry in a *chowkidaree* attendance book, with a view to support a charge which was made against a Sub-Inspector of having made a false report regarding the length of absence from duty of another *chowkidar*, and thereby to cause loss or injury to the Sub-Inspector, it was held that the intention was too remote to fall within this section.[5] S was charged with the preparation of a certain record, and was in the habit of preparing it from certain abstracts made and read to him by D. D made and read false abstracts whereby an incorrect record was prepared. It was held that D could not be held to have committed this offence but was guilty of abetting it.[6]

It is not necessary that the incorrect document should be submitted to another person, or be otherwise used by the writer; it is sufficient if it is shown that it has been prepared by a public servant charged with its preparation, in a manner which he knows to be incorrect and with the knowledge that he is thereby likely to cause

[1] *Deodhar Singh*, (1899) 27 Cal 144.
[2] *Mazhar Husain*, (1883) 5 All. 553.
[3] *Ramachandra*, (1884) Unrep. Cr. C. 201.
[4] *Ibid.*
[5] *Jungle Lall*, (1873) 19 W. R. (Cr.) 40.
[6] *Brj Mohan Lal*, (1875) 7 N. W. P. 134.

loss to the public. If, after such preparation, he submits the document, with intent to procure credit for a payment of more than to his knowledge is due to him, all the elements of an attempt to cheat in its simple or aggravated form (ss. 417, 418) would be present; but it does not follow that, because there was not a complete attempt to cheat, there was no complete offence.[1] As to the definition of 'injury,' see s. 44, *supra*.

4. 'With intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment.'—The words 'any person' mean a person other than the public servant or the public servant himself. If the legislature had intended that this section should only apply when the intention was to save some person other than the public servant, it would have been easy to insert the word "other" between the words "any" and "person." A public servant who does that which, if done to save another from legal punishment, would bring the public servant within this section, has equally committed the offence punishable under this section if the person whom he intends to save from legal punishment is himself.[2]

'Legal punishment.'—The expression does not include departmental punishment.[3] "The gist of the section is the stifling of truth and the perversion of the course of justice in cases where an offence has been committed. It is not necessary even to prove the intention to screen any particular person. It is sufficient that he knows it to be likely that justice will not be executed and that some one will escape punishment for the offence."[4]

Actual commission of offence not necessary.—The actual guilt or innocence of the alleged offender is immaterial if the accused believes him guilty and intends to screen him.[5] It is necessary to prove that the accused believed, or had reason to believe, that the person concerned had committed an offence, though it is not necessary to prove that such an offence had, as a matter of fact, been committed It is quite sufficient that the commission of a cognizable offence has been brought to the notice of the accused officially and that in order to screen the offender he prepared the record in a manner which he knew to be incorrect.[6]

CASES.

Public servant framing incorrect record to save a person from legal punishment.—A *kulkarni* who made a false report with reference to an offence committed in his village with intent to save the offenders from punishment was held to have committed this offence.[7] Where it was proved that the prisoner's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, it was held that he had committed this offence.[8]

A report of the commission of a dacoity was made at a *thana*. The police-officer in charge of the *thana* took down the report which was made to him, but subsequently destroyed the report and framed another and a false report of the commission of a totally different offence to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him by the complainant. It was held that the police-officer was guilty of offences punishable under s. 204 and this section.[9]

[1] *Megraj*, (1880) P. R. No. 13 of 1881.

[2] *Nand Kishore*, (1897) 19 All. 305, overruling [illegible]

[3] [illegible]

[4] [illegible] *khan*, [illegible] 25 Bom. L. R. 825, 6 Bom. Cr. C. 72. Fawcett, J., refrained from expressing any opinion on the point whether it is unnecessary to prove an intention to screen any particular person

[5] *Krishnaji*, (1888) Unrep. Cr. C. 405.

[6] *Moti Ram*, (1925) 7 L. L. J. 331, 26 P. L. R. 594.

[7] *Malhar Ramchandra*, (1870) 7 B. H C. (Cr. C) 64.

[8] *Girdhari Lal*, (1886) 8 All. 653.

[9] *Muhammad Shah Khan*, (1898) 20 All. 307.

Where a Police Inspector had been charged with framing an incorrect record in that he entered in his diary that certain cartmen told him that "they were not beaten by dacoits," while in fact they told him that "they were beaten by dacoits," it was held that this was not sufficient to sustain a conviction under this section. But where he, without endeavouring to enquire into the truth of the said entry in his diary, destroyed certain records which falsified it and substituted fresh note-books, his *bona fides* were open to question and he was deemed to have framed an incorrect public record intentionally.[1] Where a Station House Officer, in order to support the Inspector, made a false entry in his diary that the "four cartmen stated to him as they had said before the Inspector," he was guilty of framing an incorrect public record intentionally when it appeared from the evidence that he took no action on the complaint of the cartmen, and his statement that no complaint of dacoity was made to him, was falsified by his own witness.[2]

The accused, a Head Constable, whilst investigating a complaint of theft, searched the house of the suspect and found there a piece of cloth and a bodice which the complainant said belonged to him. Statements made by the complainant and his wife claiming the property to be theirs were taken down. The complainant produced from his house some clothes of his own for comparison. Panchnamas were made of the search and the comparison. Subsequently, these papers were suppressed, and the accused prepared statements purporting to have been made by the complainant and his wife withdrawing the complaint; and a Panchnama of the property produced by the complainant which was wrongly supposed to have been stolen from his house was made. The accused was charged with offences punishable under s. 201 and this section. It was held that the accused had committed no offence under s. 201, but that he was guilty of an offence punishable under this section.[3]

Incorrect record framed without any of the objects mentioned in this section.—A village Munsif who submitted a false calendar in which he purported to have convicted certain persons of theft was not guilty under this section.[4]

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.

(2) That he was charged with the preparation of record or other writing in his capacity as a public servant.

(3) That he framed such record or other writing in an incorrect manner.

(4) That he then knew that he was framing it in an incorrect manner.

(5) That he did as above, with the intent or with the knowledge, that it was likely, that he would thereby (*a*) cause loss or injury to the public, or any person; or (*b*) save a person from punishment; or (3) save some property from forfeiture or charge.

(6) That such punishment was legally enforceable, or that such charge or forfeiture was a legal liability.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the——day of ——, you being a public servant charged with the preparation of a record (*or* writing), to wit——, framed the said record (*or* writing) in a manner which you knew to be incorrect——(*specify the incorrect statement*) and which you made with intent to cause (*or* knowing it to be likely that

[1] *Ramaswami Iyengar*, (1911) 2 M. W. N. 41.

[2] *Pasupuleti Ramdoss*, (1911) 2 M. W. N. 64.

[3] *Anverkhan Mahamadkhan*, (1921) 23 Bom. L. R. 823, 6 Bom. Cr. C. 72.

[4] *Chinnakannu Udayan*, (1899) 1 Weir 197.

you will thereby cause) loss (*or* injury) to public [(*or* to any person, to wit——) (*or* with intent thereby to save *or* knowing it to be likely that you will thereby save any person from legal punishment *or* with intent to save *or* knowing that you are thereby likely to save any property, to wit——) from forfeiture to which it was liable by order of the Court in case No.——of ——] and that you thereby committed an offence punishable under s. 218 of the Indian Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

Public servant in judicial proceeding corruptly making report, etc., contrary to law.

219. Whoever, being a public servant,[1] corruptly[2] or maliciously[3] makes or pronounces in any stage of a judicial proceeding,[4] any report, order, verdict or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT.

This section must be read with s. 77; it contemplates some wilful excess of authority, in other words, a guilty knowledge superadded to an illegal act. Knowledge that the commitment is contrary to law is a question of fact, and its existence or non-existence must be inferred from the circumstances of each case.[1] This and the next section deal with corrupt or malicious exercise of the power vested in a public servant for a particular purpose.

1. '**Public servant**'—See s. 21, *supra*.

2. '**Corruptly**.'—See. s. 196, as to the meaning of this word.

3. '**Maliciously**.'—"Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse."[2] A man acts maliciously when he wilfully and without lawful excuse does that which he knows will injure another in person or property. The term 'maliciously' denotes a wicked, perverse and incorrigible disposition.[3] It means and implies an intention to do an act which is wrongful, to the detriment of another.[4] Where any person wilfully does an act injurious to another without lawful excuse he does it 'maliciously.'[5] Whether a person has acted corruptly or maliciously is a question of fact and must be proved. Proof of an unlawful commitment to confinement will not of itself warrant the legal inference of malice.[6] Where a village Munsif passed a decree which was contrary to law, it was held that he was guilty under this section for maliciously pronouncing a decision.[7]

4. '**Judicial proceeding**.'—See s. 192, *supra*.

PRACTICE.

Evidence—Prove (1) that the accused is a public servant.

(2) That he made or pronounced the report, order, verdict or decision.

(3) That he did as in (2) corruptly or maliciously,

(4) That such report, order, verdict, or decision was made or pronounced in the course of a judicial proceeding.

[1] *Narayan Babaji*, (1872) 9 B. H C 346

[2] Per Bayley, J., in *Bromage* v *Prosser*, (1825) 4 B. & C. 247, 255

[3] *Ward*, (1871) L. R. 1 C. C. R. 356.

[4] Per Bowen, L. J., in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, (1889) 23 Q B. D. 598.

[5] Per Blackburn, J, in *Pembliton*, (1874) L. R. 2 C. C. R 119, 122, followed in *Piare Lal*, (1916) 15 A L. J. R. 106.

[6] *Narayan Babaji*, sup.

[7] *Piare Lal*, sup.

(3) That the accused was legally bound to apprehend such person for the same.

(4) That he omitted to apprehend.

(5) That he did so intentionally.

Prove also that the offence for which such person is charged with, etc., is punishable (*a*) with death; or (*b*) with transportation for life or imprisonment up to ten years; or (*c*) with imprisonment for less than ten years.

Or prove the following points :—

(1) That the accused is a public servant.

(2) That the person in question was in confinement for an offence.

(3) That the accused was legally bound to keep such person is such confinement.

(4) That he suffered such person to escape, or aided such person in escaping or in the attempt to escape.

(5) That he did so intentionally.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, if the case comes under the first clause; by Court of Session, Presidency Magistrate, or first class Magistrate, if it comes under the second; by Magistrate, Presidency, first, or second class, if it comes under the third.

Charge—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you on or about the——, at——, being a public servant (*state* [illegible] *of office held by the prisoner so as to make him a public* [illegible] public servant to keep in confinement AB charge [illegible] offence punishable with (*state the punishment*), intention.." [illegible] such person to escape, and that you thereby committed an offence punishable under s. 221 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.[1]

For the second paragraph the following may be substituted :—

That you being a public servant, to wit——, and being as such public servant legally bound to apprehend (*or* keep in confinement one AB, who was, on or about the——day of——, at——, charged with (*or* liable to be apprehended for) the offence of——, punishable with——, did intentionally omit to apprehend such person [*or* intentionally suffer the said AB to escape *or* intentionally aid the said AB in escaping *or* attempting to escape from such confinement]; and that you thereby committed an offence punishable under s. 221 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Intentional omission to apprehend on the part of public servant bound to apprehend person under sentence or lawfully committed.

222. Whoever, being a public servant,[1] legally bound[2] as such public servant to apprehend or to keep in confinement any person under sentence of a Court of Justice[3] for any offence,[4] or lawfully committed to custody intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say :—

with transportation for life or with imprisonment of either description for a term which may extend to fourteen years, with

[1] Criminal Procedure Code, Sch. V, No. xxviii.

or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death; or

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to transportation for life or penal servitude for life or to transportation or penal servitude or imprisonment for a term of ten years or upwards; or

with imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, to imprisonment for a term not extending to ten years, or if the person was lawfully committed to custody.

COMMENT.

This section is similar to the last section with the exception that the person to be apprehended had already been convicted or committed for an offence. It is thus an aggravated form of the offence made punishable by the last section.

1. '**Public servant.**'—See s. 21, *supra*.

2. '**Legally bound.**'—See s. 43, *supra*.

3. '**Court of Justice.**'—See s. 20, *supra*.

4. '**Offence.**'—'Offence' means a thing punishable under the Code or under any special or local law (s. 40).

Amendment.—The words "or lawfully committed to custody" in the first paragraph, and "or if the person was lawfully committed to custody" at the end were inserted by Act XXVII of 1870, s. 8.

PRACTICE.

Evidence.—Prove (1) that the accused is a public servant.
(2) That the person in question was sentenced by a Court of Justice.
(3) That such sentence was for an offence committed.
(4) That such person was liable to be apprehended under such sentence.
(5) That the accused was legally bound to apprehend such person.
(6) That he omitted to apprehend.
(7) That he did so intentionally.
Or prove the following points :—(1), (2) and (3) as above, and further—
(4) That such person was in confinement under such sentence.
(5) That the accused was legally bound to keep him in such confinement.
(6) That he suffered such person to escape, or aided him in escaping or in the attempt to escape.
(7) That he did so intentionally.
Prove also the offence for which such person was confined.
Or prove the following points :—
(1) That the accused is a public servant.
(2) That the person in question had been committed to custody.
(3) That such committal was lawful.
(4) That the accused was legally bound to keep him in confinement under such committal.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, having been sentenced to transportation by the Court of Session of——(*specify the term*) and that on the——day of——, at——, you did return from such transportation, *the term of such* transportation not having expired, and your punishment not having been remitted, and that you thereby committed an offence punishable under s. 226 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Violation of condition of remission of punishment.

227. Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

COMMENT.

This section deals with those cases in which remission of punishment is made conditional by Government under s. 401 of the Code of Criminal Procedure.

PRACTICE.

Evidence.—Prove (1) the nature and extent of the original punishment to which the accused had been sentenced.

(2) That such punishment had been remitted.

(3) That such remission had been granted to and accepted by the accused upon a certain condition.

(4) That the accused violated such condition.

(5) That he did so, knowing that he was violating such condition.

(6) Prove also whether the accused has already suffered any part of the original punishment.

Procedure.—Not cognizable—Summons—Not bailable—Not compoundable—Triable by the Court by which the original offence was triable.

Jurisdiction.—A person convicted by the Recorder's Court of Prince of Wales' Island, Singapore and Malacca, of the crime of burglary, and sentenced to transportation for ten years was released from the Ratnagiri Jail on a ticket-of-leave after having been in confinement for more than eight years. At Karwar he committed theft in a dwelling-house before his sentence had expired. It was held that the First Class Magistrate at Karwar had jurisdiction to try the case.[1]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——were sentenced in case *No.*—— of ——by the Court of——to——(*mention the punishment*) and which punishment was remitted on——by the order of——on your accepting the condition, *to wit*——, and which you accepted, and which you knowingly violated in that on or about the——day of——you——(*state the nature of the violation*) *and that* you thereby committed an offence punishable under s. 227 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I thereby direct that you be tried [by the said Court] on the said charge.

[1] *Akone Akong*, (1872) 9 B. H. Cr. 356.

Intentional insult or interruption to public servant sitting in judicial proceeding.

228. Whoever, intentionally [1] offers any insult, or causes any interruption to any public servant,[2] while such public servant is sitting in any stage of a judicial proceeding,[3] shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The object of this section is to punish a person who intentionally insults in any way the Court administering justice. It is to preserve the prestige and dignity of the Court that this section is provided. It lays down the highest sentence that could be inflicted for contempt of Court. Under s. 480 of the Criminal Procedure Code a person guilty of contempt of Court may be dealt with summarily, but in such cases he can only be fined.

Acts such as rude and contumacious behaviour; obstinacy, perverseness, prevarication or refusal to answer any lawful question; breach of the peace or any wilful disturbance whatever, will amount to a contempt of Court. The Penal Code does not provide against a contempt of Court committed by the publication of a libel out of Court when the Court is not sitting, and neither in Chapter XXI on 'Defamation' nor elsewhere, provides for the punishment of a contempt of Court committed by the publication of a libel reflecting upon a judge in his judicial [illegible] d judge [illegible] g action under this section ought not to give room for the impression that they are unduly sensitive [2]

This section is confined to those cases of contempt of Court where the public servant is sitting in any stage of a judicial proceeding But the Court has inherent jurisdiction to punish cases of contempt not coming within the purview of this section. A process-server was insulted in most filthy language, caught by his throat and severely pushed out of the room by the plaintiff while effecting service of a notice; service was subsequently effected by him by affixing a copy on the outer door. It was held that when a process-server, in execution of his duty, has been abused and assaulted, it is a contempt of Court, as it is an attempt to obstruct or unduly interfere with the administration of justice. Those who have duties to discharge pursuant to the orders of a Court are protected by the law and shielded on their way to the discharge of such duties, while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of justice and carry out their orders [3]

Ingredients.—Three things are necessary under this section—

1. Intention.
2. Insult or interruption to a public servant.
3. The public servant insulted or interrupted must have been sitting in any stage of a judicial proceeding.

1. 'Intentionally.'—The insult or interruption to the Court should be intentional "Merely uttering of words and not keeping silent can hardly be construed as intentional insult or interruption caused by an undefended prisoner

[1] *Surendra Nath Banerjee*, (1883) 10 Cal. 274 109, P. C.

[2] *Ramasami Goundan*, (1915) 29 M. L. J. 41 C. L. J. 515.

[3] *Shone v. Bason*, (1925) 29 C. W. N. 766,

a transfer of his case, the accused could not be convicted of this offence.[1] The use of objectionable or defamatory expressions in the petition presented to a Magistrate could not be regarded as a contempt committed in his presence justifying him in taking immediate action under this section and s. 480, *Criminal Procedure Code*.[2]

Statutory application.—See s. 37 of the Indian Income-tax Act (XI of 1922).

PRACTICE.

Evidence.—Prove (1) that the person offended is a public servant.

(2) That, at the time of the offence, such public servant was sitting in some stage of a judicial proceeding.[3]

(3) That, while he was so sitting, the accused offered an insult to such public to him.

Intention must be strictly made out by the prosecution.[4]

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by the Court in which the offence is committed, subject to the provisions of Chapter XXXV of the Criminal Procedure Code. See s. 480, Criminal Procedure Code.

The law requires that a criminal Court inflicting a fine for contempt of Court should specially record its reasons, the facts constituting the contempt with any statement the offender may make as well as the finding and sentence.[5] The record must show the nature and stage of the judicial proceedings in which the Court interrupted or insulted was sitting and the nature of the interruption or insult.[6]

The procedure laid down in s. 480, Criminal Procedure Code, should be strictly followed. The provisions of the section should be applied then and there, at any rate before its rising, by the Court in whose view or presence a contempt has been committed.[7]

Complaint.—Complaint in writing of the Court before which the offence is committed or of some other Court to which it is subordinate is required.[8]

Personation of a juror or assessor.

229. Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned,[1] empanelled or sworn as a juryman or assessor in any case in which he knows that he is not entitled by law[2] to be so returned, empanelled or sworn, or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily[3] serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section is intended to punish false personation of a juror or an assessor. It deals with two classes of cases: (1) where the accused had guilty knowledge

[1] *Abdullah Khan*, (1898) 18 A. W. N. 145.
[2] *Wahid Bakhsh*, (1903) P. L. R. No. 137 of 1903.
[3] *Prokash Chunder Dass*, (1869) 12 W. R. (Cr.) 64; *Khushal Singh*, (1886) P. R. No. 36 of 1886.
[4] (1881) 1 Weir 216; *Hurri Kishen Doss*, (1871) 15 W. R (Cr) 62; *K. Chappu Menon*, (1868) 4 M. H. C. 146, *Venkatrao Rajerao Mudvedkar*, (1922) 24 Bom. L. R. 386, 6 Bom. Cr. C. 186.
[5] *Panchanada Tambiran*, (1869) 4 M. H. C. 229; *Kashinath Vithal v. Daji Govind*, (1870) 7 B. H. C. (A. C. J.) 102.
[6] *Khushal Singh*, sup.
[7] *Paiambar Bakhsh*, (1889) 11 All. 361
[8] Criminal Procedure Code, s. 195.

before he was returned, *i.e.*, got himself enlisted as a juror or assessor, and (2) where he had such knowledge after he was returned.

Five sections of the Code deal with false personation, *viz.*, ss. 140, 170, 171, 205 and 229.

1. **'By personation or otherwise shall intentionally cause, or knowingly suffer himself to be returned.'**—'To be returned' means getting oneself enlisted as a juror or as an assessor.

It is a misdemeanour at common law for a person to pretend to be a qualified juryman, and to go into the jury-box and act in the name of a qualified juryman, and this without any corrupt motive on the part of such person.[1]

2. **'Not entitled by law.'**—See s. 278, Criminal Procedure Code, which says what persons are not qualified to serve as jurors or assessors. As to choosing a jury, see s. 276, Criminal Procedure Code; as to choosing assessors, see s. 321, Criminal Procedure Code.

3. **'Voluntarily.'**—See s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused was returned, etc.

(2) That he was not entitled by law to be so returned or empanelled, etc.

(3) That he caused or suffered himself intentionally or knowingly to be so returned, empanelled, etc., by personation, or otherwise.

(4) That he at the time he was so returned or empanelled, etc., knew that he was not entitled to be so returned or empanelled, etc.

Or prove points (1) and (2) as above and further—

(3) That the accused knew that he had been returned or empanelled, etc., contrary to law.

(4) That he nevertheless voluntarily served in that capacity

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows :—

That you, on or about the——day of——, at——, intentionally caused (*or* knowingly suffered) yourself to be returned (*or* empanelled *or* sworn) as a juryman (*or* assessor) in case No.——of——tried by——by personating AB when you knew that you were not entitled to be so returned (*or* empanelled *or* sworn) [*or* you knowing yourself to have been so returned (*or* empanelled *or* sworn) contrary to law voluntarily served on such jury (*or* as such assessor)] and that you thereby committed an offence punishable under s. 229 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

[1] *Clark*, (1918) 26 Cox 138.

CHAPTER XII.

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

On second conviction of an offence under this Chapter punishable with imprisonment for three years, the offender may be punished with transportation for life or ten years' imprisonment (*vide* s. 75).

"Coin defined."

230. Coin[1] is metal used for the time being[2] as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used.

Queen's coin.

Queen's coin[3] is metal stamped and issued by the authority of the Queen, or by the authority of the Government of India, or of the Government of any Presidency, or of any Government in the Queen's dominions, in order to be used as money; and metal which has been so stamped and issued shall continue to be the Queen's coin for the purposes of this Chapter, notwithstanding that it may have ceased to be used as money.

ILLUSTRATIONS.

(*a*) Cowries are not coin

(*b*) Lumps of unstamped copper, though used as money, are not coin.

(*c*) Medals are not coin, inasmuch as they are not intended to be used as money.

(*d*) The coin denominated as the Company's rupee is the Queen's coin.

(*e*) The "Farukhabad" rupee, which was formerly used as money under the authority of the Government of India, is Queen's coin although it is no longer so used.

COMMENT.

Why heavier punishment for counterfeiting the King's coin.—The authors of the Code say: "We have proposed that the Government of India should follow the general practice of Governments in punishing more severely the counterfeiting of its own coin than the counterfeiting of foreign coin. It appears to us peculiarly advisable, under the present circumstances of India, to make this distinction. It is much to be wished that the Company's currency may supersede the numerous coinages which are issued from a crowd of mints in the dominions of the petty Princes of India. It has appeared to us that this object may be in some degree promoted by the law as we have framed it. That coinage, the purity of which is guarded by the most rigorous penalties, is likely to be the most pure; and that coinage which is likely to be the most pure will be the most readily taken in the course of business

"It is not very probable that any person in this country will employ himself in making counterfeit sovereigns or shillings; but should so improbable an event occur, we think that the King's coin should have the same protection which is given to the coin of the Local Government...It appears to us, however, that the offence of coining, though, in an arbitrary classification, it may be called by the technical name of treason, is in substance an offence against property and trade, that it is an offence of very nearly the same kind with the forging of a bank note, and that it would be an offence of exactly the same kind if the bank note,

like the notes of the Bank of England formerly, were in all cases legal tender, or if the coin, like the Company's gold mohur at present, were not legal tender. We do not therefore conceive that in proposing a law for punishing the counterfeiting of the King's coin, we are proposing a law which can reasonably be said to affect any of the royal prerogatives."[1]

1. **'Coin.'**—The present definition of 'coin' was introduced by Act XIX of 1872 in order to check the practice of counterfeiting the copper coin of Native States. The former definition defined coin as "metal stamped and issued by the authority of some Government." But 'Government,' by s 17, denotes the person or persons authorized by law to administer executive Government in any part of British India. It had thus happened that the coin of Native States was not coin within the meaning of the Code.

2. **'For the time being.'**—These words were introduced by Act XIX of 1872 as it was suggested that the definition might possibly be held to include old coin, such as a Græco-Bactrian Stater formerly used as money, but now regarded only as a curiosity. A coin of the time of Emperor Akbar[2] or a gold mohur of the reign of Shahjahan[3] cannot be deemed to be a coin inasmuch as it is not used for the time being as money.

Legal tender not necessary.—Coin need not [illegible] a value in rupees fixed by law. Gold mohurs whi[illegible]s at an absolutely fixed value, yet have a current [illegible]erely by weighing them as lumps of gold, but attaching to them as coin, are coins "for the time being used as money."[4]

The test of whether a particular piece of metal is money or not (supposing it genuine) is the possibility of taking it into the market, and obtaining goods of any kind in exchange for it. For this, its value must be ascertained and notorious; that it is known to persons of special skill or information is not sufficient[5]

3. **'Queen's coin.'**—The present definition of Queen's coin was introduced by Act VI of 1896, s 1. The reasons for amending the definition are stated as follows: "At present 'coin' is defined as metal used for the time being as money, and the consequence is that, if any offence under these sections has to be proved, it has to be shown that the coin was in use at the time of the offence as money. There is a process in coinage which is provided for by law, namely, in the Indian Coinage Act, which is termed the 'Calling in of coin' This gives Government an authority which it exercises under certain circumstances to call in coin and to cause it after a certain time to cease to be used as money. It is extremely doubtful whether, if the coin so called in has been counterfeited, a Court would hold that it was in use as money after the date of the proclamation which had called it in After a certain time it would certainly cease to be in use as money. This power to call in money has been exercised in one case,—and I think in only one, namely, that of the Farukhabad rupee, which immediately preceded the existing Government rupee, or, as it was at first called, 'the Company's rupee.' It was called in in 1877.- We have ascertained that this coin has been recently largely manufactured in Bombay. The manufacture has been carried on perfectly openly, and it has been brought to our notice by some of our Political Officers, who showed that it was being imported into Central India and Rajputana in considerable quantities. This manufacture we are unable, under the present law, to stop, because that particular coin is not in use at present as money The immediate practical object of the change which I propose to the Council to make in the Indian Penal Code is to put a stop to this particular coinage. But it is obvious that the same necessity may arise in any future case. We may at any time find reason to call in any particular

[1] Note I, pp. 134, 135.
[2] *Bapu Yadav*, (1874) 11 B. H. C. 172.
[3] *Khushali*, (1906) 29 All. 141.
[4] *Kunj Beharee*, (1873) 5 N. W. P. 187.
[5] *Bapu Yadav*, sup.

relation arising from the position of the object is insufficient. The possession contemplated is not possession which has never been voluntary: and for the purpose of bringing home to any person the voluntary possession of any object, the mere proof of a fact of which he knows nothing, would be valueless. The section no doubt also requires in the accused person intention or knowledge as to the use to be made of the objects in possession, and these might be implied from the nature of the objects themselves. But before that stage is reached, there must be some circumstance indicating such intention or knowledge as is inseparable from the notion of conscious retention implied in the word 'possession.' "Such indication may arise from the position of the object in a place which is constantly used by the person accused, and which could not be overlooked by him, or from the bulk of the object itself, or from any circumstance, such as the locking up of the object which would point to voluntary and conscious possession."[1]

Under the English statute dealing with offences relating to coin the word 'possession' embraces a wider area. Having any matter in the custody or possession of any person includes "not only the having it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling house, or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of any other person."[2]

If coining implements are found in a house occupied at the time by a man and his wife, the presumption is that they are in the possession of the husband alone, unless there are circumstances to show that the wife was acting separately and without her husband's sanction, they cannot both be convicted. The fact of a wife attempting to break up coining implements at the time of her husband's apprehension if done with the object of screening him, is no evidence of possession.[3] Where several persons are found in a room where false coining is going on and most of them are shown to have taken active [illegible] are all to be presumed to have been in possession [illegible] lying there which can be used for the purp[illegible] coins.[4]

Where father and son were accused of being in possession of moulds for the purpose of using the same for making counterfeit coins and of being in possession of such coins, and there was evidence to show that the father looked after the family cultivation while the son exclusively attended to the shop, in the verandah of which the moulds and coins were discovered, and it was also shown that the father was never seen in possession of the moulds or of the counterfeit coins, it was held that the ordinary presumption that the things in the house of a joint Hindu family were in the possession, and under the control, of the managing member, had been rebutted.[5]

It is not only necessary that the accused should be in possession of the instruments or materials for counterfeiting coin, but it should also be proved that the possession was within the accused's knowledge.[6]

[1] Per Batty, J., in *Hari Maniram Sonar*, (1904) 6 Bom. L. R. 887, 891. In the same case, Aston, J., did not concur in the above remarks, and went on to say (p. 894): "I think that if we introduce 'conscious' or 'voluntary' before the word possession where that word is not so qualified in a section of the Indian Penal Code we shall be legislating instead of administering the law, with inconvenient consequences such as shifting the burden of proof indicated by sections 114 and 106 of the Evidence Act... and even altering the substantive criminal law."

[2] 24 & 25 Vic., c. 99, s. 1.

[3] *Boober*, (1850) 4 Cox 272.

[4] *Lal Chand*, (1911) P. W. R. No. 17 of 1912, P. L. R. No. 43 of 1912.

[5] *Amrit Sonar*, (1919) 4 P. L. J. 525. See *Sangam Lal*, (1893) 15 All. 129, as to what evidence is necessary where a criminating article is found in a common room of a joint family house.

[6] *Nga San Nyein*, (1915) 8 B. L. T. 131.

The accused was in possession of a box containing instruments used for counterfeiting coin. It appeared that two other brothers of his had access to the box and it was not proved that there was any property of the accused in it. It was held that the accused could not be convicted for it was not shown that he was in exclusive possession of the box.[1] The accused went into a village and purchased sweetmeats from one K for which he paid a counterfeit two-anna piece: he also delivered another counterfeit two-anna piece to R in payment for some milk. K, on discovering the fraud, pursued the accused and aided by two others arrested him. On being pursued the accused threw away a yellow bag which was found to contain a mould, an instrument called a "gugui" used for keeping up a draught in a fire, a file and some white metal, all evidently instruments or materials used for counterfeiting coin. It was held that he was guilty of an offence under this section.[2]

Where coining instruments were found in a house occupied by a man, his wife, and a child ten years of age, the jury were directed to acquit the child of a felonious possession.[3] The prisoner was indicted for knowingly and without lawful excuse having in his possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half-crown. The mould was found in the house of the prisoner, who had previously passed a bad half-crown; but there was no evidence to show that the half-crown had been made in that mould. It was held that [illegible]

Instruments of coining.—[illegible] press for coinage[5]; a mou[illegible] inverted[6]; a puncheon of iron upon which was impressed the figure and similitude of the head-side of a shilling[7]; a collar of iron for graining the edges of counterfeit money[8]; and a galvanic battery.[9]

2. **'For the purpose of using the same for counterfeiting coin.'**—The mere possession of instruments and materials capable of counterfeiting coins is no offence. Possession of such instruments should be with the intention of counterfeiting coins, and the intention must be proved in order to establish the charge. The accused had in his possession three 'dies' and some instruments for the purpose of counterfeiting coin. He was a goldsmith by occupation, and the instruments found with him were required for his work as a goldsmith. The dies were deficient and no complete counterfeit coin could be struck from them either singly or combined. There was no evidence that he ever used those instruments or dies for the purpose of counterfeiting. It was held that he was not guilty of an offence under this section.[10] Instruments and materials which can be used for the purpose of making false coins as well as other purposes are to be considered instruments and materials used for the purpose of making false coins when these are found in connection therewith.[11]

3. **'Reason to believe.'**—See s. 26, *supra*.

4. **'Queen's coin.'**—See s. 230, *supra*.

PRACTICE.

Evidence.—Prove (1) that the instrument or material in question is one for the purpose of counterfeiting coin (*or* King's coin).

It must be shown by the prosecution that the instrument is capable of counterfeiting coin.[12]

[1] *Abdul Majid*, (1903) P. L. R. No. 7 of 1904.
[2] *Ahmad Shah*, (1892) P. R. No. 10 of 1892.
[3] *Boober*, (1850) 4 Cox 272.
[4] *Weeks*, (1861) L. & C. 18
[5] *Bell*, (1753) 1 East P. C. 169.
[6] *Lennard*, (1772) 1 East P. C. 170.
[7] [illegible]
[8] [illegible]
[9] [illegible]
[10] [illegible]
[11] [illegible] 17 of 1912
[12] *Kona Tirumala Reddi*, (1889) 1 Weir 219.

(2) That the accused was in possession of such instrument or material in question.

(3) That he was in possession thereof, for the purpose of using it; or that he knew, or had reason to believe, that it was intended to be used for that purpose.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—[illegible] coin; otherwise by Court [illegible] should be committed for trial to the Court of Session.[1]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:—

That you, on or about the——day of——, at——, were in possession of a certain instrument (*or* material), to wit——, for the purpose of using the said instrument for counterfeiting a piece of King-Emperor's coin, known as——[or knowing or having reason to believe that the said instrument was intended to be used for the purpose of counterfeiting, etc.], and thereby committed an offence punishable under s. 235 of the Indian Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

Sentences.—Having regard to s. 71 of the Code separate sentences cannot be passed under s. 232 and this section.

Abetting in India the counterfeiting out of India of coin.

236. Whoever, being within British India,[1] abets[2] the counterfeiting[3] of coin out of British India, shall be punished in the same manner [illegible] counterfeiting of such coin [illegible]

COMMENT.

Any person in India, whether a British subject or a foreigner, who supplies instruments or materials for the purpose of counterfeiting any coin, or assists in any other way, is punishable under this section. Abetment in British India must be complete.

1. '**British India.**'—See s. 15, *supra*.
2. '**Abets.**'—See s. 107, *supra*.
3. '**Counterfeiting.**'—See s. 28, *supra*.

PRACTICE.

Evid[illegible] [illegible] of coin.

(2) [illegible] tment.

(3) [illegible]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, being in British India abetted one AB, residing out of British India, at——in the counterfeiting of coin by doing (*mention the act done*) and thereby committed an offence punishable under s. 236 of the Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

[1] Criminal Procedure Code, s. 348.

Import or export of counterfeit coin.

237. Whoever imports into Birtish India,[1] or exports therefrom, any counterfeit[2] coin, knowing or having reason to believe[3] that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

The offence under this and the following section consists in an import or export, whether by sea or by land, of any coin known by the importer, or which he has reason to believe, to be counterfeit.

1. **'British India.'**—See s. 15, *supra.*
2. **'Counterfeit.'**—See s. 28, *supra.*
3. **'Reason to believe.'**—See s 26, *supra.*

PRACTICE.

Evidence.—Prove (1) that the coins in question are counterfeit coins.

(2) That the accused imported into, or exported from, British India, such coins.

(3) That he, at the time he so imported or exported them, knew, or had reason to believe, that they were counterfeit.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—Same as for s. 238.

Import or export of counterfeit of Queen's coins.

238. Whoever imports into British India, or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section describes the same offence as the one under the preceding section, but provides enhanced punishment as the coin is King's coin.

PRACTICE.

Evidence.—Prove the same points as for s. 237, showing in (1) that the counterfeit coins are King's coins.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, did import into (*or* export from British India, *viz.*, at——, certain pieces of counterfeit King-Emperor's coin, to wit——, (*specify the amount and name of the coins*) knowing (*or* having reason to believe) that the said coins were counterfeit; and that you thereby committed an offence punishable under s 238 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Delivery of coin, possessed with knowledge that it is counterfeit.

239. Whoever, having any counterfeit[1] coin, which at the time when he became possessed[2] of it he knew to be counterfeit,[3] fraudulently[4] or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENT.

Object.—This section is directed against a person other than the coiner, who procures or obtains or receives counterfeit coin, and not to the offence committed by the coiner.[1] The receipt of the false coin, knowing at the time it is received that it is counterfeit, is made the test of a person being such a dealer. The offence contemplated in this section appears to be a delivery or attempt to deliver by such a dealer to some person whether an accomplice or not: the intention being that that person, or some other should be defrauded.

The authors of the Code say: "An utterer by profession, an utterer who is the agent employed by the coiner to bring counterfeit coin into circul[illegible] is guilty of a very high offence. Such an utterer stand[illegible] not very different from that in which [illegible] thief. He makes coining a far less [illegible] than it would otherwise be. He passes [illegible] violation of the law, and in the systematic practice of fra[illegible] one of its most pernicious forms. He is one of the most mischievous, and is likely to be one of the most depraved of criminals. But a casual utterer, an utterer who is not an agent for bringing counterfeit coin into circulation, but who, having heedlessly received a bad rupee in the course of his business, takes advantage of the heedlessness of the next person with whom he deals to pay that bad rupee away, is an offender of a very different class. He is undoubtedly guilty of a dishonest act, but of one of the most venial of dishonest acts. It is an act which proceeds not from greediness for unlawful gain, but from a wish to avoid, by unlawful means it is true, what to a poor man may be a severe loss. It is an act which has no tendency to facilitate or encourage the operations of the coiner. It is an occasional act, an act which does not imply that the person who commits it is a person of lawless habits. We think, therefore, that the offence of a casual utterer is perhaps the least heinous of all the offences into which fraud enters.

"We considered whether it would be advisable to make it an offence in a person to have in his possession at one time a certain number of counterfeit coins, without being able to explain satisfactorily how he came by them. It did not, after much discussion, appear to us advisable to recommend this or any similar provision. We entertained strong objections to the practice of making circumstances which are in truth only evidence of an offence part of the definition of an offence; nor do we see any reason for departing in this case from our general rule.

"Whether a person who is possessed of bad money knows the money to be bad, and whether, knowing it to be bad, he intends to put it in circulation, are questions to be decided by the tribunals according to the circumstances of the case, circumstances of which the mere number of the pieces is only one and may be one of the least important. A few bad rupees which should evidently be fresh from the stamp would be stronger evidence than a greater number of bad rupees which appeared to have been in circulation for years. A few bad rupees, all obviously coined with the same die, would be stronger evidence than a greater number obviously coined with different dies. A few bad rupees placed by

[1] *Sheobux*, (1871) 3 N. W. P. 150.

themselves, and unmixed with good ones, would be far stronger evidence than a much larger number which might be detected in a large mass of treasure."[1]

Three classes of offences are created by ss. 239 to 243.

(1) Delivery to another of coin, possessed with the knowledge that it is counterfeit (ss. 239, 240.)

(2) Delivery to another of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit (s. 241).

(3) Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof (ss. 242, 243).

1. **'Counterfeit.'**—See s. 28, *supra*. It is not necessary that the counterfeit coin should be counterfeit of a current coin.[2] But it must be a counterfeit of a coin used for the time being as money. Otherwise the offence will be that of cheating and not of uttering false coin.[3]

2. **'Possessed.'**—See s. 235, *supra*.

3. **'Which, at the time when he became possessed of it, knew it to be counterfeit.'**—These words point to a person other than the coiner, that is, the person who procures, or obtains, or receives counterfeit coins.[4] Against such a person this [illegible]

[illegible] owledge of the spuriousness of the coin at [illegible]

A knowledge of the coin being counterfeit at the time of becoming possessed of it was inferred from the fact of the accused being goldsmiths.[6]

4. **'Fraudulently.'**—See s. 25, *supra*.

Uttering under this section must be with intent to defraud the party receiving the money. The giving of a piece of counterfeit money in charity is held to be not an uttering, although the person may know it to be counterfeit[7] But this decision has been not only questioned in a later case where a person who gave a counterfeit coin to a woman with whom he had intercourse was held to be guilty of uttering[8]; but it is considered to have been overruled.[9]

PRACTICE.

Evidence.—Prove (1) that the coin in question is a counterfeit coin.

(2) That the accused became possessed of it

(3) That when he became so possessed he knew that it was a counterfeit coin.

(4) That he delivered it to some one, or attempted to induce some one to receive it

(5) That he, when he so delivered it, etc., intended to defraud, intended that a fraud might be committed.

Evidence of the possession and the attempted disposal of coins of unusual [illegible]

[illegible] er bills forged in other names may be given [illegible] It is impossible to lay down any general [illegible] previous uttering must have taken place in order to be admissible in evidence.[12]

[1] Note [7], pp. 135, 136.
[2] *Kandamuru Annappa*, (1883) 1 Weir 21.
[3] *Khushali*, (1906) 29 All. 141.
[4] *Sheobux*, (1871) 3 N. W. P. 150.
[5] *Parushullah Mundul* v. *Kheroo Mundul*, (1874) 23 W. R. (Cr.) 4; *Karuppa Muppen*, (1887) 1 Weir 222.
[6] *Kandamuru Annappa*, sup.
[7] *Page*, (1837) 8 C. & P. 122.
[8] *Anon.*, (1845) 1 Cox 250.
[9] *William Ion*, (1852) 2 Den. Cr. C. 475, 484.
[10] *Nur Mahomed*, (1883) 8 Bom. 223.
[11] *Harrison*, (1834) 2 Lewin 118.
[12] *Salt*, (1862) 3 F. & F. 834; *Sarah Whiley*, (1804) 2 Leach 983.

Upon a charge of uttering counterfeit coin, *in order to prove a guilty knowledge*, evidence is admissible of the subsequent uttering by the prisoner of counterfeit coin of a different *denomination*.[1]

Section 14, ill. (*b*), of the Indian Evidence Act, recognizes this *principle of English cases*.

Procedure.—*Cognizable*—*Warrant*—*Not bailable*—*Not compoundable*—Triable by Court of Session or Magistrate, Presidency or first class.

Charge—Same as for s. 240.

240. Whoever, having any counterfeit coin which is a counterfeit of the Queen's coin, and which, at the time when he became possessed of it, he knew to be a counterfeit of the Queen's coin, fraudulently or with intent that fraud may be committed, delivers the same to any person or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Delivery of Queen's coin possessed with knowledge that it is counterfeit.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last.

It does not apply to the actual coiner.[2] *The offence under it is committed even though the coin is refused by the person to whom it is offered.*[3]

See Comment on s. 23, *supra*.

CASES:

Sections 240 and 243.—A person having four counterfeit rupees in his possession, but uttering only one of them, cannot be separately convicted under s. 240 respecting the one rupee, and under s. 243 regarding the other three; because an offence under this section implies prior guilty possession.[4]

Delivering.—The prisoner went into the shop of D, and asked to purchase some coffee and sugar, and in payment of the same he put down on D's shop a counterfeit shilling, which D took up and said to the prisoner that it was a bad one. The prisoner left D's shop, leaving the shilling; but without the coffee and sugar. It was held that the prisoner was guilty of uttering a false coin.[5]

Ringing the changes.—R bargained with the [illegible] e five apricots for six pence, and [illegible] put the [illegible] ing a sh[illegible] which al[illegible] [illegible] saying it was not a good o[illegible] good shilling with which he practised this trick a t[illegible] The shillings returned by the prisoner were all bad shillings. It was held that he was guilty of uttering bad coin.[6]

PRACTICE.

Evidence.—*Prove the same points as for s. 239*, showing in (1) that the counterfeit coin is a counterfeit of the King's coin.

[1] *Forster*, (1855) 6 Cox 521, 24 L. J (M. C.) 134, Dearsly 456.

[2] *Ahmad Shah*, (1892) P. R. No. 10 of 1892.

[3] *Patrick Welch*, (1851) 20 L. J. (M. C.) 1 1.

[4] *Lakshia*, (1884) Unrep. Cr. C. 202.

[5] *Patrick Welch*, sup. See *Parushullah Mundul v. Kheroo Mundul*, (1874) 23 W. R. (Cr.) 4.

[6] *Franks*, (1794) 2 Leach 644.

Joint uttering—If two prisoners are indicted for uttering a counterfeit shilling, having another counterfeit shilling in their possession, it is necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered, if both th. pieces of money are proved to b counterfeit; and if it appear that the two prisoners went into a shop, and that one of them went in and uttered the bad money, having no more in her possession, and the other stayed outside the shop, having other bad pieces of money, both may be convicted: the uttering and the possession being both joint.[1]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, having in your possession——pieces of counterfeit King-Emperor's coin, known as——, knowing at the time when you became possessed of the said coins that they were counterfeit, fraudulently (*or* with intent [illegible] ed the same to one AB (*or* attempted to [illegible] reby committed an offence punishable un[illegible] within my cognizance (*or* cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

Delivery of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.

241. Whoever delivers to any other person as genuine,[1] or attempts to induce any other person to receive as genuine, any counterfeit[2] coin which he knows to be counterfeit but which he did not know to be counterfeit at the time when he took it into his possession,[3] shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

ILLUSTRATION.

A, a coiner, delivers counterfeit Company's rupees to his accomplice B, for the purpose of uttering them. B sells the rupees to C, another utterer, who buys them knowing them to be counterfeit. C pays away the rupees for goods to D, who receives them, not knowing them to be counterfeit. D, after receiving the rupees, discovers that they are counterfeit and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under s. 239 or 240, as the case may be.

COMMENT:

This section applies to a casual utterer of base coins. Section 239 deals with professional utterers. A casual utterer may not be aware that the coin was counterfeit at the time when he took it into his possession but he is responsible if he utters it knowingly.

1. 'As genuine.'—The gist of an offence under this section is that a person should deliver or attempt to induce any other person to receive as genuine coin known to be counterfeit.[2] Where A handed a counterfeit coin to his friend, in order to avoid its being discovered by the police in A's possession, it was held that A had committed no offence under the section, because the coin was not delivered

[1] *Merrit*, (1826) 2 C. & P. 427.

[2] *Soorut*, (1872) 4 N. W. P. 62.

as genuine.[1] If the Court be of opinion that the coin was not intended by the utterer to pass as a good coin, it should not convict the accused.[2]

2. 'Counterfeit.'—See s. 28, *supra*.

3. 'Possession.'—See s. 231, *supra*.

PRACTICE.

Evidence.—Prove (1) that the coin in question is a counterfeit coin.

(2) That the accused delivered it, or attempted to induce some one to receive it.

(3) That he so delivered it, or so attempted to induce some one to receive the same, as genuine.

(4) That he, at the time he delivered it, etc., knew the same to be a counterfeit coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, having in your possession——pieces of counterfeit King-Emperor's coin, known as——delivered as genuine to one AB the said coins (*or attempted to induce one AB to receive the said coins as genuine*) knowing at the time of the said delivery (*or attempt*), though not at the time when you became possessed of the said coins, that the said coins were counterfeit and thereby committed an offence punishable under s. 241 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Possession of counterfeit coin by person who knew it to be counterfeit when he became possessed thereof.

242. Whoever, fraudulently or with intent that fraud may be committed, is in possession[2] of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit,[3] shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMM[illegible]

Mo[illegible]

secti[illegible] kept for a fraud [illegible] guilty knowledge. Possession [illegible]

1. 'Fraudulently.'—See s. 25, *supra*.
2. 'Possession.'—See s. 225, *supra*.
3. 'Counterfeit.'—See s. 28, *supra*.

PRACTICE.

Evidence.—Prove (1) that the coin in question is a counterfeit coin.

(2) That the accused was in possession of it.

(3) That he was in possession thereof, with intent to defraud, or with intent that fraud might be committed.

The accused may tender evidence to shew that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not.[3]

[1] *Michael Byrne*, (1852) 6 Cox 475

[2] *Soorut*, (1872) 4 N. W. P. 62

[3] Evidence Act (I of 1872), s. 21, ill. (e).

(4) That at the time he became so possessed thereof, he knew it to be counterfeit.

When pieces of counterfeit coin are found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty.[1]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—See s. 243.

Possession of Queen's coin by person who knew it to be counterfeit when he became possessed thereof.

243. Whoever, fraudulently[1] or with intent that fraud may be committed, is in possession[2] of counterfeit coin which is a counterfeit of the Queen's coin,[3] having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT:

The offence under this section is an aggravated form of the offence described in the last section.

1. **'Fraudulently.'**—See s. 25, *supra*.
2. **'Possession.'**—See s. 235, *supra*.
3. **'Queen's Coin.'**—See s. 230, *supra*.

PRACTICE.

[illegible] was in possession of the coin himself, or his wife, clerk or servant was in possession of the coin on his account.[2] The point of time to be considered was the time when the accused had actual or conscious possession of the counterfeit coins for determining whether he had knowledge at the time that the coins were spurious.[3]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently (*or* with intent that fraud might be committed) were in possession of——pieces of counterfeit King-Emperor's coin, known as——, knowing at the time when you became possessed of the said coins that they were counterfeit; and thereby committed an offence punishable under s. 243 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session *or* High Court.)

And I hereby direct that you be tried by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

Person employed in mint causing coin to be of different weight or composition from that fixed by law.

244. Whoever, being employed in any mint lawfully established in British India,[1] does any act, or omits what he is legally bound to do,[2] with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[1] *William Rogers*, (1839) 2 Moody 85. [illegible] 477, F.B.
[2] *Fatch Chand Agarwalla*, (1916) 44 Cal. [illegible] [3] *Ibid.*

COMMENT.

The law has fixed the weight and composition of various coins and has declared in what cases they shall be a legal tender. The object of this section is to secure the purity of the coinage and its exact conformity to the legal standard against the act or omission of persons employed in mints. The proof must be that the person is employed in a Government mint, and that the act or omission which is the subject of the charge was intended to cause the coin there made or issued to vary from the fixed standard. It is no part of the definition and therefore it will be no necessary part of the proof that any wrongful gain should accrue to the person charged, or that loss should be caused to the Government or the public.[1] See the Indian Coinage Act.[2]

1. 'British India.'—See s. 15, *supra*.

2. 'Legally bound to do.'—See s. 43, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused is employed in a lawfully established mint in British India.

(2) That he, during such employment, did or omitted to do, something he was legally bound to do, which would cause any coin issued from that mint to be of a different weight or composition from that fixed by law.

(3) That he did, or omitted to do, such thing with that intention.

Procedure.—*Cognizable—Warrant—Not bailable—Not compoundable*—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, being employed as——in the——mint lawfully established in British India did an act, to wit——, (*or* omitted what you were legally bound to do, to wit——) with the intention of causing the coin——issued from the said mint to be of a different weight (*or* composition) from the weight (*or* composition) fixed by law, and thereby committed an offence punishable under s. 244 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Unlawfully taking coining instrument from mint.

245. Whoever, without lawful authority, takes out of any mint, lawfully established in British India,[1] any coining tool or instrument,[2] shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT

The substance of this offence consists in taking a coining tool without lawful authority out of any mint for the purpose of using it for making counterfeit coins.

1. 'British India.'—See s. 15, *supra*.

2. 'Instrument.'—That is, coining instrument.

PRACTICE.

Evidence.—Prove (1) that the instrument in question is a coining tool or instrument.

(2) That it belonged to a mint lawfully established in British India.

(3) That the accused took it out of the mint without lawful authority.

[1] M. & M. 102.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (name and office of Magistrate, etc.,) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, without lawful authority, did take out of a mint lawfully established in British India, to wit the mint——, a certain coining tool (*or* instrument), to wit——; and thereby committed an offence punishable under s. 245 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Fraudulently or dishonestly diminishing weight or altering composition of coin.

246. Whoever fraudulently[1] or dishonestly[2] performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.—A person who scoops out part of the coin and puts anything else into the cavity, alters the composition of that coin.

COMMENT.

Fraudulent or dishonest diminution in the weight or composition of a coin is punishable.

1. 'Fraudulently.'—See s. 25 *supra*.
2. 'Dishonestly.'—See s. 24, *supra*.

PRACTICE.

Evidence.—Prove (1) that the metal in question is a coin.
(2) That the accused performed upon such coin the operation in question.
(3) That such operation diminished its weight, or altered its composition.
(4) That the accused did as above fraudulently or dishonestly.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently (or dishonestly) performed on the coin, to wit——, an operation which diminished its weight (*or* altered its composition) and you thereby committed an offence punishable under s. 246 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried (by the said Court) on the said charge.

Fraudulently or dishonestly diminishing weight or altering composition of Queen's coin.

247. Whoever fraudulently or dishonestly performs on any of the Queen's coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

PRACTICE.

Evidence.—Prove the same points as for s. 246, showing in (1) that the coin in question is a King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—See s. 246.

Altering appearance of coin with intent that it shall pass as coin of different description.

248. Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

This section refers to any operation which alters the appearance of a coin with the intention that the said coin shall pass as a coin of a *different description*. The operation, whether of guilding, or silvering, or washing, etc., must be of such a kind, and so far completed, that the coin which is subjected to it, is actually altered in appearance. Thus quick-silvering of a half-piece so as to give it the appearance of a four-anna silver piece will be punishable under this section. The offence is complete as soon as the coin is altered, though no fraudulent purpose [illegible] there is in fact a descrip- [illegible] coin. The alteration [illegible] If the weight is dimi- [illegible] nished either s. 246 or s. 247 will apply.

PRACTICE.

Evidence.—Prove (1) that the metal in question is a coin.

(2) That the accused performed on such coin the operation in question.

(3) That such operation altered the appearance thereof.

(4) That the accused did as above with the intention that such coin should pass as a coin of a different description.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

In the case of a previous conviction the accused should be committed for trial to the Court of Session unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence.[1]

Charge.—See. s. 249.

Altering appearance of Queen's coin with intent that it shall pass as coin of different description.

249. Whoever performs on any of the Queen's coin[1] any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

See comment under the preceding section. The offence under this section is merely an aggravated form of the offence described in the last section.

1. **'Queen's coin.'**—See s. 230, *supra*.

PRACTICE.

Evidence.—Prove the same points as for s. 248, showing in (1) that the coin in question is a King's coin.

[1] Criminal Procedure Code, s. 348.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, did perform a certain operation, to wit——, on a piece of the King-Emperor's coin known as——, with the intention that the said coin should pass as a coin of a different description, to wit——; and that you thereby committed an offence punishable under s. 249 of the Indian Penal Code and within my cognizance (*or* cognizance of the Court of Session *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

Delivery of coin possessed with knowledge that it is altered.

250. Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently[1] or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENT.

This and the following sections are intended to punish persons who are traders in spurious or altered coins They correspond to ss 239 and 240 There must be both possession with knowledge and fraudulent delivery.

1. **'Fraudulently.'**—See s. 25, *supra.*

PRACTICE.

Evidence.—Prove (1) that the coin in question was one with respect to which the offence defined in s. 246 or 248 was committed.

(2) That the accused was in possession of it.

(3) That at the time when he became possessed of it he knew that any of the said offences had been committed.

(4) That he delivered it to some one, or attempted to induce some one, to receive it

(5) That he did as above with intent to defraud or with intent that fraud might be committed

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Charge.—See s. 251.

Delivery of Queen's coin possessed with knowledge that it is altered.

251. Whoever, having coin in his possession with respect to which the offence defined in section 247 or 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with

imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.[1]

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

1. 'And shall also be liable to fine.'—The section does not require a sentence of fine as well as imprisonment to be inflicted; the sentence of fine is *optional.*[1]

PRACTICE.

Evidence.—Prove (1) that a coin in question was one with respect to which the offence defined in s. 247 or 249 was committed.

Other points as in s. 250.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or First Class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused as follows:—*

That you, on or about the——day of——, at——, had in your possession a coin, to wit——, and in respect of which the offence defined in s. 246 (*or* s. 248) *of the Indian Penal Code had been committed, and knowing at the time when you* became possessed of the said coin that such offence had been committed, you fraudulently (*or with intent that fraud may be committed*) *delivered such coin to* A B (or attempted to induce the said A B to receive the same) and thereby committed *an offence* [illegible] within my cognizance (*or* [illegible]

And [illegible] (*in cases tried by Magistrate, omit these words*)] on the said charge.

Possession of coin by person who knew it to be altered when he became possessed thereof.

252. Whoever fraudulently,[1] or with intent that fraud may be committed, is in possession[2] of coin with respect to which the offence defined in either of the sections 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

[illegible] *the professional dealer, with* fraudulent [illegible] tion. This and the following section [illegible] and 251 *the accused is punished for* uttering, under this and the next section he is punished for possessing a coin in respect of which the offence defined in either s. 246 or 247 has been committed.

1. 'Fraudulently.'—See s. 25, *supra.*

2. 'Possession.'—See s. 235, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused was in possession of a coin.

(2) That it was a coin in respect of which the offence defined in s. 246 or 248 had been committed.

[1] *Joseph* alias *Thawai,* (1888) 1 Weir 223.

(3) That the accused knew of it when he became possessed of the coin.

(4) That he was so possessed of the coin with intent to defraud, or with intent that fraud might be committed.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Possession of Queen's coin by person who knew it to be altered when he became possessed thereof.

253. Whoever fraudulently, or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 247 or 249 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section. See Comment on the preceding section.

PRACTICE.

Evidence.—Prove the same points as for s. 252, showing in (1) that the coin in question was King's coin.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session or Magistrate, Presidency or first class.

Delivery of coin as genuine which, when first possessed, the deliverer did not know to be altered.

254. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248 or 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

COMMENT.

Section 241 is similar to this section. Where possession is acquired innocently but on subsequent knowledge that the coin is counterfeit, if a person passes it off or attempts to pass it off as a genuine coin he will be punished under this section.

See the Metal Tokens Act, s. 3[1].

PRACTICE.

Evidence.—Prove (1) that the coin in question is one with respect to which any such operation as that mentioned in ss. 246, 247, 248 or 249 has been performed.

(2) That the accused delivered it to some one; or that he attempted to induce some one to receive it.

[1] Act I of 1889.

(3) That he so delivered it, or attempted to induce some one to receive it, as a genuine coin, or as a coin of a different description.

(4) That at the time he did so, he knew that it had been operated upon.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, delivered to AB (*or* attempted to induce AB to receive) as genuine a coin, to wit——, in respect of which an operation as is mentioned in s. 246 (*or* s. 247 *or* 248 *or* 249) of the Indian Penal Code, to wit——, had been performed, and you thereby committed an offence punishable under s. 254 of the Indian Penal Code and with in my cognizance.

And I hereby direct that you be tried on the said charge.

Counterfeiting Government stamp.

255. Whoever counterfeits,[1] or knowingly performs any part of the process of counterfeiting, any stamp[2] issued by Government[3] for the purpose of revenue, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

COMMENT.

The remaining sections of this Chapter deal with offences relating to Government stamps. These stamps are impressions upon paper, parchment, or any material used for writing made by Government, mostly for the purpose of revenue.

This section is similar to s. 241 which deals with counterfeiting of coins.

1. **'Counterfeits.'**—See s. 28, *supra*. Engraving a stamp, like in some part to a genuine stamp, and unlike in others, and then cutting out the unlike parts, and concealing the part cut out, amounts to conterfeiting a stamp.[1]

2. **'Stamp.'**—This word is used in this and the following sections to denote the impression or mark set upon the paper, parchment, etc. It includes postage stamps.[2]

The word 'stamp' must be construed according to its ordinary meaning in the English language. An obliterated stamp can be a stamp in the ordinary use of the English language. A stamp does not cease to be a stamp because it is cancelled. A person selling a forged stamp, although it bears a cancellation mark, commits an offence of selling forged stamps.[3]

3. **'Government.'**—See s. 17, *supra*, and 263-A (4), *infra*.

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purposes of revenue.

(2) That the accused made such counterfeit; or that he knowingly performed any part of the process of counterfeiting.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

[1] *Thomas Collicot*, (1812) 2 Leech 1048.
[2] Indian Post Office Act, VI of 1898, ss. 16 and 17.
[3] *Lowden*, [1914] 1 K. B. 14[illegible].

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, counterfeited (*or* knowingly performed a certain part of the process of counterfeiting, to wit——), a certain stamp issued by Government for the purpose of revenue, to wit——, and thereby committed an offence punishable under s. 255 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court),

And I hereby direct that you be tried by the said Court on the said charge.

Having possession of instrument or material for counterfeiting Government stamp.

256. Whoever has in his possession [1] any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

See Comment on the preceding section. This section resembles s. 235 with which it may be compared.

1. **'Possession.'**—See ss. 27 and 235, *supra*,. The proprietor of a newspaper circulating among stamp-collectors and others caused a die to be made for him abroad, from which imitations or representations of a current colonial postage stamp could be produced The only purpose for which the die was ordered by him, and was subsequently kept in his possession, was for making upon the pages of an illustrated stamp catalogue or newspaper, called "The Philatelist's Supplement," illustrations in black and white and not in colours of the colonial stamp in question, this special supplement being intended for sale as part of his newspaper. It was held that the possession of a die for making a false stamp, known to be such to its possessor, was, however innocent the use that he intended to make of it, a possession without lawful excuse within the meaning of the Post Office Act, 1884, s. 7 (c), which says that "a person shall not make, or, unless he shews a lawful excuse, have in his possession any die, plate, instrument, or materials for making any fictitious stamps."[1]

PRACTICE.

Evidence.—Prove (1) that the instrument or material in question is one usable for counterfeiting stamps.

(2) That the stamps so produceable thereby are counterfeits of those issued by Government for the purposes of revenue.

(3) That the accused had such instrument or material in his possession.

(4) That the same was in possession of the accused for the purpose of its being used to counterfeit such Government stamps; or that the accused knew or had reason to believe that such instrument or material was intended to be so used.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Making or selling instrument for counterfeiting Government stamp.

257. Whoever makes or performs any part of the process[1] of making, or buys or sells or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe [2] that it is intended to be used, for the purpose of counterfeiting any

[1] *Dickins* v. *Gill*, [1896] 2 Q. B. 310.

stamp [3] issued by Government [4] for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section corresponds to s. 231.

1. **'Performs any part of the process.'**—It is not necessary that the instruments should be capable of making an entire impression of a stamp.[1]

2. **'Reason to believe.'**—See s. 26, *supra*.

3. **'Stamp.'**—See s. 255, *supra*.

4. **'Government.'**—See s. 263-A, *infra*.

PRACTICE.

Evidence.—Prove (1) that the instrument or material in question is one usable for counterfeiting stamps.

(2) That the stamps so produceable thereby are counterfeits of those issued by Government for the purpose of revenue.

(3) That the accused made, or performed, some part of the process of making such instrument; or that he bought, sold, or disposed of such instrument.

(4) That he did as above in order that such instrument might be used for the purpose of counterfeiting such stamp; or that the accused knew or had reason to believe that the same was intended to be used for such purpose.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, made (*or* performed any [illegible] ment for the purpose of revenue, and thereby committed an offence punishable under s. 257 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

258. Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Sale of counterfeit Government stamp.

COMMENT.

[illegible] it bear [illegible]

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purposes of revenue.

[1] *Foster*, (1836) 7 C. & P. 494.

[2] *Lawden*, [1914] 1 K. B. 144.

(2) That the accused sold or offered to sell such counterfeit stamp.

(3) That when selling or offering the same for sale he knew, or had reason to believe, that the same was counterfeit.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, sold (*or* offered for sale) a stamp, to wit——, which you knew (*or* had reason to believe) to be counterfeit of the stamp——issued by the Government for the purpose of revenue, and thereby committed an offence punishable under s. 258 of the Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

Having possession of counterfeit Government stamp.

259. Whoever has in his possession [1] any stamp [2] which he knows to be a counterfeit [3] of any stamp issued by Government [4] for the purpose of revenue, intending to use or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section resembles s. 243.

1. 'Possession.'—See ss 27 and 235, *supra*.
2. 'Stamp.'—See s. 255, *supra*.
3. 'Counterfeit.'—See s. 28, *supra*.
4. 'Government.'—See s. 263-A, *infra*.

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purpose of revenue.

(2) That the accused has such counterfeit stamp in his possession.

(3) That he then knew the same to be counterfeit.

(4) That he was so possessed intending to use or dispose of the same as a genuine stamp; or that he was so possessed thereof in order that the same may be used as a genuine stamp.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, were in possession of a stamp, Exhibit——, which you knew to be a counterfeit of a stamp, to wit——, issued by Government for the purpose of revenue, intending to use (*or* dispose of) the same as a genuine stamp and thereby committed an offence punishable under s. 259 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session, *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by the Magistrate, omit these words*)] on the said charge.

Using as genuine a Government stamp known to be counterfeit.

260. Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT.

See Comment on s. 255. This section corresponds to s. 254.

Here the stamp used as genuine must be a counterfeit stamp. Hence, where a person sold a one-anna stamp as a one-rupee stamp, it was held that he had committed no offence under this section, but was guilty of cheating under s. 415.[1]

PRACTICE.

Evidence.—Prove (1) that the counterfeit was that of a stamp issued by Government for the purpose of revenue.

(2) That the accused knew the same to be counterfeit.

(3) That used such counterfeit stamp with such knowledge.

(4) That he used the same as a genuine stamp.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, used as genuine stamp, to wit——, knowing it to be counterfeit of a stamp issued by Government for the purpose of revenue, to wit——, and thereby committed an offence punishable under [illegible]
of the [illegible]
A[illegible]
Magistrate, omit these words] [illegible]

Effacing writing from substance bearing Government stamp, or removing from document a stamp used for it, with intent to cause loss to Government.

261. Whoever fraudulently,[1] or with intent to cause loss to the Government, removes or effaces from any substance, bearing any stamp issued by Government for the purpose of revenue, any writing or document[2] for which such stamp has been used, or removes from any writing or document, a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section provides penalty for (1) the effacing of a writing from a stamp, and (2) the removing of a stamp from a document. The intention may be to defraud some one or to cause loss of revenue to Government. The section resembles ss. 246 and 248 which provide punishment for the alteration and defacement of a coin.

1. 'Fraudulently.'—See s. 25, *supra*.

2. 'Document.'—See s. 29, *supra*.

[1] *Shuroop Chunder Dose*, (1865) 2 W. R. (Cr.) 65.

PRACTICE.

Evidence.—Prove (1) that the stamp was issued by Government for revenue purposes.

(2) That such stamp had been used as such on the substance in question.

(3) That the accused removed or effaced from such stamp some of the writing for which it had been used.

(4) That he did so with intent to defraud or to cause loss to Government. Or prove points (1) and (2) as above, and further—

(3) That such stamp had been used as such for a writing or document.

(4) That the accused removed the stamp from such writing or document.

(5) That he did so in order that such stamp might be used for a different writing or document.

(6) That he did so with intent to defraud or to cause loss to Government.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently (*or* with intent to cause loss to the Government) removed (*or* effaced) from any substance bearing any stamp issued by Government for the purpose of revenue any writing (*or* document) for which such stamp had been used or removed from any writing (*or* document) a stamp which had been used for such writing (*or* document, in order that such stamp may be used for a different writing (*or* document), and thereby committed an offence punishable under s. 261 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate, omit these words*)] on the said charge.

Using Government stamp known to have been before used.

262. Whoever fraudulently,[1] or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Under this section fraudulent use of a stamp already used is made punishable.

1. 'Fraudulently.'—See s. 25, *supra*. The mere affixing to a letter of a postal stamp which has been previously used does not of itself prove fraud or an intent to cause loss to Government[1]; but if a person uses a postage stamp twice he will be punished under this section.[2]

PRACTICE.

Evidence.—Prove (1) that the stamp was issued by Government for the purposes of revenue

(2) That it had been already used for such purpose.

(3) That the accused afterwards again used such stamp.

(4) That when he used it again he knew that it had been before used.

(5) That he again so used the stamp with intent to defraud or to cause loss to Government.[3]

[1] *Niaz Ahmad*, (1881) 1, A. W. N. 56.
[2] *Sitaram*, (1882) 5 C. P. L. R. (Cr.) 43.
[3] *Murlidhar*, (1880) Unrep. Cr. C. 145.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class.

Erasure of marks denoting that stamp has been used.

263. [illegible] with intent to cause loss to the [illegible] removes from a stamp issued by Government for the purpose of revenue, any mark put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession, or sells or disposes of, any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

Under this section three things are punishable: (1) erasure or removal of a mark denoting that a stamp has been used, (2) knowingly possessing any such stamp, and (3) selling or disposing of any such stamp.

1. 'Fraudulently.'—See s. 25, *supra*.

PRACTICE.

Evidence.—Prove (1) that the stamp was issued by Government for the purpose of revenue.

(2) That it had been used for that purpose.

(3) That it bore a mark or impression denoting that it had been so used.

(4) That the accused removed or erased [illegible]

(5) That when [illegible] did so with an intention to [illegible] Government.

Or prove [illegible] (3) and (4) as above, and further—

(5) That the accused had possession of such stamp in such cancelled condition; or that such stamp, in such cancelled condition, was sold or disposed of by the accused.

(6) That the accused at the time knew that such mark or impression had been so removed or erased.

(7) That he had a fraudulent intention, or had the intention to cause loss to Government, when he had such possession, or made such sale or disposal.

Or [illegible]

(4) [illegible]

(5) [illegible] knew that it had been so used.

(6) That he had a fraudulent intention, or had the intention to cause loss to Government, when so selling or disposing of it.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, or Magistrate, Presidency or first class.

Prohibition of fictitious stamps.

263-A. (1) Whoever—

(*a*) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(*b*) has in his possession, without lawful excuse, any fictitious stamp, or

(c) makes or, without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees.

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and shall be forfeited.

(3) In this section "fictitious stamp" means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255 to 263, both inclusive, the word "Government," when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorized by law to administer executive government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.

COMMENT.

This section is exactly the same as s. 7 of the English Post Office Act, 1884.[1]

Object.—This section was added by Act III of 1895, s. 2, and is intended to give full effect to what is known as the Vienna Convention in respect of postage, and it provides for making it an offence to make fictitious stamps, which are defined to be stamps purporting to be used for purposes of postage whether by the British or any foreign Government. It was introduced at the instance of the Post office for the purpose of stopping the use of fictitious stamps on letters coming from abroad.

Possession of a fictitious stamp without lawful excuse is an offence. The proprietor of a newspaper circulating among stamp-collectors and others caused a die to be made for him abroad, from which imitations or representations of a current colonial postage stamp could be produced. The only purpose for which the die was ordered by him, and was subsequently kept in his possession, was for marking upon the pages of an illustrated stamp catalogue or newspaper, called "The Philatelist's Supplement," illustrations in black and white and not in colours of the colonial stamp in question, this special supplement being intended for sale as part of his newspaper. It was held that the possession of a die for making a false stamp, known to be such to its possessor, was, however innocent the use that he intended to make of it, a possession without lawful excuse.[2]

PRACTICE.

Evidence.—Prove (1) that the accused made, knowingly uttered, dealt in, or sold the fictitious stamp in question, or knowingly used it for any postal purposes; or

(2) that he had in his possession, without lawful excuse, such stamps; or

(3) that he made, or, without lawful excuse, had in his possession any die, plate, instrument, or materials for making such stamp.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

[1] 47 & 48 Vic., c. 76, s. 7.

[2] *Dickins* v. *Gill*, [1896] 2 Q. B. 310

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

THE offences punishable by this Chapter are not defined with reference to any precise standard of weight or measure established by law. A false weight or measure here signifies that—*taking the law or the ordinary usage of the place*, or the common understanding of the parties, to have fixed on certain known instrument of weight or measure, with reference to which two persons deal together—the false dealer by deceit substitutes another weight or measure in order to defraud.[1]

The legislature has, however, not left the matter quite at large. By the Indian Weights and Measures of Capacity Act,[2] it has fixed "a ser," corresponding to the French "Kilogramme de Archives," as the primary standard of weight. Later, an Act entitled the Measures of Length Act[3] was passed by which the imperial yard for the United Kingdom has been made the legal standard measure of length in British India; and certain officers in every presidency and district towns in India are required to keep standards of such retail weights and measures in use throughout the particular town or district.[4]

Fraudulent use of false instrument for weighing.

264. Whoever fraudulently uses any instruments for weighing[1] which he knows to be false,[2] shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT:

"The sections...relating to weights make no mention of standard weights. In every place there are well-known customary weights, and, if any resident of the place or other person..., knowing that a weight is less than the customary weights which it purports to be, uses the weight dishonestly, he commits fraud, and may be punished under Chap. XIII."[5]

As to inspection of weights and measures by police, s. 153, Criminal Procedure Code, provides: "*(1) Any officer in charge of a police-station may, without a* warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false. (2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction."

Ingredients.—This section requires two essentials:—

1. Fraudulent use of an instrument for weighing.

[1] M. & M. 201.
[2] Act XXXI of 1871, s. 2.
[3] Act II of 1889, ss. 2, 7.
[4] The Calcutta Police Act (Beng. Act IV of 1866) s. 55; the Calcutta Municipal Consolidation Act (Beng. Act II of 1888), s. 370; the Madras City Police Act (Mad. Act III of 1888), s. 32; the City of Bombay Municipal Act (Bom. Act III of 1888), s. 418; the City of Bombay Police Act (Bom. Act IV of 1902), s. 64; Police Duties and Powers of Magistrate (Bombay) Regulation XII of 1827, s. 20; the Burma Municipal Act (Burma Act III of 1898), s. 142(o); the Burma Excise Act (Burma Act V of 1917), s. 21.
[5] Per Hosking, J. C., in *Ma Ein Me*, (1897) P. J. L. B. 354.

2. Knowledge that such instrument is false.

1. 'Fraudulently using any instrument of weighing.'—See s. 25, *supra*. Intention is an essential part of the offence under this section.[1] "The intention however must be alleged in laying the charge, though it may be matter of inference only, from the fact of the possession, and the attending circumstances as manifesting the purpose, and the inference may of course be rebutted...But where the incorrectness of the scale is so visible, and there is no attempt to cover or conceal it, there can be no ground for imputing fraud from that defect alone; the circumstances negative the intention of fraud, and no charge would lie against the party using such a balance. On the other hand a false balance artfully contrived to elude detection in the use of it, carries with it a presumption of fraudulent intention, which properly brings it within the scope of the chapter."[2] A one *tolah* below weight in a five seers only represents a fair wear and tear, and is no evidence of a fraudulent intention.[3]

2. 'Knows to be false.'—The word 'false' in this and the following sections means different from the instrument, weight, or measure, which the offender and the person defrauded have fixed upon, expressly or by implication, with reference to their mutual dealings.[4] A railway company kept a weighing machine, which for a fortnight had been so out of repair that, when anything was weighed by it, the weight appeared to be four pounds more than was really the weight. It was held that the company was liable to be convicted for having in its possession a weighing machine which on examination was found to be incorrect or otherwise unjust.[5]

PRACTICE.

Evidence.—Prove (1) that the instrument in question is one for weighing.
(2) That it is a false one.
(3) That the accused knew it to be false.
(4) That he used it knowing it to be so.
(5) That he did as above with intent to defraud.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, fraudulently used a certain instrument for weighing, to wit——, knowing it to be false at the time of using it, and thereby committed an offence punishable under s. 264 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Fraudulent use of false weight or measure.

265. Whoever fraudulently[1] uses any false[2] weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

Section 264 punishes one who uses a false balance; this section punishes one who uses a false weight or measure.

[1] *Kangalee Muduk*, (1872) 18 W. R. (Cr.) 7.
[2] 2nd Rep., ss. 220, 221.
[3] *Bikka Mal*, (1883) 3 A. W. N. 224.
[4] Stokes, Vol. I, p. 193.
[5] *The Great Western Ry. Co.* v. *Bailie*, (1864) 34 L. J. M. C. 31.

To ascertain whether a measure is false or not, the only proper test to apply is that of the measure, and the same articles must be measured in each case, and proof should be adduced that this had been done. The weight of the *grain that a measure* is found to hold is no evidence of its capacity, as compared with that of another measure unless the very same grain is used.[1]

1. 'Fraudulently.'—See s. 25, *supra*.

2. 'False.'—S [illegible] ed weight or meas [illegible] which was not the [illegible] capacity, it was held that they had not committed an offence under this section but one under s. 415.[2] Selling by means of an unstamped measure does not, in the absence of evidence of fraud or falsity of the measure, constitute this offence.[3]

PRACTICE.

Evidence.—Prove (1) that the weight or measure is a false one; or that it is different from what it was used as.

(2) That the accused used such false or different weight or measure.

(3) That he did as above with intent to defraud.

A conviction under this section cannot be maintained where there is no complaint by a purchaser.[4]

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, [fraudulently used a false weight (*or* false measure of length or capacity)], [*or* fraudulently used a weight (*or* measure of length or capacity) as a different weight (*or* measure) from what it was] *and thereby committed an offence* punishable under s. 265 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Being in possession of false weight or measure.

266. Whoever is in possession[1] of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently[2] used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section punishes a person who is in possession of a false weight or measure just as ss. 235, 239 and 240 punish a person who is in possession of counterfeit coins and s. 259 punishes a person who is in possession of a counterfeit stamp.

1. 'Possession.'—The mere possession of false weights or measures will not of itself raise any strong presumption of fraud, as the weights or measures may have been put away so as not to be used. The fraudulent intent will be shown greatly by the place where they are found. Suppose a false balance was found fixed to a tradesman's counter where he was accustomed to sell his goods, and there was no other in the place. There would be, in the case, the strongest possible presumption that the possession was not innocent. *On the other hand.*

[1] *Lakshman Morland*, (1898) Unrep. Cr. C. 989.

[2] *Narodin*, (1888) Cr. R. No. 36 of 1888, Unrep. Cr. C. 386.

[3] *Ichi*, (1882) 1 Weir 223.

[4] *Sobha*, (1902) P. W. R. (Cr.) No. 38 of 1998.

suppose he had true balances in his shop, but an untrue one stowed away in an attic with a lot of lumber, there the presumption would be against fraud.

But the mere possession of the false instrument, if such possession cannot be satisfactorily explained and accounted for, is sufficient ground for presuming an intention to use it fraudulently.

As to the definition of the word "possession" see s. 27.

2. **'Knows to be false...fraudulently used.'**—It is necessary to prove that the accused knew the scales to be false and intended to use them fraudulently. The mere possession of the scales, or evidence of their use, with a string not accurately tied at the centre of the beam, so that one scale outweighed the other, but which could be shifted at any time, and might sometimes have been accurately tied, was held not of itself sufficient evidence of fraud.[1] The mere possession of weights in excess of the authorized standard will not support a conviction.[2]

A person who professes to sell by a certain standard of weight is bound to take reasonable care that the weights he uses are not defective.[3] He is bound to see that the measure is correct according to that standard and if the measure varies [illegible] considerable advantage, the Courts are [illegible] professed to sell by weights of a certain [illegible] in the possession of the accused for the [illegible] all deficient, but the Sessions Judge was [illegible] fraud, because the weights had been openly and therefore presumably ignorantly used. It was held that the accused was guilty of an offence under this section.[5]

'Fraudulently'—See s. 25, *supra*. Where standard weights are not prescribed no presumption of fraud can arise in respect of short weights, and a conviction under this section cannot be obtained unless the element of fraud is strictly proved.[6]

Where a search took place after dark without proper precautions, and there was absence of proper description of the weights seized and there was silence of [illegible] and [illegible] was

PRACTICE.

Evidence.—Prove (1) that the instrument, or the measure, or the weight in question is false.

To prove that the weight or measure is false, comparison should be made with standard weights or measures. Some reasonable allowance should be made for wear and tear and for the rough and ready methods of bazaar shop-keepers.[8]

(2) That the accused was in possession of the same.

(3) That he knew the same to be false.

(4) That he intended that such false weight, etc., should be used to defraud some one.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, were in possession of a certain instrument for weighing (*or* of a certain weight, *or* of a certain measure

[1] *Hamirmal*, (1890) Cr. R. No. 36 of 1890, Unrep. Cr. C. 514. *Harel Chand Marwari*, (1917) 15 A. L. J. R. 897.

[2] *Damodhar Daly*, (1864) 1 B. H. C. 181.

[3] *Appasami alias Munisami*, (1884) 1 Weir 225.

[4] *Venkata Chetti*, (1883) 1 Weir 225.

[5] *Meetalagath Poler*, (1883) 1 Weir 223.

[6] *Mi Ya Pyan*, (1908) U. B. R. (P.C.) 17.

[7] *Sobha*, (1902) P. W. R. (Cr.) No. 38 of 1908.

[8] *Nanak Chand*, (1913) P. R. No. 29 of 1913.

of length or capacity), to wit——, *knowing it, at the time of your possession, to be false, and intending that the same might be fraudulently used, and thereby* committed an offence punishable under s. 266 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Making or selling false weight or measure.

267. Whoever makes, sells or disposes of any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false,[1] in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT:

This section punishes a person who makes, sells, or disposes of a false balance, weight or measure. The object is to prevent the circulation of false scales, weights or measures.

1. 'False.'—See s. 261, *supra*.

PRACTICE.

Evidence.—Prove (1) that the instrument, or the measure, or the weight in question, is false.

(2) That the accused either made, sold, or disposed of the same.

(3) That he then knew it to be false.

(4) That he so made, sold, or disposed of it, in order that it might be used as true; or that he knew that it was likely to be used as true.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summary trial.

Charge—I (*name and office of Magistrate, etc.*), *hereby charge you* (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, made (*or sold, or disposed of*) a certain instrument for weighing (*or* a certain weight, *or* a certain measure of [illegible] to wit——, knowing at the time of making (*or* selling *or* dis- [illegible] r that the said instrument might be used as true), [illegible] ment was likely to be used as true) and thereby [illegible] under s. 267 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

Public nuisance.

268. A person is guilty of a public nuisance who does any act or is guilty of an illegal omission[1] or which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity,[2a] or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.[2b]

A common nuisance is not excused on the ground that it causes some convenience[3] or advantage.

COMMENT.

Nuisances are of two kinds: (1) Public, and (2) Private.

(1) 'Public' nuisance or common nuisance is an offence against the public, either by doing a thing which tends to the annoyance of the whole community in general, or by neglecting to do anything which the common good requires. It is an act affecting the public at large, or some considerable portion of them; and it must interfere with rights which members of the community might otherwise enjoy. It depends in a great measure upon the number of houses and the concourse of people in the vicinity; and the annoyance or neglect must be of a real and substantial nature. Acts which seriously interfere with the health, safety, comfort, or convenience of the public generally, or which tend to degrade public morals, have always been considered to be public nuisances.

Persons who carry on offensive trades and thereby, or by any other offensive means, corrupt the air, or by any means cause loud and continued noises and thereby occasion injury or annoyance to those d[illegible] of their health, or comfort and convenience [illegible] are liable to a prosecution for causing a pu[illegible] to me a *sine qua non* that such an annoyance as this should injuriously affect every member of the public within its range of operation. It is sufficient that it should affect people in general who dwell in the vicinity."[2] A brew-house, glass-house or swine yard may be a public nuisance if it is shown that the trade is such as to render the enjoyment of life and property uncomfortable. Erecting gunpowder mills or keeping gunpowder magazines near a town, keeping large quantities of naphtha near dwelling-[illegible] ties of materials for ma[illegible] at night in a residenti[illegible] disorderly inns, bawdy houses, gaming houses, and committing acts of indecency in public places have been held to be public nuisances.

A public nuisance can only be the subject of one indictment, otherwise a party might be ruined by a million suits. An indictment will fail if the nuisance complained of only affects one or few individuals.

As to when an individual can bring a civil action in respect of a public nuisance, see the authors' Law of Torts, 9th Edn.

[1] 7th Parl. R., p. 57. P. R. No. 9 of 1904.
[2] Per Anderson, J., in *Phiraya Mal*, (1904) [3] *Ibid.*

(2) 'Private nuisance' is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another, and not amounting to trespass. It is an act affecting some particular individual or individuals as distinguished from the public at large. It is in the *quantum* of annoyance that public nuisance differs from private. It cannot be the subject of an indictment, but may be the ground of a civil action for damages or an injunction, or both.

The various sections of this Chapter deal with everything that is regarded as nuisance in English law. Section 290 is a general provision intended to cover a case not specially provided.

Ingredients.—The section requires two essentials—

1. A person must do an act or must be guilty of an illegal omission.
2. Such act or omission must cause

(a) common injury, danger, or annoyance (i) to the public, or (ii) to the people in general who dwell or occupy property in the vicinity, or

(b) injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

1. **'Person does any act or is guilty of an illegal omission.'**—Section 11 defines the word 'person'

The word 'act' is defined in s. 33, *supra*. It is used in this section in the sense of positive conduct only, not negative conduct or omission to do something as the expression 'illegal omission' is specifically used in conjunction with it

The word 'illegal,' as defined in s. 43, is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action. Every omission causing a nuisance is not punishable. The omission must be 'illegal.' Thus, a person omitting to fence a wall on a private ground within eight yards of a highway,[1] and a person omitting to keep his ponies[2] and his pigs[3] from straying, were held to have committed no nuisance. Similarly, where the Lombardars of a village, who were making arrangements when an annual fair was held at that village for the public sanitation of the place, did not make the usual arrangements when a fair was held and for which they were convicted of a public nuisance, it was held that their omission to make proper sanitary arrangements was not an illegal omission within the meaning of this section.[4]

Liability of absent proprietor for nuisance committed by his servant.—Where the use of premises gives rise to a public nuisance it is, generally, the occupier for the time being who is liable for it, and not the absent proprietor.[5]

2-a. **'Causes common injury, danger or annoyance to the public . . . who dwell or occupy property in the vicinity.'**—The injury contemplated in this section must be common, i.e., it must affect the public and not any solitary individual. Thus, a person trotting rams trained to fight in a market place,[6] and a person fouling the water of a streamlet by putting into it bundles of stalks of *tur* plants,[7] were held guilty of a public nuisance.

Villagers accumulating filth and manure in their villages are not guilty of public nuisance.[8] But a person throwing dust and sweeping on the road in front of his house and thus making the atmosphere noxious to health[9]; and a woman keeping on her premises vegetable matter which caused a smell offensive to persons using the public street,[10] were held guilty of a public nuisance. Throwing

[1] *Anthony Udayan*, (1883) 6 Mad. 280.
[2] *Joynath Mundul v. Jamul Sheikh*, (1866) 6 W. R. 71.
[3] *Vallapoo Kotadu*, (1894) 1 Weir 244.
[4] *Guj Singh*, (1875) P. R. No. 11 of 1875.
[5] *Bibhuti Bhusan Biswas v. Bhubon Ram*, (1918) 46 Cal. 515, 22 C.W.N. 1062, 29 C. L. J. 262.
[6] *Rajah Sahib*, (1883) 1 Weir 243.
[7] *Vithoba*, (1884) Unrep. Cr. C. 203.
[8] *Bata Singh*, (1872) P. R. No. 25 of 1872; *Guj Singh*, sup.
[9] *Vasudeva Chetti*, (1882) 1 Weir 242.
[10] (1883) 1 Weir 243.

rubbish into one's own garden does not amount to a public nuisance.[1] It should be noted, however, that every act which causes an offensive odour does not necessarily constitute this offence.[2]

The 'annoyance' must also be caused to the general public. An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place. Where, therefore, from the noise made by a tinman in carrying on his trade three members of an inn were disturbed in the occupation of their chambers, it was held that the nuisance was not of a sufficiently general extent to support an indictment.[3] The defendant had converted his land near a public highway into a shooting ground where persons came to shoot with rifles at a target, and also at pigeons. As the pigeons which were fired at frequently escaped, persons collected outside of the ground, and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot. It was held that the act of the accused amounted to a public nuisance.[4] Again, the injury or annoyance must not be fleeting or evanescent.[5] It must be such as reasonable persons would complain of.[6]

The Allahabad High Court has held that annoyance to one individual is sufficient. If a public servant, whose duty it was to keep the streets clean, saw anybody easing himself and, therefore, he reported it, in his official capacity and gave evidence of the act, it was held that it was a reasonable inference to draw that he was annoyed.[7]

No nuisance where there is no annoyance to the public—A prostitute visiting a dark bungalow at the request of a person staying there[8]; a person committing bare solicitation of chastity[9]; a person soliciting passers-by on a public road for purposes of prostitution[10]; a person merely placing cowdung cakes by the side of a road to dry[11], a person placing a cot temporarily on a public road[12]; a person selling fish near or on a public road[13], a person enclosing land which was village site and property of Government[14]; a person refusing to have any social intercourse with persons belonging to *shumsees* or to associate with them as Hindus[15]; and a person skinning an animal which has died a natural death,[16] were held to have committed no offence under this section.

'To the public or the people in general who dwellor occupy property in the vicinity.'—The word "public" includes any class of the public or any community (s. 12). The expression "people in general" means a body or considerable number of persons.[17] This section does not apply to acts or omissions calculated to offend the sentiments of a class. *Lex non favet vots delicatorum*—the law makes no allowance for the susceptibilities of the hypersensitive. "In this country (India) it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The erection of a place of worship in a particular spot is likely to offend the sentiments of adherents of other creeds residing in the neighbourhood, but the *Penal Code* does not regard such an act as a public nuisance."[18] Similarly, the slaughtering of kine by the Mahomedans may injure the susceptibilities of the Hindus but it will not be deemed to be a public nuisance unless the act is done in such places or such a manner as to be

[1] *Kuppa Pillai*, (1888) 1 Weir 242.
Shewoo, Weir (3rd edn.) 11.
[2] *Allen* v. *Lloyd*, (1802) 4 Esp. 199.
[4] *Charles Moore*, (1832) 3 B. & Ad. 184.
[5] *Benjamin* v. *Storr*, (1874) L R. 9 C. P. 400, 407.
[6] *Attorney-General* v. *Corporation of Nottingham*, [1904] 1 Ch. 673.
[7] *Lallu Ram*, (1923) 21 A. L. J. R. 772.
[8] *Musumat Begum*, (1870) 2 N. W. P. 349.
[9] *Raja*, (1895) Cr. R. No. 28 of 1895, Unrep. Cr. C. 765.
[10] *Nanni*, (1899) 22 All. 113.
[11] *Bapu Jaga*, (1886) Cr. R. No. 42 of 1886, Unrep. Cr. C 297.
[12] [illegible]
[13] [illegible]
[14] [illegible]
[15] [illegible]
No. 3 of 1883.
[16] *Beni*, (1914) 12 A. L. J. R. 349.
[17] *Nga Tun U*, (1902) 1 L. B. R. 213.
[18] Per Turner, C. J., in *Muttumira*, (1884) 7 Mad. 590, 591; *Ramditta* v. *Kirpa Singh*, sup.

a nuisance.[1] It is the legal right of every person to make such use of his own property as he may think fit, provided that in doing so he does not cause real injury to others or offend against the law even though he may thereby hurt the susceptibilities of others.[2] The scope of this section is to protect the public or people in general, as distinguished from the members of a sect.

Gambling.—A common gaming-house to which every one who chooses to pay is able to go is necessarily a nuisance and no evidence of any actual annoyance to the public is in such a case required. But a person who admits gamblers into his house, and every person who games therein is not guilty of this offence in the absence of such evidence.[3] Where a lessee of a house permitted disorderly people to use it for gambling and thereby caused annoyance to the public, he was convicted of this offence.[4] Persons who sat on a public road outside a village, and induced villagers to gamble,[5] and persons who gambled in a market place,[6] were held to have committed a public nuisance. Similarly, where the accused allowed large crowd of people to collect near their shops with a view to carry on satta (gambling) transactions and the crowd was so great as to stop the traffic in the street for half an hour, it was held that they were guilty of a public nuisance. The Court observed: "If a crowd collects and obstructs the traffic so as to cause a nuisance, the person who is directly responsible for the crowd collecting is obviously not less but more guilty than the other persons who form the crowd and this would be equally the case whether he were inside or outside his shop at the precise moment when the police appeared. No one is allowed to make use of his premises in such a way as to interfere with the rights of the public."[7]

The Calcutta High Court has ruled that gambling is not an offence such as is defined in this section. Where, therefore, certain persons were found to have gambled at a place where the Gambling Act was not in force and convicted under s. 290, it was held that the conviction was bad.[8] In a Burma case, the Judicial Commissioner said: "It is quite clear that, however pernicious may be the results of gambling, whether in a private house or in a common gaming-house, the mere act of gambling cannot be regarded as a public nuisance within the Penal Code. It would be as reasonable to punish people who hold *pwes* or keep grogshops as being guilty of a public nuisance on the ground that *pwes* and drinking frequently 'endanger the public peace and safety.'"[9]

Lawful cremation is not a nuisance.—When persons entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, they cannot be convicted of a public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to.[10] But the owner of a private cremation ground may be liable for a nuisance if he allows the cremation of bodies upon the ground to be so performed as to annoy or endanger the lives and properties of persons living in the neighbourhood.[11]

Offending the sentiments of a class is no nuisance.—Where Mahomedans, residing in a Hindu village, erected, in the neighbourhood of a Hindu temple, a shed containing a religious symbol[12]; where a person cut up meat on his *verandah* and exposed

[1] *Zakhsuddin*, (1887) 10 All. 44.

[2] *Shahbaz Khan* v. *Umrao Puri*, (1908) 30 All 181.

[3] *Hau Nagn*, (1870) 7 B. H. C. (Cr. C.) 74; (1870) 1 Weir 240, *Dustoor Khan*, (1867) P. R. No. 16 of 1867.

[4] *Thandavarayudu*, (1891) 14 Mad. 364; *Rogier*, (1823) 1 B. & C. 272.

[5] (1878) 1 Weir 239.

[6] *Bethan Chetti*, (1881) 1 Weir 242.

[7] *Hapoop Mal*, (1924) 22 A. L. J. R. 662; *Noor Mahomed*, (1911) 13 Bom. L. R. 209.

[8] *Basi Kumar Bose*, (1903) 7 C. W. N. 710. See, to the same effect, *Managil Karuvan*, (1891) 1 Weir 240.

[9] Per Ward, J. C., in *Nga Shwe Nyo*, (1884) S. J. L. B. 279.

[10] *Saminadha Pillai*, (1896) 19 Mad. 464.

[11] *Indra Nath Banerjee*, (1897) 25 Cal. 425.

[12] *Muttumira*, (1884) 7 Mad. 590.

it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by[1]; where a person kept a shop open for the sale of meat though the sight of meat was offensive to the sentiments of a section of the public[2]; and where Mahomedans for a religious purpose killed and cut up two cows before sunrise in a private compound partly visible from a public road,[3] this offence was held not to have been committed. But it would be a public nuisance if a person wilfully slaughtered cattle in a public street so that the groans and blood of the poor beasts were heard and seen by passers-by.

2-b. **'Which must necessarily cause injury, etc., to persons who may have occasion to use any public right.'**—The persons referred to in this clause can seek a criminal remedy for apprehended injury. Under this clause common injury to the public or neighbours need not be shown; any individual might complain, provided he is interfered with in respect of a public right, e.g., obstruction caused by building over a part of a public street. Whoever appropriates any part of a street by building over it infringes the right of the public *quoad* the part built over, and thereby commits public nuisance under this section.[4] If any portion, however small, of a public street is encroached upon, the inevitable result must be to cause obstruction to persons who may have occasion to use the highway, for the public is entitled to use every inch of a road that has been dedicated to the public.[5]

The Calcutta High Court in a case where persons placed a bamboo stockade across a tidal navigable river for the purpose of fishing, although they left in such stockade a narrow opening for the passage of boats, which passage was kept closed except on the actual passage of boats, held that they were guilty of a public nuisance.[6] But subsequently it has held that an encroachment, however slight, on a tidal navigable river would not constitute this offence. There must be some evidence that such encroachment caused one of the results specified in this section.[7] The Lahore High Court[8] has agreed with the view expressed in the earlier case and has dissented from the view expressed in this case.

A person who filled up a portion of a ditch or drain which formed part of a public way and which belonged to the public,[9] was held to have committed this offence. Similarly, letting loose cattle at night on a road was held to constitute this offence.[10]

3. **'Nuisance not excused on the ground that it causes some convenience or advantage.'**—It is immaterial whether the act complained of is convenient to a larger number of the public than it inconveniences, but the fact that the act complained of facilitates the lawful exercise of their rights by part of the public may show [illegible]

annoyance.[12]

No prescriptive right can be acquired to commit nuisance.—No prescriptive right can be acquired to maintain, and no length of time can legalize, a public nuisance. Though twenty years' user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, though of long

[1] *Byramji Edalji*, (1887) 12 Bom. 437.
[2] *Hasan Samad*, (1897) Cr. R. No. 13 of 1897, Unrep. Cr. C. 903; *Eesa* v. *Keemoo*, (1867) P. R. No. 18 of 1867; *Assa Nand* v *Hoosein Buksh*, (1868) P. R. No. 15 of 1868.
[3] *Zakhiuddin*, (1887) 10 All. 44.
[4] *Virappa Chetti*, (1896) 20 Mad. 433.
[5] *Nisar Muhammad Khan*, (1925) 6 Lah. 203.
[6] *Umesh Chandra Kar*, (1887) 14 Cal. 656
[7] *Jugal Das Dalal*, (1893) 20 Cal. 665
[8] *Nisar Muhammad Khan*, sup.
[9] *Roopnarain Dutt*, (1872) 18 W. R. (Cr.) 38.
[10] *Kasayi Ahmed*, (1892) 1 Weir 238.
[11] Stephen's Digest of Criminal Law, Art. 197; *Train*, (1862) 9 Cox 180; *Ward*, (1836) 4 Ad. & El. 384.
[12] Russell, 734.

standing.[1] But a long possession or enjoyment of what is said to be a nuisance may give to the objection of the person so possessing or enjoying it the character of a *bona fide* dispute as to title such as might have the effect of ousting the jurisdiction of the Magistrate under ss. 133 and 137 of the Criminal Procedure Code and making the question a proper one for the civil Court.[2]

Liability of a master for the acts of his servants.—Under English law the criminal liability of a master for the acts of his servants in cases of public nuisance is an exception to the general rule that he who does a criminal act is alone guilty. The owner of works, carried on for his benefit by his agents, is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders.[3] The Calcutta High Court has differed from this view. Where the proprietors and the manager of a mill were prosecuted on a complaint that the working of the mill was a nuisance, and it appeared that the proprietors were not residents in the locality and there was no allegation of abetment by them, it was held that the person liable, where the user of premises gave rise to a nuisance, was the occupier for the time being whoever he might be, and the proprietors were therefore not guilty of nuisance.[4]

Prosecution under the Criminal Procedure Code not a condition precedent.—A prosecution under this section is not illegal on the ground that proceedings have not previously been taken under the Criminal Procedure Code.[5]

Civil and criminal liability.—Nuisances punishable under the Code may be made the subject of a civil action before or without prosecution. A person aggrieved by the erection of a building in a public thoroughfare, or on the waste land of a town or village, is entitled to institute a suit in a civil Court for its removal, instead of preferring a complaint to the Magistrate.[6]

Statutory authority to commit nuisance.—A statute may authorize and legalize acts which would otherwise amount to a nuisance.[7]

Situation.—If a party set up a noxious trade, remote from habitations and public roads, and after that new houses are built, and new roads constructed near it, the party may continue his trade, although it be a nuisance to persons inhabiting such houses or passing along such roads.[8] But this case has been doubted in a later decision.[9]

Statutory application.—Act for Removal of Nuisances below highwater-mark (XI of 1853); Sanitary Regulation Act (Bom. Act VI of 1867), ss. 3, 5, 6 and 8; the Burma Water Hyacinth Act (Burma Act I of 1917), s. 3. The definition of 'public nuisance' applies to all Acts of the Governor-General in Council and Regulations under 33 Vic., c. 3, s. 1, made after 14th January 1887.[10]

English cases.—The following acts are held to be public nuisance.—Allowing a house near a highway to be ruinous and dangerous to the public[11]; keeping swine

[1] *Weld* v *Hornby*, (1806) 7 East 195, 199; *Municipal Commissioners of the Suburbs of Calcutta* v. *Mahomed Ali*, (1871) 7 Beng. L. R. 499; *Shotts Iron Co.* v. *Inglis*, (1882) 7 App. Cas. 518, 528; *Attorney-General* v. *Richmond*, (1866) L. R. 2 Eq. 306, 311; *Tipping* v. *St. Helen's Smelting Co*, (1865) L. R. 1 Ch. 66, 69; *Cross*, (1812) 3 Camp. 224.

[2] *Preonath Dey* v. *Gobordhone Malo*, (1897) 25 Cal. 278.

[3] *Stephens*, (1866) L. R. 1 Q. B. 702; *Medley* (1834) 6 C. & P. 292.

[4] *Bibhuti Bhusan Biswas* v. *Bhuban Ram*, (1918) 46 Cal. 515, 22 C. W. N. 1062, 29 C L. J. 262.

[5] *Suklal*, (1869) Unrep. Cr. C. 23.

[6] *Jina Ranchhod* v. *Jodha Ghella*, (1863) 1 B. H. C 1.

[7] *Hammersmith, etc., Ry.* v. *Brand*, (1868) L. R. 4 H. L. 171; *London and Brighton Railway Co.* v. *Truman*, (1885) 11 App. Cas. 45; *Withington Local Board, etc.* v. *Corporation of Manchester*, [1893] 2 Ch. 19; *Attorney-General* v. *Corporation of Nottingham*, [1904] 1 Ch. 673.

[8] *Cross*, (1826) 2 C. & P. 483.

[9] *Vide* the judgment of Byles, J., in *Hole* v. *Barlow*, (1858) 27 L. J. C. P. 207, 208.

[10] General Clauses Act, (X of 1897), ss. 3, (44) 4 (2).

[11] *Watts*, (1704) 1 Salk. 356.

in the city[1]; making a great noise at night with a speaking trumpet[2]; collecting a number of persons for pigeon shooting[3]; indecent exposure in an omnibus,[4] or on the roof of a house,[5] or in a public urinal,[6] or in a place where the public go[7]; negl [illegible] langer the safety of persons living in t [illegible] picture of a man naked to his waist [illegible] a bawdy-house[10]; naked bathing near a public footpath[11]; keeping a booth in a public place for the purpose of showing an indecent exhibiton[12]; exposing the naked dead body of a child near a public highway so as to shock and disgust passers-by[13]; burning of a dead body in such a place and in such a manner as to annoy persons passing along public roads or other places where they have a right to go.[14]

PRACTICE.

As to conditional orders by a Magistrate for the removal of nuisances, see ss. 133 to 143 of the Code of Criminal Procedure; and as to a Magistrate's powers [illegible] ee s. 144 of the [illegible] inal Procedure [15]

269. Whoever unlawfully or negligently does any act[1] which is, and which he knows or has reason to believe[2] to be, likely to spread the infection of any disease dangerous to life,[3] shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Negligent act likely to spread infection of disease dangerous to life.

COMMENT.

If a man is [illegible] ly goes abroad with it [illegible] ted, he does what he m [illegible] And unless some lawful occasion or reason for this conduct can be shewn, as that the sick person had been directed to be removed to a hospital, and that the removal was performed with due caution, the act will be an offence punishable under this section [16]

1. **'Does any act.'**—See ss. 32 and 33, *supra*, as to the meaning of 'act.'

2. **'Reason to believe.'**—See s. 26, *supra*. It must be shewn that the accused had knowledge that the disease was infectious. Where the disease is generally known to be infectious there will be no difficulty.

3. **'Likely to spread the infection of any disease dangerous to life.'**—The infection which is likely to be spread must be of a disease dangerous to life.

Syphilis.—A prostitute, who was suffering from syphilis, encouraged and permitted a man, whom she had assured that she was healthy, to have sexual

[1] *Wigg*, (1706) 2 Raym. 1163, 2 Salk. 460.
[2] *Smith*, (1726) 2 Strar. 704.
[3] *Charles Moore*, (1832) 3 B. & Ad. 184
[4] *Charles Holmes*, (1853) Dears. Cr. C. 207
[5] *Thallman*, (1863) 9 Cox 388.
[6] *Harris*, (1871) L. R. 1 C. C. R. 282.
[7] *Wellard*, (1884) 14 Q B. D. 63.
[8] *Mutters*, (1864) 34 L. J. (M C.) 22.
[9] *Grey*, (1864) 4 F. & G 73.
[10] *Rice*, (1866) L. R. 1 C. C. R. 21; *Singleton* v. *Ellison*, [1895] 1 Q B. 607.
[11] *Reed*, (1871) 12 Cox 1; *Crunden*, (1809) 2 Camp, 89, 11 R. R. 671.
[12] *Saunders*, (1875) 1 Q. B. D. 15
[13] *Jane Clark*, (1883) 15 Cox 171.
[14] *Price*, (1884) 12 Q. B. D. 247.
[15] *Sullal*, (1869) Unrep. Cr. C. 23
[16] M. & M. 205.

intercourse with her, and [illegible] d the disease to him, was not liable to [illegible] 417 or 420. West, J., said: "Assum- [illegible] lpable negligence, still accused's act of [illegible] not spread infection without the intervention of the [illegible] party, himself a responsible person and himself generally an accomplice."[1] This decision does not seem to be sound [illegible] ant cannot be deemed to be an accomplice, he [illegible] munication of syphilis to him [illegible]

Small-po [illegible] allow her daughter suffering from small-pox to [illegible] to a hospital in accordance with an order made by the District Magistrate unless she accompanied her, it was held that she committed no unlawful or negligent act within the meaning of this section. To keep one's child suffering from small pox confined to the house or to oppose the removal to hospital, where there is no evidence to show that lodgers or boarders are kept in that house, is not an act or omission as defined in s. 268.[2] It was held similarly where a person disobeyed the order of the Health Officer of the Madras Corporation, under s. 366 of the Madras Municipality Act, to remove his son, who was suffering from small pox, to an isolation hospital, but he removed him to an isolated house.[3] But in England it is an offence to carry a child suffering from small-pox through a public street in which persons are passing.[4]

Cholera.—Where K, knowing he was suffering from cholera, travelled by a train, without informing the railway officers of his condition, and M, knowing K's condition, purchased his ticket and travelled with him, it was held that K was properly convicted under this section, because he must have known that he was doing an act likely to spread infection, and he did so negligently, in not informing the railway authorities, and that M was guilty of abetment of K's offence.[5]

Plague.—The accused resided in a plague-stricken house in the Umballa Cantonment and had been in contact with a plague patient. He was taken to the plague shed in company with the patient, who died there. The next day the accused left the shed against orders and travelled by rail to the neighbouring town of Shahabad, and from thence to Karnal. It was held that he was guilty of this offence as he had [illegible] at his act was dangerous and likely to sprea [illegible].[6]

Inoculation [illegible] is not in itself an illegal or negligent act. On proof of a negligent dealing with a patient or patients after inoculation, with the knowledge or belief required by the section, the operator or a third person may be liable under the section.[7] Though inoculation for small-pox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease.[8]

Glanders.—Bringing a horse infected with glanders into a public place to the danger of infecting other people is an offence.[9]

PRACTICE.

Evidence.—Prove (1) that the disease in question is (a) infectious; and (b) dangerous to life.

(2) That the accused did an act which was likely to spread infection thereof.

(3) That such act was unlawful or negligent.[10]

[1] *Rakhma Lom Sadhu*, (1886) 11 Bom. 59, [illegible] of this ruling.

[2] [illegible] 24 Cal. 494.

[3] [illegible] (1919) 26 M. L. T. 380.

[4] *Vantandillo*, (1815) 4 M. & S. 73; *Burnett*, (1815) 4 M. & S. 272.

[5] *Krishnappa*, (1883) 7 Mad. 276.

[6] *Niadar Mal*, (1902) P. R. No. 22 of 1902. See *Chabumian Sahib*, (1912) 12 M. L. T. 664.

[7] (1866) 1 Weir 226; *San Hla*, (1900) 1 U. B. R. (1897-1901) 280.

[8] *Burnett*, (1815) 4 M. & S. 272.

[9] *Thomas Henson*, (1852) Dears. 24.

[10] See *Kandaswami Mudaliar*, sup.

(4) That the accused knew, or had reason to believe, that such act of his was likely to spread the infection of such disease.[1]

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Malignant act likely to spread infection of disease dangerous to life.

270. Whoever malignantly[1] does any act[2] which is, and which he knows or has reason to believe[3] to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

The offence under this section is an aggravation of that which is punished by the preceding section. In the last section the act is done either 'unlawfully' or 'negligently,' under this, 'malignantly.' Malice aggravates the offence.

The Law Commissioners observe: "If any person died of the plague and his death could be traced to infection so caused maliciously, the person who caused it, we apprehend, would be chargeable with homicide. . . It is contrary to the principle of the Code to punish acts which the doer when he committed them knew to be likely to cause certain evil results, if in fact such results were not produced, in the same manner as if such evil consequences had actually flowed from them."[2] This section is intended to meet those cases in which the malignant act is not the cause of death, but death could be traced to it.

1. **'Malignantly.'**—See s. 153, *supra*. The word 'malignantly' denotes a deliberate intention on the part of the accused. It is nowhere defined in the Code but it is used in the sense of 'maliciously.' And the word "malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse."[3]

2. **'Act.'**—See ss. 32 and 33, *supra*.

3. **'Reason to believe.'**—See s. 26, *supra*.

PRACTICE.

Evidence.—Prove points (1), (2) and (4) as in s. 269; and

(3) That the accused acted malignantly.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Disobedience to quarantine rule.

271. Whoever knowingly disobeys any rule made and promulgated[1] by the Government of India,[2] or by any Government,[3] for putting any vessel into a state of quarantine, or for regulating the intercourse on vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[1] *Potina Padmanabhaswami*, (1891) 1 Weir 226.

[2] 2nd Rep., s. 226.

[3] Per Bayley, J., in *Bromage* v. *Prosser*, (1825) 4 B. & C. 247, 255.

COMMENT.

The motive for disobeying any rule is quite immaterial under this section. The disobedience is punishable whether any injurious consequence flows from it or not.

Any breach of a quarantine rule is punishable under this section.[1]

1. **'Any rule made and promulgated.'**—The Indian Ports Act[2] authorizes the making of rules in ordinary cases. For outbreaks of plague, the Epidemic Diseases Act[3] is passed.

2. **'Government of India.'**—See s. 16, *supra*.

3. **'Any Government.'**—See s. 17, *supra*.

Statutory application.—Sanitary Regulation Act (Bom. Act VI of 1867), ss. 11, 14.

PRACTICE.

Evidence.—Prove (1) the existence of the rule of quarantine.
(2) That such rule was made and promulgated by Government.
(3) That the accused knew of such rule.
(4) That he disobeyed it knowingly.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Adulteration of food or drink intended for sale.

272. Whoever adulterates[1] any article of food or drink,[2] so as to make such article noxious[3] as food or drink, intending to sell such articles as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

[illegible] otherwise rendering it [illegible] Mere adulteration [illegible] fit is not punishable under it, *e.g.*, mixing water with milk.[4]

1. **'Adulterates.'**—The word 'adulterates' means mixes with any other substance, whether wholly different, or of the same kind but inferior quality.

2. **'Any article of food or drink.'**—According to the plain meaning of the section the articles of food or drink may be for human consumption, or for the use of animals.

3. **'Noxious as food or drink.'**—The word 'noxious' means injurious to health [illegible] *e.g.*, paddy soa[illegible] or bread mixed [illegible] shewn to be no [illegible] the mixture as [illegible] commit an offence under th[illegible] *ghi* and selling the mixture [illegible] both Hindus and Mahomedans, [illegible]

[1] Bom. Act VI of 1867, s. 11.
[2] Act III of 1891 repealing the Indian Quarantine Act (I of 1870).
[3] Act III of 1897.
[4] *Abdul Rahman*, (1902) 1 L. R. R. 153.
[5] *Cunnyappa*, (1887) 1 Weir 227.
[6] *Edigi Narasappa*, (1894) 1 Weir 228.
[7] *John Dixon*, (1814) 3 M. & S. 11.
[8] *Ganesha*, (1873) P. R. No. 15 of 1873.

come within the meaning of the expression 'noxious as food' which occurs in s. 272 of the Indian Penal Code. That the expression obviously means unwholesome as food or injurious to health and not repugnant to one's feelings. The word 'noxious,' had it stood by itself, might have had a wider meaning, but what I have to consider is the expression 'noxious as food' and not merely 'noxious.'"[1]

Similarly, if a person exposes for sale milk adulterated with water he does not commit an offence under this section because the mixture is not noxious or injurious as food or drink.[2]

Adulteration statutes.—Recently several statutes are passed for preventing the adulteration of food. See the Bengal Food Adulteration Act (Beng. Act VI of 1919); the Punjab Adulteration of Food Act (Punj. Act VI of 1919); the Central Provinces Prevention of Adulteration Act (C. P. Act II of 1919); the Behar and Orissa Food Adulteration Act (Behar Act II of 1919); the Bombay Prevention of Adulteration Act (Bom. Act V of 1925).

PRACTICE.

Evidence.—Prove (1) that the article in question is food or drink.

(2) That the accused adulterated it.

(3) That such adulteration rendered it noxious *if* taken as food or drink.

(4) That the accused, at the time of such adulteration, intended to sell such article as food or drink, or knew it to be likely that such article would be sold as food or drink.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summarily triable.

Order for destruction.—On a conviction under this section the Court may order the food or drink to be destroyed.[3]

Sale of noxious food or drink.

273. Whoever sells, or offers or exposes for sale, as food or drink, any article[1] which has been rendered or has become noxious, or is in a state unfit for food or drink,[2] knowing or having reason to believe that the same is noxious as food or drink,[3] shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Section 272 deals with adulteration of food or drink, this section, with the sale or attempted sale of such adulterated noxious articles, and not only such food or drink. This section is more comprehensive in its provisions, and includes any article of food [illegible] at any time fit for [illegible] time it has been bo[illegible] germinated is an offence under it.[4]

Scope.—This section is not expressly limited to food intended for human consumption. But as it comes in the Chapter dealing with offences relating to public health, [illegible] The words "th[illegible] According to [illegible] nation, state, or community." Thus, this section does not make the sale of horse's [illegible] r it.[5]

[1] Per Sulaiman, J., in *Ram Dayal*, (1923) 46 All. 94.

[2] *Dhawa*, (1924) 1 L. C. 273.

[3] Criminal Procedure Code, s. 521.

[4] *Ediga Narasappa*, (1894) 1 Weir 228.

[5] *Sita Ram*, (1907) P. L. R. No. 139 of 1908.

COMMENT.

The motive for disobeying any rule is quite immaterial under this section. The disobedience is punishable whether any injurious consequence flows from it or not.

Any breach of a quarantine rule is punishable under this section.[1]

1. **'Any rule made and promulgated.'**—The Indian Ports Act[2] authorizes the making of rules in ordinary cases. For outbreaks of plague, the Epidemic Diseases Act[3] is passed.

2. **'Government of India.'**—See s. 16, *supra*.

3. **'Any Government.'**—See s. 17, *supra*.

Statutory application.—Sanitary Regulation Act (Bom. Act VI of 1867), ss. 11, 14.

PRACTICE.

Evidence.—Prove (1) the existence of the rule of quarantine.
(2) That such rule was made and promulgated by Government.
(3) That the accused knew of such rule.
(4) That he disobeyed it knowingly.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Adulteration of food or drink intended for sale.

272. Whoever adulterates[1] any article of food or drink,[2] so as to make such article noxious[3] as food or drink, intending to sell such articles as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The mixing of noxious ingredients in food or drink, or otherwise rendering it unwholesome by adulteration is punishable under this section. Mere adulteration with harmless ingredients for the purpose of getting more profit is not punishable under it, *e.g.*, mixing water with milk.[4]

1. **'Adulterates.'**—The word 'adulterates' means mixes with any other substance, whether wholly different, or of the same kind but inferior quality.

2. **'Any article of food or drink.'**—According to the plain meaning of the section the articles of food or drink may be for human consumption, or for the use of animals

3. **'Noxious as food or drink.'**—The word 'noxious' means injurious to health *e.g.*, paddy soaked in dirty water[5]; or toddy in which germs have germinated[6], or bread mixed with alum.[7] It is not an offence to sell inferior food cheap, if it is not shewn to be noxious.[8] A person who mixes pig's fat with *ghi*, intending to sell the mixture as food or knowing it to be likely that it will be sold as such does not commit an offence under this section. "It is true that the mixing of pig's fat with *ghi* and selling the mixture would be noxious to the religious and social feelings of both Hindus and Mahomedans; but I am of opinion that such an act would not

[1] Bom. Act VI of 1867, s 11.
[2] Act III of 1901 repealing the Indian Quarantine Act (I of 1870).
[3] Act III of 1897.
[4] *Abdul Rahman*, (1902) I L. R. 153.
[5] *Cumnyappa*, (1887) I Weir 227.
[6] *Ediga Narasappa*, (1894) 1 Weir 228.
[7] *John Dixon*, (1814) 3 M & S. 11.
[8] *Gunesha*, (1873) P. R. No. 15 of 1873.

come within the meaning of the expression 'noxious as food' which occurs in s. 272 of the Indian Penal Code. That the expression obviously means unwholesome as food or injurious to health and not repugnant to one's feelings. The word 'noxious,' had it stood by [illegible] what I have to consider is the expression' [illegible]

Similarly, if a person ex[illegible] he does not commit an offence under this section because the mixture is not noxious or injurious as food or drink.[2]

Adulteration statutes.—Recently several statutes are passed for preventing the adulteration of food. See the Bengal Food Adulteration Act (Beng. Act VI of 1919); the Punjab Adulteration of Food Act (Punj. Act VI of 1919); the Central Provinces Prevention of Adulteration Act (C. P. Act II of 1919); the Behar and Orissa Food Adulteration Act (Behar Act II of 1919); the Bombay Prevention of Adulteration Act (Bom. Act V of 1925).

PRACTICE.

Evidence.—Prove (1) that the article in question is food or drink.

(2) That the accused adulterated it.

(3) That such adulteration rendered it noxious if taken as food or drink.

(4) That the accused, at the time of such adulteration, intended to sell such article as food or drink, or knew it to be likely that such article would be sold as food or drink.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Summarily triable.

Order for destruction.—On a conviction under this section the Court may order the food or drink to be destroyed.[3]

Sale of noxious food or drink.

273. Whoever sells, or offers or exposes for sale, as food or drink, any article[1] which has been rendered or has become noxious, or is in a state unfit for food or drink,[2] knowing or having reason to believe that the same is noxious as food or drink,[3] shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Section 272 deals with adulteration of food or drink, this section, with the sale or attempted sale of such adulterated noxious articles, and not only such food or drink. This section is more comprehensive in its provisions, and includes any article of food which has gone bad by being kept too long, or which never was at any time fit for food; or drink which has gone bad by exposure or by length of time it has been bottled, etc. For instance, the selling of toddy in which germs are germinated is an offence under it.[4]

Scope.—This section is not expressly limited to food intended for human consumption. But as it comes in the Chapter dealing with offences relating to public health, etc., it seems it is not intended to include food or drink for animals The words "the public" mean human beings in general and do not include animals. According to Webster, 'public' means "the general body of mankind or of a nation, state, or community." Thus, this section does not make the sale of horse's food of grain, or fodder, unfit for a horse to eat, an offence punishable under it.[5]

Ingredients.—The section has the following essentials :—

1. Selling or offering or exposing for sale as food or drink some article.

[1] Per Sulaiman, J., in *Ram Dayal*, (1923) 46 All. 94.

[2] *Dhawa*, (1924) 1 L. C. 273.

[3] Criminal Procedure Code, s. 521.

[4] *Ediga Narasappa*, (1894) 1 Weir 228.

[5] *Sita Ram*, (1907) P. L. R. No. 139 of 1908.

2. Such article must have become noxious or must be in a state unfit for food or drink.

3. The sale or exposure must have been made with a knowledge or reasonable belief that the article is noxious as food or drink.

1. **'Sells or offers or exposes for sale as food or drink any article.'**—The article of food should have been exposed for sale. Where a butcher had killed and hung up a sheep, and on inspection the flesh was found unfit for food, but it was not removed to the shop nor exposed or offered for sale, it was held that the offence was incomplete and a conviction could not be sustained.[1]

'As food or drink.'—The mere sale of an article not itself an article of food, even though it be sold with the knowledge of the vendor that it is the buyer's intention to mix it with the ingredients of which an article of food—*e.g.*, bread—is to be composed, will be no offence under this section. The appellant sold to the respondent a packet of baking powder composed of 20 per cent. of bicarbonate of soda, 40 per cent. of ground rice, and 40 per cent. of alum, the latter of which ingredients is injurious to health. It was held that such baking powder was not an article of food and that the sale of it was not an offence.[2]

What is punishable under this section is the sale or offer or exposure for sale of noxious articles as food or drink and not the mere sale or offer or exposure for sale of noxious articles. Where, as a matter of trade, the owner of a grain pit sold the contents of the pit before it was opened at a certain sum per maund whether the grain was good or bad, and on the pit being opened it was found that a large proportion of the grain was unfit for human consumption, it was held that the vendor could not be convicted under this section.[3]

2. **'Which has been rendered or has become noxious or is in a state unfit for food or drink.'**—The word 'noxious' means harmful or injurious to health or unwholesome.[4] It must be shown that the accused sold or exposed for sale an article which was to his knowledge noxious as food or drink. The accused was convicted for exposing for sale some *ghi* which was bad. The *ghi* was not adulterated but somewhat rancid. The High Court quashed the conviction on the ground that it was not shewn that the *ghi* was noxious as food or drink to the knowledge or belief of the accused.[5] Milk is not rendered noxious by being mixed with water.[6] Nor is *ghi*, when adulterated with vegetable oil.[7] It is not an offence to sell inferior food cheap, if it is not shown to be noxious. Where a person sold an inferior quality of flour after reducing its price and the purchaser was aware of the fact, it was held that he was not guilty under this section.[8] Similarly, selling wheat containing a large admixture of extraneous matter, *e.g.*, dirt, wood, matches, charcoal, blackseeds, etc., is held to be no offence.[9]

A grocer on being asked for two pots of cream sold two pots of cream labelled: "Rich cream. This cream contains a small percentage of boron preservative to retard sourness." No indication beyond the label was given to the purchaser as to the composition of the cream, which, on analysis, was found to contain boracic acid. In the trade there were two kinds of cream known and sold, preserved cream, and cream, and the boracic acid was generally used by the trade as a preservative to keep the cream good. It was found as a fact that cream if mixed with boracic acid equivalent to that found in the cream sold was not injurious to adults, but was injurious to the health of children and invalids, and that this class of cream was given to children. It was held that the preserved cream so sold was not in itself an

[1] *Madar Sahib*, (1884) 1 Weir 227. See *Barlow* v. *Terrett*, [1891] 2 Q. B. 107.
[2] *James* v. *Jones*, [1894] 1 Q. B. 304.
[3] *Salig Ram*, (1906) 28 All. 312.
[4] *Chokraj Marwari*, (1903) 12 C. W. N. 608.
[5] *Sheo Lal*, (1904) 26 All. 387.
[6] *Chinniah*, (1887) 1 Weir 228.
[7] *Chokraj Marwari*, sup.
[8] *Ganesha*, (1872) P. R. No. 15 of 1873.
[9] *Narumal Jaccarmal*, (1904) 6 Bom. L. R. 520.

rticle of food," but was an article of food—namely, cream—mixed with an gredient; that the article so mixed was "injurious to health" within the mean- of s. 3 of the Sale of Food and Drugs Act, 1875, (38 & 39 Vic., c. 93), although was not injurious to normal adult persons, and that the seller was guilty of ling an article of food mixed with an ingredient so as to render the article urious to health.[1]

'Unfit for food or drink.'—According to the plain wording of the section the icles of food or drink may be for human consumption, or for the use of animals. t if the food in question is unfit for men, but fit for animals, and is sold as food for imals, no conviction will lie.[2]

3. **'Knowing or having reason to believe that the same is noxious.'**—See s. 26 to the meaning of the expression 'reason to believe.' A meat salesman can be nvicted for knowingly selling or exposing meat for sale in a public market as fit human food, when it is not.[3]

Selling adulterated article as unadulterated.—The sale of adulterated articles food as pure and unadulterated is not an offence under this section though it may nount to cheating or to an offence under some Municipal Act.[4]

Statutory application.—The City of Bombay Municipal Act (Bom. Act III of 88), s. 417-B.

PRACTICE.

Evidence.—Prove (1) that the article is food or drink.

(2) That the accused sold, or offered, or exposed for sale such article.

(3) That at the time it was sold, etc., it had been rendered, or had become oxious, or was in a state unfit for food or drink.

(4) That he at the time knew, or had reason to believe, that the article sold, c., was noxious, or unfit for food or drink.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—riable by Magistrate, Presidency or first or second class—Triable summarily.

Order for destruction.—On a conviction the Court may order the food or drink be destroyed.[5]

Adulteration of rug.

274. Whoever adulterates[1] any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be old or used for, or knowing it to be likely that it will be sold or sed for, any medicinal purpose, as if it had not undergone such dulteration, shall be punished with imprisonment of either descrip- ion for a term which may extend to six months, or with fine which nay extend to one thousand rupees, or with both.

COMMENT.

To preserve the purity of drugs sold for medicinal purposes this section is nacted.

To support a conviction under this and the following section it is sufficient o show that the efficacy of a drug is lessened, it need not necessarily become oxious to life. Under both these sections mixing water with a drug would be enal, but where a drug loses its efficacy by its being kept, the sections do not

[1] *Cullen* v. *McNair*, (1908) 21 Cox 682; *Haigh* v. *Aerated Bread Co.*, (1916) 25 Cox 78.

[2] *Crowley*, (1862) 3 F. & F. 109

[3] [illegible] *Upendra*

apply. A person cannot be convicted who sells an inferior quality of a drug because the word 'adulteration' imports an admixture of some foreign substance.

1. **'Adulterates.'**—'Adulterates,' that is, apparently mixes with any other substance, whether wholly different, or of the same kind but inferior quality. Mayne, however, thinks that to mix an inferior quality of cod liver oil with a superior quality of that drug would not come under this section, though the efficacy of the drug would be lessened by the mixing.

PRACTICE.

Evidence.—Prove (1) that the article is a drug or medical preparation.

(2) That it was adulterated by the accused.

(3) That such adulteration tended to lessen its efficacy, or to change its operation or to make it noxious.

(4) That the accused intended that such adulterated drug should be sold or used for a medicinal purpose as an unadulterated drug; or knew that it was *likely that it would be sold or used as for the same.*

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Order for destruction.—On a conviction the Court may order the drug or medical preparation to be destroyed.[1]

Sale of adulterated drugs.

275. Whoever knowing any drug or medical preparation to have been adulterated[1] in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells[2] the same, or offers or exposes[3] it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The offence under this section consists in selling, or offering, or exposing for sale, or issuing *from any dispensary, an adulterated drug as unadulterated.* This section bears the same relation to s. 274 as s. 273 bears to s. 272. Section 273 deals with the sale of an article of food or drink that has become noxious. This section not only prohibits its sale but also its issue from any dispensary.

1. **'Knowing any drug or medical preparation to have been adulterated, etc.'**—*There must be knowledge* that the drug or medical preparation has been adulterated in such a manner as to lessen its efficacy or to change its operation or to render it noxious. Upon a complaint, under s. 6 of the Food and Drugs Act, 1875, (38 & 39 Vic., c. 93) for selling tincture of opium which was not "of the nature, substance, or quality of the article demanded by the purchaser," it appeared that the drug which was sold as "tincture of opium" by the defendant was deficient in opium to the extent of one-third and in alcohol to the extent of nearly one-half as compared with the standard prescribed by the British Pharmacopœia. It was held that the defendant was liable to be convicted.[2] Similarly, it was held where a purchaser asked to be supplied with "mercury ointment,"

[1] Criminal Procedure Code, s. 521.

[2] *White v. Bywater*, (1887) 19 Q. B. D. 682.

was given an ointment containing a less proportion of mercury than that prescribed by the Pharmacopœia.[1]

2. 'Sells.'—He who sells, whether he be a master or servant, whether he be principal or a person to whom the conduct and management of sales is delegated, is struck at by this section.[2] But a mere canvasser who gets only commission for [illegible] be in a packet: it is not necessary that it [illegible] is sufficient exposure of the article if the packet containing it is in the shop for sale.[4] There is no exposure for sale if the drug is simply stored up in a room or cellar.[5]

PRACTICE.

Evidence.—Prove (1) that the drug has been adulterated.

(2) That the adulteration was such as to lessen its efficacy, or change its operation, or render it noxious.

(3) That the accused sold, or offered, or exposed such drug for sale; or that he issued it from a medical dispensary; or that he caused it to be used for a medical purpose.

(4) That he sold, or issued such drug as an unadulterated drug; or caused it to be used by a person who did not know of such adulteration.

(5) That he knew that such drug was so adulterated when so sold, etc.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Order for destruction.—On a conviction the Court may order the destruction of the drug.[6]

Sale of drug as a different drug or preparation.

276. Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation, as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

The offence constituted by this section does not involve the idea of any adulteration, or inferiority, in the substituted medicine. It is sufficient that it is not in fact what it purports to be; for instance, supplying savin instead of saffron.[7] [illegible] d to be just as effective as [illegible], he would not be justified [illegible] the same purpose. The fraud consists, not in the injury done, but in the false pretence by which persons, who suppose that they are using one medicine, are forced to use another against their will.

The difference between this and the two preceding sections is that no adulteration is contemplated or essential for a conviction under this section while under the former it is.

This section deals with drugs only and not with articles of food or drink.

[1] *Dickins* v. *Randerson*, [1901] 1 K. B. 437.

[2] *Pharmaceutical Society* v. *London and Provincial Supply Association*, (1880) 5 App. Cas. 857; *Hotchin* v. *Hindmarsh*, [1891] 2 Q. B. 181.

[3] *Pharmaceutical Society* v. *White*, [1901] 1 K. B. 601.

[4] *Wheal* v. *Brown*, [1892] 1 Q. B. 418.

[5] *Crane* v. *Lawrence*, (1890) 25 Q. B. D. 152.

[6] Criminal Procedure Code, s. 521.

[7] *Knight* v. *Bowers*, (1885) 14 Q. B. D. 845.

PRACTICE.

Evidence.—Prove (1) that the accused sold, or offered, or exposed for sale, or issued from a dispensary for medicinal purposes, the drug or medical preparation.

(2) That it was so sold, etc., by him, as a drug or medical preparation different from what it is.

(3) That he knew of such difference at the time it was so sold, etc.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class—Triable summarily.

Fouling water of public spring or reservoir.

277. Whoever voluntarily corrupts or fouls[1] the water of any public spring or reservoir,[2] so as to render it less fit for the purpose for which it is ordinarily used,[3] shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENT.

The water of a public spring or reservoir belongs to every member of the public in common and, if a person voluntarily fouls it, he commits a public nuisance.

Ingredients.—The section requires (1) voluntary corruption or fouling of water; (2) the water must be of a public spring or reservoir; and (3) the water must be rendered less fit for the purpose for which it is ordinarily used.

1. **'Voluntarily corrupts or fouls.'**—See s. 39, *supra*. The purpose for which the water is ordinarily used must be considered in determining whether there has been a voluntary corrupting within the meaning of this section.

'Corrupts or fouls.'—The words 'corrupts or fouls' mean some act which physically defiles or fouls the water.[1] Bathing in a tank[2] or spitting into a public well[3] fouls drinking water. But angling with an unfoul bait does not.[4] Fishing with basket-nets in a tank, the water of which was used for drinking purposes, the use of the baskets having caused a slight disturbance of the mud and so rendered the water rather less fit than usual for drinking[5]; and cultivating paddy in the bed of a tank, the water of which was used as of right by the public for drinking purposes,[6] were held to be offences under this section. The act of a woman of a lower caste taking water from public cisterns of water does not amount to corrupting or fouling.[7] Similarly, a person of a low caste drawing water from a public well cannot be said to corrupt or foul the well.[8]

2. **'Public spring or a reservoir.'**—These words do not include a public river.[9] The word 'public' is nowhere defined. But a 'public place' is a place where the public go, no matter whether they have a right to go or not.[10] Similarly, a public spring will be a spring used by the public whether rightly or not. The strewing of branches in a river for fishing purposes was held, therefore, to be no offence under this section.[11] The words 'public spring' do not include a continuous stream of water running along the bed of a river[12]; nor the water of a rivulet standing in pools from

[1] *Bhagi*, (1900) 2 Bom. L. R. 1078; *Pandia Mahar*, (1900) 13 C. P. L. R. 92.
[2] *Muthian*, (1897) 1 Weir 229. See, however, (1878) 1 Weir 228.
[3] *Ramkaranlal*, (1916) 13 N. L. R. 68.
[4] *Srinivasa Naik*, (1881) 1 Weir 231.
[5] *Punni Besoyi*, (1883) 1 Weir 231.
[6] *Ramatripati*, (1881) 1 Weir 229.
[7] *Bhagi*, sup.
[8] *Pandia Mahar*, sup.
[9] *Nama Rama*, (1904) 6 Bom. L. R. 52.
[10] *Wellard*, (1884) 14 Q. B. D. 63, 66.
[11] *Halodhur Porae*, (1877) 2 Cal. 383; see also *Patha*, (1868) Cr. R. July 1869, Unrep. Cr. C. 14.
[12] *Vitti Chokkan*, (1881) 4 Mad. 229; *Anthony*, (1884) 1 Weir 230

which water is drawn for drinking purposes [1]; nor the water of a *nullah*.[2] Where a dog-killer buried the carcass of a dog in the bed of a public river near a town, it was held that a conviction under this section could not be sustained, although there was evidence that the people of the vicinity bathed in, and drank water from, the river and also used for domestic purposes water taken from the river in the bed of which the carcass was buried, because the section applied to [illegible] or reservoir.[3] [illegible] a gas company for a nuisance, in conveying the [illegible] ic river, whereby the fish were destroyed, and the water was rendered unfit for drinking, etc., it was held that the circumstance that by the diminution of fish, a considerable number of fishermen were thrown out of employ was not of itself sufficient ground to sustain such indictment.[4]

3. **'So as to render it less fit.'**—The water must have been rendered less fit for the purposes for which it is ordinarily used.

Statutory application.—A violation of ss. 388 (*a*), (*b*), (*c*) and (*d*), 389 and 173 of the City of Bombay Municipal Act[5] falls under this section.

PRACTICE.

Evidence.—Prove (1) that the spring or reservoir is public.

(2) That the accused caused the water thereof to become corrupt or foul.

(3) That he did so voluntarily.

(4) That such corrupting or fouling rendered the same less fit for use than it ordinarily was before the accused did as above.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

Making atmosphere noxious to health.

278. Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

COMMENT.

Prosecutions against offensive trades which give out bad smells will come under this section. As the contamination of atmosphere affects the people living in the neighbourhood, this section is not so general as the last one which deals with the fouling of the water of a stream or reservoir This section and s. 336 provide for the punishment of similar acts causing danger to human life and personal safety. It is not essential unher either of them that hurt be actally caused.

1. **'Voluntarily vitiates the atmosphere, etc.'**—See s. 39, *supra*, as to the meaning of the word 'voluntarily.' The act done must be noxious to the health of persons in general dwelling or carrying on business in the neighbourhood. It is not necessary that the alleged nuisance should produce smells injurious to health; it is sufficient if they be offensive to the senses. Thus, allowing a large stock of bones to remain uncovered in the open for a long time so as to become rotten and to emit a smell noxious to people living in or passing by the vicinity is a public nuisance.[6]

Offices of nature.—The act of performing the offices of nature in a public street is not an offence under this section.[7] No reasons are given for this decision,

[1] *Hari*, (1885) Cr. R. Sept. 1885, Unrep. Cr. C. 215.

[2] *Nilappa Dayappa*, (1898) Unrep. Cr. C. 963.

[3] *Anthony*, (1884) 1 Weir 230.

[4] *Medley*, (1894) 6 C. & P. 292.

[5] Bom. Act III of 1888.

[6] *Berckefeld*, (1906) 34 Cal. 73.

[7] *Mahadshet Appashet*, (1884) Cr. R. May 1884; Unrep. Cr. C. 200.

In cases of 'heedlessness,' he adverts not to consequences of the act he does.

In cases of 'rashness' he adverts to those consequences of the act; but by reason of some assumption which he examines insufficiently.

'Negligence' has been defined to be the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[1]

'Negligence' is not an affirmative word; it is a negative word; it is the absence of such care, skill and diligence, as it was the duty of the person to bring to the performance of the work which he is said not to have performed.[2]

Culpable rashness is acting with the conciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. *Culpable negligence* is acting without the consciousness that the illegal and mischievous effect will follow but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.[3]

An injury shall be deemed to be negligently caused whensoever it is not wilfully caused, but results from want of reasonable caution, in the undertaking and doing of any act either without such skill, knowledge or ability as is suitable to the occasion, or without due care taken to ascertain the nature and probable consequences of such act; or when it results from the not exercising reasonable caution in the doing of any act, either as regards the means used or the manner of using them, or from the doing of any act without using reasonable caution for the prevention of mischief, or from the omitting to do any act which a person using reasonable caution would not have omitted to do.[4] When 'negligently' is a part of the definition of an offence, it implies that the act constituting the offence shall have been done, or caused, by the alleged offender himself, proof that it was done by the alleged offender's servant, without more, will not bring the charge home.[5]

Criminal negligence or criminal rashness is an important element in offences punishable under ss. 279, 280, 283-289, 304-A, 336-338.

'Endanger human life.'—It is not necessary that the rash or negligent act should result in injury to life or property.[6] It is not necessary to prove that any person was on the road, at the time, and the Court may take into consideration the probability of persons using it being placed in danger.[7] The mere fact, therefore, that a public road happens, at the moment, to be empty is *not per se* a ground for acquitting a person of the offence under this section, for his rash driving or riding in such public road is likely to cause injury to human life, even though in point of fact he had, by the intervention of Providence, not endangered the safety of any person.[8] Supposing that a person driving a vehicle in a crowded thoroughfare urges the horses to such speed that it is impossible for him to stop their course suddenly, and that a passenger is knocked down by them and killed on the spot, the driver would be found guilty of culpable homicide. Now if the passenger was just saved by the timely effort of another person pulling him out of the way, would not a want of due regard for human life on the part of the driver be, as justly inferred

[1] *Blyth* v. *Birmingham Waterworks Co.*, (1856) 11 Ex. 781, 784.

[2] Per Willes, J., in *Grill* v. *General Iron Screw Collier Co.*, (1866) 35 L. J. C. P. 321, 330.

[3] *Nidamarti Nagabhushanam*, (1872) 7 M. H. C. 119, *Kelabdi Mundul*, (1879) 4 Cal. 764.

[4] 10th Par. R. 16.

[5] *Chisholm* v. *Doulton*, (1889) 22 Q. B. D. 736.

[6] (1871) 6 M. H. C. App. 33; *Nabi Bakhsh*, (1910) P. W. R. (Cr.) No. 2 of 1912.

[7] *Hormusji Nowroji Lord*, (1894) 19 Bom. 715.

[8] *Ganesh Das*, (1910) P. W. R. (Cr.) No. 39 of 1910.

from the manner of his driving, proved as we may assume by the evidence of those two persons, the one who had been in imminent peril of his life and the other who happily saved him, as if the result had been a fatal accident? The want of due regard for human life upon which the criminality depends is a matter of inference from the circumstances, and wherever the circumstances proved are such that if loss of life had ensued the party committing the act would be answerable for it criminally, the same circumstances will sufficiently warrant a conviction of the simple offence where no injury has resulted.

There can be no civil action for negligence if the negligent act or omission has not been attended by any injury to any person. But here negligence involving the risk of injury is punishable criminally, [illegible]

If actual hurt is caused the case would [illegible] is caused, under s. 302 or 304-A.

Under ss. 279, 280, 282, and 284-289 the offences against public safety are completed although the rash or negligent act results in no injury to life or property.

'Hurt.'—See s. 319, *infra*.

'Injury.'—See s. 44, *supra*.

Liability of the master for the rash driving of his servant.—In case of collision or injury arising out of rash driving the actual driver and not the owner of the carriage is liable under this section[1]; whereas in a civil suit the injured party has an option to sue any of them. In a criminal case every man is responsible for his own act; there must therefore be some personal act.[2]

Contributory negligence.—The doctrine of contributory negligence does not apply in criminal actions.[3] The accused will be liable even though there has been a degree of negligence on the part of the prosecutor which would incapacitate him from bringing a civil suit.

Special statute.—Where there is a special statute, such as the Bombay Motor Vehicles Act (Bom. Act II of 1904), which penalises the rash driving of a motor, the punishment should be under such statute.[4]

PRACTICE.

Evidence.—Prove (1) that the accused was driving a vehicle or that he was riding.

(2) That it was a public way on which he was driving or riding.

(3) That he was driving or riding in a rash or negligent manner.

Negligence cannot be inferred from the mere fact of a person having been run over.[5]

(4) That the same was such as to endager human life, or such as likely to cause hurt or injury.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

Rash navigation of vessel.

280. Whoever navigates any vessel[1] in a manner so rash or negligent[2] as to endanger human life,[3] or to be likely to cause hurt[4] or injury[5] to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[1] *Larrymore* v. *Pernendoo Deo*, (1870) 14 W. R. (Cr.) 32.

[2] *Allen*, (1835) 7 C. & P. 153; *Green*, (1835) 7 C. & P. 156.

[3] *Kew*, (1872) 12 Cox 355; *Jones*, (1870) 11 Cox 544; *Dant*, (1865) 10 Cox 102, 34 L. J. (M. C.) 119; *Longbottom*, (1849) 3 Cox 439; *Swindall*, (1846) 2 C. & K. 230, *Blenkinsop* v. *Ogden*, [1898] 1 Q. B. 783. See 6 M. H. C. App. 31.

[4] *Bayne*, (1906) 8 Bom. L. R. 414.

[5] *Pillagan*, (1895) 1 Weir 232.

with her crew and a captain only; but it will afford no protection if a single passenger goes to the bottom; though he may have been carried gratuitously.

Object.—The motive for specifically providing for the case of a common carrier by water is that he exercises an employment affecting the public in general, and the probable consequences of negligence in carrying by water are much more serious than they ordinarily are in carrying by land.

1. **'Knowingly or negligently conveys or causes to be conveyed, etc.'**—The word 'knowingly' has here a significance similar to 'rashly.' Where a person with the assistance of two others plied a ferry boat, which was out of order, and had a crack, and he took in one hundred passengers, and as a consequence the boat was upset, and seven persons were drowned, it was held that he should be convicted under this section.[1] Certain persons whom the accused, a ferryman, was rowing across a river, were drowned by the sinking of the boat which was an old one, with some holes in the bottom, over which planks had been nailed. It was held that the accused was guilty under this section.[2]

PRACTICE.

Evidence.—Prove (1) that the accused conveyed a person for hire, or caused the same to be done.

(2) That the mode of conveying that person was, in a vessel, by water.

(3) That such vessel at the time was in such a state, or so loaded, as to be dangerous to the life of that person.

(4) That when such person was thus conveyed, the accused acted negligently or with a knowledge of the state of such vessel.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Danger or obstruction in public way or line of navigation.

283. Whoever, by doing any act,[1] or by omitting to take order[2] with any property[3] in his possession[4] or under his charge, causes danger, obstruction or injury to any person[5] in any public way[6] or public line of navigation,[7] shall be punished with fine which may extend to two hundred rupees.

COMMENT.

This section refers to parties who do acts so as to cause danger, obstruction or injury to any person in any public way,[3] or public line of navigation.

Every man is bound to use his property as not to injure others. Holt, C. J., laid down the strict principle of law—*sic utere tuo ut alienum non locedas* (every one must so use his own as not to do damage to another). The offence punishable by this section is the nuisance of causing obstruction, etc., in a public way or navigable river or canal.

All injuries to a public way, as by digging a ditch or making a hedge across it or laying logs of timber in it, or ploughing it up, or by doing any other act which will render it less commodious to the public, will be punishable under this section.

Ingredients.—The section requires two essentials—

1. A person must do an act or omit to take order with any property in his possession or under his charge.

2. Such act or omission must cause danger, obstruction or injury to any person in any public way or line of navigation.

[1] *Khoda Jagia*, (1864) 1 B. H. C. 137.
[2] *Mogenet Beharo*, (1869) 11 W. R. (Cr.) 3.
[3] *Bholanath Banerjee*, (1867) 7 W. R. (Cr.) 31.

1. **'By doing an act or by omitting to take order with any property in his possession, etc.'**—Here the word 'act' is contrasted with 'omitting' though it includes omission. See s. 32, *supra*.

'To take order.'—That is, to dispose of the property in his possession or charge in such a way as to prevent danger, obstruction, or injury. The defendant was the owner and occupier of a vacant piece of land. He had surrounded it by a hoarding, but peopl. threw filth and refuse over, and broke up the hoarding, so that the condition of the land and the use to which it was put constituted a public nuisance. It was held that it was a common law duty of the owner of the piece of land to prevent it from being so used as to be a public nuisance.[1]

'Property.'—See s. 22, *supra*.

'Possession.'—See s. 27, *supra*.

Where obstruction was caused to a public way by the erection of a hut and not by the exposing of goods for sale in the said hut by the accused, who had rented it from the person who had raised the hut, it was held that the accused could not be convicted of an offence under this section.[2]

2. **'Causes danger, obstruction, or injury to any person in any public way or public line of navigation.'**—Every unauthorized obstruction of a highway to [illegible] is, it is an offence [illegible] [3] A permanent [illegible] awful authority, [illegible] lawful act and a [illegible] [4]

Under this section it must be established that the act of the accused had caused 'danger, obstruction, or inury' to any particular person or class of persons.[5] Thus, the spreading of fishing nets by the side of a thoroughfare in a town, when it did not cause obstruction to any particular person or persons, was held to be no offence.[6] Where the danger or obstruction is not caused to any particular person the person obstructing would be guilty under s. 290 and not under this section.[7] But in a later case the Madras High Court has held that where the evidence showed that an obstruction placed on a road must necessarily prevent vehicles from passing at all and foot-passengers from passing without inconvenience, it was a necessary inference that persons were obstructed and that it was not necessary to expressly prove that any specific individual was actually obstructed.[8]

Where the accused allowed a prickly-pear fence, which formed a boundary between accused's yard and the road, to extend itself over a part of the road, and an obstruction of the road was thereby caused, it was held that his act was punishable. The Court said: "Prickly-pear is a plant which naturally extends itself very rapidly; and it is the duty of those who use it as a hedge by the side of a public road to take care that the road is not obstructed by its growth."[9] The accused, who had a toy shop, exhibited in the windows of their shop, overlooking a public road, certain clock-work toys during the Divali festival. A large crowd

[1] *Attorney-General* v. *Tod Heatley*, [1897] 1 Ch. 560.

[2] *Narain Adhikari*, (1904) 8 C. W. N. 369.

[3] *Cross*, (1812) 3 Camp. 224

[4] *The United Kingdom Electric Telegraph Co.*, (1862) 9 Cox 137.

[5] *Khader Moidin*, (1881) 4 Mad. 235; *Virappa Chetti*, (1896) 20 Mad. 433; *Jugal Das Dalal*, (1893) 20 Cal. 665; *Beni Madhav Chakravarti*, (1897) 25 Cal. 275; *Ram Singh*, (1882) 11 C L R. 462. The Chief Court of Lower [illegible] (1900) [illegible]

[6] *Kh* [illegible]

[7] *Virappa Chetti*, sup; *Umesh Chanara Kar*, (1887) 14 Cal. 656.

[8] *Venkappa*, (1913) 38 Mad. 305. See *Jitan*, (1920) 1 P. L. T. 564.

[9] *Palakora Kathersa*, (1883) Weir (3rd edn.) 140.

of people collected on the road to witness the toys; in consequence of which there were dangerous rushes, several persons were knocked down and great obstruction and danger were caused to those using the road. The accused were asked by the police to stop the exhibition but they did not obey. On these facts, the Magistrate convicted the accused of offences under this section and s. 114. It was held that there was obstruction, danger and injury to the persons using the public way, which amounted to a public nuisance, and that the efficient cause of the nuisance was the act of the accused, inasmuch as in working the toys in the manner they did, their object was to attract a crowd, and as they knew that a crowd would be attracted by what they did, they must be regarded as having intended that consequence.[1]

'Public way.'—See s. 279, *supra*.

'Public line of navigation.'—It is a nuisance to divert part of a public navigable river whereby the current is weakened and made unable to carry vessels of the same burden as it could before, or to lay logs of timber in it, or to erect a jetty so as to interfere with the navigation, or to build a bridge over it has the same effect.[2]

An owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not thereby be occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection.[3] On the trial for an indictment for a nuisance in a navigable river and common King's highway, called the harbour of C, the erecting of an embankment in the waterway was held to be a public nuisance although the inconvenience was counterbalanced by the public benefit in some other way.[4]

English cases.—A wagoner occupying one side of a public street in a city, before his warehouses, in loading and unloading his wagons for several hours at a time both day and night, kept one wagon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, was held guilty of nuisance.[5] Where a person, having a house in a street, exhibited effigies at his windows and thereby attracted a crowd to look at them which caused the footway to be obstructed, so that the public could not pass as they ought to do, it was held that he was guilty of nuisance.[6] Where a person removed the pavement and dug trenches in the roadway and footway of a public thoroughfare in order to lay down service pipes for the supply of gas from mains to private houses, it was held that this was not a temporary obstruction of the highway as might be necessarily incidental to the enjoyment of his property.[7] Where the accused, for the purposes of profit to themselves, placed telegraph posts upon a highway, and did permanently keep them there, such posts being of such sizes and dimensions as to obstruct and prevent the passage of carriages and horses or foot-passengers, it was held that the accused were liable for a nuisance.[8] The prisoner in the night time altered the position of two arms of a semaphore signal on a railway station, so as to change the signal from "all clear" to "danger" and "caution," respectively, and also altered the colour of two distant signals on the line from white to red, thereby changing the signal from "clear" to "danger." The alteration caused a train, which would have passed the station without slackening speed, to slacken speed, and to come nearly to a stand. Another train going in the same direction, and on the same rails, was due at the station in half an hour. It was held that the prisoner

[1] *Noor Mahomed Suleman*, (1911) 13 Bom. L. R. 209. 1 Bom. Cr. C. 23. See *Lyons Sons & Co. v Gulliver*, [1914] 1 Ch. 631, 644.

[2] Russell, 6th Edn., Vol. I, p. 543.

[3] *Attorney General v Terry*, (1874) L. R. 9 Ch. 423.

[4] *Ward*, (1836) 4 Ad. & El. 384. See *Umesh Chunder Kar*, (1887) 14 Cal. 636; *Jugal Das Dalal*, (1893) 20 Cal. 665.

[5] *Russell*, (1805) 6 East 427.

[6] *Carlile*, (1834) 6 C. & P. 636.

[7] *Stole Fenton and Langton Gas Co.*, (1860) 29 L. J (M. C) 118.

[8] *Baron Lionel De Rothschild v. The United Kingdom Electric Telegraph Co.*, (1862) 31 L. J (M. C) 166.

had obstructed a train.[1] A person improperly went on a line of railway, and purposely attempted to stop a train approaching by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by the inspector of the line when desirous of stopping a train. The driver was thereupon induced to diminish the speed from twenty to four miles per hour. It was held that this amounted to an obstruction.[2]

PRACTICE.

Evidence.—Prove (1) that the accused caused the danger, obstruction or injury in question.

(2) That the same was caused by his act, or omission, to take order with property in his possession or under his charge.

(3) That the person put in danger, or obstructed, or injured, was then in a public way or public line of navigation.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Negligent conduct with respect to poisonous substance.

284. Whoever does, with any poisonous substance, any act[1] in a manner so rash or negligent[2] as to endanger human life,[3] or to be likely to cause hurt[4] or injury[5] to any person,

or knowingly or negligently omits to take such order[6] with any poisonous substance in his possession[7] as is sufficient to guard against probable danger to human life from such poisonous substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

[illegible]

substance, suffices itself to impose upon him the duty of being careful, and he is criminally responsible if he negligently omits to take such order with the substance as is sufficient to guard against any probable danger from such substance to human life, whether the substance be poison, or fire, or a combustible, or explosive substance or machinery...It is not necessary to constitute an offence under that section, that the negligent omission punishable under it should be followed by any disastrous consequences."[3]

This section proceeds on the principle that carelessness, when sufficient in degree, is to be regarded as criminal notwithstanding that it may not have occasioned hurt.

1. 'Act.'—See s. 32, *supra*.
2. 'Rash or negligent.'—See s. 279, *supra*.
3. 'Endanger human life.'—See s. 279, *supra*.
4. 'Hurt.'—See s. 379, *infra*.
5. 'Injury.'—See s. 44, *supra*.

[1] *Joseph Hadfield*, (1870) L. R. 1 C. C. R. 253.

[2] *Hardy*, (1871) L. R. 1 C. C. R. 278.

[3] Per Plowden, J., in *Hosein Beg*, (1882) P. R. No. 16 of 1882.

6. **'To take such order.'**—See s. 283, *supra*. Where the accused, a sergeant in the police, took over a desk containing poisonous powders and other powders, which might easily be mistaken one for the other, without taking any precaution whatever to guard against misuse of the poison, and the only order he took with the poison subsequently was to hand over the key of the receptacle in which the powders were kept, to a subordinate official who by mistake issued some of the poisonous powders to a Deputy Inspector suffering from fever, who took one of the powders and died, it was held that the accused was guilty under this section.[1]

7. **'Possession.'**—See s. 27, *supra*.

PRACTICE:

Evidence.—Prove (1) that the substance in question is poisonous, and, if taken, would be dangerous to life, or likely to cause hurt or injury.

(2) That the accused did an act therewith, which endangered, or was likely to endanger, human life, or was likely to cause hurt or injury.

(3) That he did such act rashly or negligently.

Or prove (1) as above, and further—

(2) That the accused was in possession of such substance.

(3) That he omitted to take such order therewith, as was sufficient to guard against a probable danger to human life therefrom.

(4) That such omission was negligent, or with a knowledge of such probable danger.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

Negligent conduct with respect to fire or combustible matter.

285. Whoever does, with fire or any combustible matter, any act[1] so rashly or negligently[2] as to endanger human life,[3] or to be likely to cause hurt[4] or injury[5] to any other person,

or knowingly or negligently[6] omits to take such order[7] with any fire or any combustible matter in his possession[8] as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section further extends the provisions of the preceding section.

1. **'Act.'**—See s. 32, *supra*.

2. **'Rashly or negligently.'**—See s. 279, *supra*. The section is not applicable where the act of the accused is wilful and not rash or negligent. The accused had a quarrel with his wife about some rice. He got angry, broke the crockery, and then went out and set fire to the eaves of his house, thereby causing risk of injury to house-owners in the neighbourhood but doing no actual mischief. It was held that this section was not applicable as the prisoner's act was wilful and not rash or negligent.[2] The owner of a house in which a fire breaks out cannot be convicted under this section, without proof of actual carelessness or an illegal omission from which rashness or negligence can be inferred.[3]

[1] *Hosein Beg*, (1882) R. R. No. 16 of 1882.
[2] *Hari*, (1877) Unrep. Cr. C. 126.
[3] *Mi On*, (1881) S. J. L. B. 134; *Ngu Stein*, (1891) S. J. L. B. 560.

3. 'Endanger human life.'—See s. 279, *supra*.

4. 'Hurt.'—See s. 319, *infra*.

5. 'Injury.'—This word includes any harm illegally caused to the property of any other person, and is not confined to injury to the person only. While a marriage procession was going on, the accused, who was one of the procession, used fire works on the road, which burnt two bundles of the straw with which a *mandap* (a temporary structure) belonging to the complainant was thatched, thereby causing him an injury. It was held that the accused was guilty under this section.[1] The accused was similarly convicted of negligent conduct with respect to fire or combustible matter, in that he was found smoking a *bidi* (cigarette) close to half-pressed cotton bales lying close to the press-house in the compound of a company.[2] See s. 44, *supra*.

6. 'Knowingly or negligently.'—See s. 286, *infra*.

7. 'Take such order.'—See s. 283, *supra*.

8. 'Possession.'—See s. 27, *supra*.

CASES.

Fire balloons.—Letting off fire balloons has been held to be no offence.[3]

English cases.—Keeping great quantities of gunpowder so as to endanger the safety of houses in the vicinity,[4] or keeping of a dangerous, ignitable and explosive fluid called naptha near dwelling-houses,[5] amounts to nuisance.

PRACTICE.

Evidence.—Prove (1) that the accused did an act that endangered, or was likely to endanger, life, or was likely to cause hurt or injury.

(2) That such act was done with fire or some combustible matter.

(3) That such act was done rashly or negligently.

Or prove (1) that the accused had in his possession some fire or combustible matter.

(2) That he omitted to take such order therewith, as was sufficient to guard against a probable danger to human life therefrom.

(3) That such omission was negligent or with knowledge of such probable danger.[6]

Procedure.—*Cognizable*—*Summons*—*Bailable*—*Not compoundable*—*Triable* by any Magistrate—Summary trial.

Preventive powers.—See ss. 133 and 144 of the Criminal Procedure Code.

Negligent conduct with respect to explosive substance.

286. Whoever does, with any explosive substance,[1] any act so rashly or negligently[2] as to endanger human life,[3] or to be likely to cause hurt[4] or injury[5] to any other person,

or knowingly or negligently[6] omits to take such order[7] with any explosive substance in his possession[8] as is sufficient to guard against any probable danger to human life from that substance,

[1] *Natha Lalla*, (1868) 5 B. H. C. (Cr. C.) 67.

[2] *Krishna*, (1878) Unrep. Cr. C. 134.

[3] *Nga Bo Gale*, (1899) P. J. L. B. 628.

[4] *Taylor*, (1742) 2 Strange 1167. In *Bennett*, (1858) 8 Cox 74, 28 L. J. (M. C.) 27, the prisoner had kept a quantity of fire works for a long time but owing to the negligence of his servant it caught fire and set to blaze a house in which a person was burnt to death. It was held that the prisoner could not be convicted [illegible] use of [illegible] ; *Nga* [illegible] *Va Po*, (1885) S. J. L. B. 337.

6. '*Knowingly or negligently.*'—See s. 286, *supra*.

7. '**Take such order.**'—See s. 283, *supra*.

8. '**Possession.**'—See s. 27, *supra*.

9. '**Or under his care.**'—These words would include an *engineer*, and all mechanics. The expression used in s. 283 is 'under his charge.'

PRACTICE.

Evidence.—Prove (1) that the accused did an act that endangered, or was likely to endanger, life, or was likely to cause hurt or injury.

(2) That such act was done with a machinery.

(3) That such act was done rashly or negligently.

Or prove (1) that the accused had in his possession or under his care some machinery.

(2) That he omitted to take such order therewith as was sufficient to guard against a probable danger to human life therefrom.

(3) That such omission was negligent or with knowledge of such probable danger.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, or first or second class—Summary trial.

Negligent conduct with respect to pulling down or repairing buildings.

288. Whoever, in pulling down or repairing any building, knowingly or negligently[1] omits to take such order with that building as is sufficient[2] to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section deals with negligent conduct with respect to pulling down or repairing buildings. If a building is situated on a public way and is in a dangerous condition and likely to injure persons using the way then s. 283 will apply and not this section.

1. '**Knowingly or negligently.**'—See s. 286, *supra*.

2. '**Such order as is sufficient.**'—The degree of care required by this section will vary in proportion to the actual necessity of the case. If the building is in a populous place more care will be necessary than when it is in a place less frequented by people.

PRACTICE.

Evidence.—Prove (1) that the accused was pulling down or repairing a building

(2) That he omitted to take sufficient order therewith to guard against a probable danger of the fall thereof, or any part thereof.

(3) That such fall would probably endanger human life.

(4) That such omission was negligent, or with knowledge of such probable danger.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, first or second class—Triable summarily.

Negligent conduct with respect to animal.

289. Whoever knowingly or negligently[1] omits to take such order[2] with any animal[3] in his possession[4] as is sufficient to guard against any probable danger to human life, or any probable danger of grievous

hurt[5] from, such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENT:

This section deals with the improper or careless management of animals.

1. 'Knowingly or negligently.'—The offence consists principally in a knowing or negligent omission, and not merely in an omission which is not an offence.[1] See Comment on s. 286, *supra*.

2. 'Take such order.'—See s. 283, *supra*.

3. 'Animal.'—See s. 46, *supra*. This section does not refer to savage animals alone, but to any animal, *e.g.*, a pony,[2] or a dog.[3]

In the case of wild and savage animals, a savage or mischievous temper is presumed to be known to their owner and to all men as a usual accompaniment of such animals; and, hence, a positive duty is cast on the owner to protect the public against the mischief resulting from such animals being at large. Anyone who keeps such a wild animal as a tiger or a bear, which escapes and does damage, is liable without any proof of the animal's ferocity. In such a case it may be said *res ipsa loquitur*.

In the case of animals which are tame and wild in their general temper no mischievous disposition is presumed. It must be shewn that the accused knew that the animal was accustomed to do mischief. Some evidence must be given of the existence of an abnormally vicious disposition.[4] A single instance of ferocity, even a knowledge that it has evinced a savage disposition, is sufficient notice.[5]

"Before the owner or keeper of the animal can be convicted under this section, it must be made out that the animal was known to be ferocious, and that it was negligently kept. It is, however, not necessary to show that the animal had actually bitten or injured another person before it bit or injured the complainant; it would be enough to show that, to the knowledge of the owner, it had evinced a savage disposition, *e.g.*, by attempting to bite."[6] Where the accused's buffalo attacked the complainant's buffalo and injured the latter by breaking its leg, he was held not guilty of this offence as there was no evidence to show that the buffalo was of a savage disposition as against human beings.[7] Where a person was injured by a buffalo, which was known to be a dangerous animal, the herdsman who was present and failed to avert the injury and the owner of the buffalo were held to have committed an offence under this section.[8]

4. 'Possession.'—See s. 27, *supra*. The animal must be in the actual possession of the person against whom a charge is brought under this section, whoever may be the owner of it. Where the accused, a horsekeeper, harnessed his master's horse, put him into his carriage, and then went away, leaving the horse and carriage standing in the road of the compound of his master's house, without any justification, it was held that the accused had committed an offence under this section, since the horse was not the less in the actual possession of the servant, because it was for some purpose in the constructive possession of his master.[9] A bull was let loose by the father of the accused some years ago. On its becoming vicious it was ordered to be shot. The accused having claimed its ownership was convicted of this offence. It was held that it could not be said that the animal was in the

[1] (1866) 5 W. R. (Cr. L.) 8.
[2] *Chand Manal*, (1872) 19 W. R. (Cr.) 1.
[3] *Mg. Shwe Zin* v. *Mg. Po Nyun*, (1923) 2 B. L. J. 8.
[4] (1880) 1 Weir 238; *Baker* v. *Snell*, [1908] 2 K. B. 825; *Lowery* v. *Walker*, [1911] A. C. 10.
[5] See the author's "The Law of Torts," 9th Edn., p. 354.
[6] Per Mere, J. C., in *Thawira Aung*, (1883) S. J. L. B. 353.
[7] *Panda*, (1884) Unrep. Cr. C. 197.
[8] *Shamlay*, (1906) 3 N. L. R. 99.
[9] *Nathu Eera*, (1881) Cr. R. April 1881, Unrep. Cr. C. 163.

influences, the publication may not be justified, though the passages form part of a religious book.[1] If the detailed passages in a book are of an obscene character, the author's liability in respect of those passages will not be saved or avoided merely by reference to other passages in the book which may contain moral precepts of an unexceptionable character. The important point to look at is rather the form of the expression than the actual meaning, for the same meaning may be obscenely expressed by one form of language, and yet by the use of another form of language may be couched in expressions free from reproach.[2] Obscene passages are not excused because the rest of the publication is unobjectionable.[3] It is no justification that the matter published is written by an eminent writer or is composed in a style not easily understood by all,[4] or that the publication is a medical one and sold only to registered subscribers.[5]

Exception.—Under the exception religious sculptures, paintings, and engravings are excepted. But works of art are never considered obscene.

Nude pictures.—Nude pictures which exhibit a work of art will not fall under this section. It may be interesting to note the observations of an English author on this subject. "In countries, like India, where coolies wear next to nothing and some women freely expose their charms, men and women wearing costumes which they would be taken up for, if walking in Piccadilly, it seems absurd to say that photographs of the nude are in themselves obscene." But pictures of a bawdy character, if filthy and disgusting, will be considered obscene.

Advocating checks to conception.—There is nothing obscene in advocating checks to conception, or in the explanation of what these checks are, or in the mere statement of the places where, and the prices at which, they can be procured.[6]

Purchase to entrap the seller.—The sale of an obscene print to a person in private, he having in the first instance requested that such prints should be shown to him, his object being to prosecute the seller, is sufficient to sustain the charge.[7]

Liability of a newspaper proprietor for the act of his servant.—The mere fact that a person is the proprietor and publisher of a newspaper is not sufficient to render him criminally liable in respect of matter inserted therein by one of his servants. There must be a distinct finding that the matter complained of was inserted by the order or owing to the negligence of the proprietor.[8]

CASES.

A society called "The Protestant Electoral Union" exposed for sale at their office a pamphlet entitled "The Confessional Unmasked," shewing the depravity of the Romish priesthood, the iniquity of the confessional, and the questions put to females in confession. The pamphlet consisted of extracts from the works of theologians on the doctrines and discipline of the Church of Rome, and particularly on the practice of auricular confession. The pamphlet also contained a preface and notes and comments condemnatory of the tenets and principles of the authors of the work from which the extracts were made. About one-half of the pamphlet related to casuistical and controversial questions, but the remainder of it was obscene. A member of the Society kept and sold these pamphlets. It was held that the publication of such a pamphlet was an offence as the inevitable effect of the publication must be to injure public morality.[9] Subsequently to this case,

[1] *Kherode Chandra Roy Chowdhury*, (1911) 39 Cal. 377; *Ghulam Hossein*, (1916) P. R. No. 5 of 1917.

[2] *Vishnu Krishna Puranik*, (1912) 15 Bom. L. R. 307, 2 Bom. Cr. C. 58.

[3] *Thakar Datt*, (1917) P. R. No. 25 of 1917.

[4] *Mantripragada Markandeyalu*, (1916) 22 M. L. T. 169; 5 L. W. 237.

[5] *Thakar Datt*, sup.

[6] *Framji D. Taraporewalla*, (1892) Unrep. Cr. C. 620.

[7] *Carlile*, (1845) 1 Cox 229.

[8] *Mohammad Mohsin*, (1890) 10 A. W. N. 175; *Mumtaz Ali*, (1905) P. R. No. 35 of 1905. See *De Marny*, [1907] 1 K. B. 388, where the accused inserted an advertisement relating to the sale of obscene books and photographs.

[9] *Hicklin*, (1868) L. R. 3 Q. B. 360.

a pamphlet was published giving a correct report of the trial of one G for selling "Confessional Unmasked," but setting out that work in full. It was held that the pamphlet, though a report of judicial proceedings, was an obscene book.[1] A pamphlet which ridiculed the Head Priest of the community of Bohras and which abounded in passages expressing or presenting to the mind or view something which delicacy, purity and decency forbade to be expressed or exposed came within the purview of this section.[2]

The accused published a pamphlet containing a series of quotations from the Koran with his comments. There were several passages in it of an objectionable nature but there was one relating to the Virgin Mary which was perverted by the incompleteness of the quotation and commented on in a very offensive form, the language employed being not such as might be used in a *bona fide* controversial treatise. It was held that he was guilty under this section.[3]

PRACTICE.

Evidence.—Prove (1) that the book, etc., is of an obscene nature.

(2) That the accused—

(*a*) sold, let to hire, distributed, publicly exhibited or in any manner put into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation made, produced or had in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(*b*) imported, exported or conveyed any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object would be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(*c*) took part in, or received profits from, any business in the course of which he knew or had reason to believe that any such obscene objects were for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(*d*) advertised or made known by any means whatsoever that any person was engaged or was ready to engage in any act which was an offence under this section, or that any such obscene object could be procured from or through any person, or

(*e*) offered or attempted to do any act which was an offence under this section.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency or first class.

Power of destruction.—On a conviction the Court may order the destruction of all the copies of the thing in respect of which the conviction was had.[4]

Charge.—A charge under this and s. 294 should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to [illegible]

[illegible] meaning of those sections. Where no such specific decision has been given, the High Court, if the case has been transferred, may either try the case *de novo* or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained.[5]

[1] *Steele* v. *Brannan*, (1872) L. R. 7 C. P. 261.

[2] Held by Hayward J. (Shah J., dissenting) in *Rahimatalli M. Mulla*, (1919) 22 Bom. L. R. 166, 5 Bom. Cr. C. 175.

[3] *Hari Singh*, (1905) 28 All. 100.

[4] Criminal Procedure Code, s. 521.

[5] *Upendronath Doss*, (1876) 1 Cal. 356; *Mi Min St*, (1884) S. J. L. B. 262.

Punishment.—The section says nothing about intention or about medical works or about agency of distribution or about immunity because only concrete cases are dealt with; or the rest of the publication is unobjectionable; but these points nevertheless indirectly affect the *quantum* of punishment.[1]

Sale, etc., of obscene objects to young persons.

293. Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENT.

This section was inserted by s. 2 of the Obscene Publications Act (VIII of 1925).

It merely enhances the punishment where the obscene objects are sold, etc., to persons under the age of twenty years.

"In the final Act of the International Conference which drafted the convention, it was stated that the conference generally was of opinion that the offences of offering, delivering, selling or distributing obscene objects must be held to have been aggravated when committed in respect of minors. The Council [of the League] considered that it would be preferable to leave each State free to fix the age under which a person should be considered to be a minor for the purposes of this provision."[2]

The principle of this recommendation has been given effect to in this section.

PRACTICE.

Evidence.—Prove (1) that the book, etc., is of an obscene nature.

(2) That the person to whom it was sold, etc., or offered or attempted to be sold was under the age of twenty years.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate, Presidency, or first or second class.

Power of destruction.—*On a conviction the Court may order the destruction of all the copies of the thing in respect of which the conviction was had.*[3]

Obscene acts and songs.

294. Whoever, to the annoyance[1] of others,—

(*a*) does any obscene act[2] in any public place,[3] or

(*b*) sings, recites or utters any obscene songs,[3] ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

COMMENT.

Object.—This section was substituted for the original section by Act III of 1895, s. 3. The object of the first clause is to meet a case of indecency common in the Presidency of Madras. It has reference to an unreported case in that Presidency.

1. **'Annoyance.'**—Unless annoyance is caused the act will not be punishable. There must be definite evidence that annoyance was caused to a particular person or persons in general.

[1] *Thakur Dass*, (1917) P. 3. No. 25 of 1917. [2] Statement of Objects and Reasons, *Gazette of India*, 1924, Part V, p. 120. [3] Criminal Procedure Code, s. 521.

2. **'Obscene act.'**—Indecent exposure of one's person or sexual intercourse in a public place will be punished under this section.

3. **'Public place.'**—See Comment on s. 159, *supra*, as to the meaning attached to this expression.[1] Acts such as indecent exposure of one's person in an omnibus,[2] in a public urinal,[3] or in a place where the public go,[4] will fall under this section. In England it has been held that an indecent exposure in a place of public resort, if actually seen by only [illegible] a common nuisance.[5] [illegible] offended by it, and so [illegible] indecently on a roof at the back of a house so as to be visible to persons in the back premises of many other houses, but not so as to be capable of being seen from any place open to the public, and seven persons in one house saw the exposure, it was held that he could be convicted for his act.[6]

4. **'Song.'**—A *lavni* is not necessarily an obscene song. It may be, and often it is, so, but it must be proved that the words of it are actually obscene before a conviction can be supported under this section.[7]

PRACTICE.

Evidence.—Prove (1) that the accused did some act; or that the accused sang, recited or uttered any obscene songs, ballad or words.

(2) That this was done in or near a public place.

(3) That it was of an obscene nature.

(4) That it caused annoyance to others.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate.

A conviction under this section for uttering an obscene abuse in a public place may amount to a conviction for an offence involving a breach of the peace *within the meaning of s.* 106, Criminal Procedure Code.[8]

Omission to set out obscene words in evidence.—Where the obscene words used by the accused were not set out in the evidence, it was held that the omission was not a sufficient ground for setting aside a conviction.[9]

Sentence.—A sentence of three months' rigorous imprisonment for using obscene language in a public place is unduly severe.[10]

Keeping lottery-office.

294-A. Whoever keeps any office or place for the purpose of drawing any lottery[1] not authorized by Government[2] shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes[3] any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery,[4] shall be punished with fine which may extend to one thousand rupees.

[1] See also *Govind Venkatesh Yalgi*, (1908) 10 Bom. L. R. 1047.

[2] *Charles Holmes*, (1853) 22 L. J. (M.C.) N. S. 122.

[3] *Harris*, (1871) L. R. 1 C. C. R. 282.

[4] *Wellard*, (1884) 14 Q. B. D. 63; *Saunders*, (1875) 1 Q. B. D. 15.

[5] [illegible] (1940) [illegible] (Cr. C.) 25.

[6] *Mi Kun Ya*, (1904) U. B. R. (P. C.) 4.

[7] *Narasamma*, (1882) 1 Weir 251.

[8] *Parliam*, (1923) 2 B. L. J. 98.

COMMENT.

This section was inserted by Act XXVII of 1870, s. 10. A lottery stands on the same footing as gambling because both of them are games of chance.

"Every lottery is either authorized or not authorized by Government. The section does not touch authorized lotteries, but intends to save people from the effects of those not authorized [illegible] of offices or places [illegible] any advertisement [illegible] the chance of any office being kept in [illegible] authorized by Government is very small indeed. *But people not subject to our laws may contrive to open offices for that purpose out of British India, but still near our own doors—at Navsari or Daman for instance, and then send advertisement to all the widely circulated newspapers throughout British India.* In that case, if the section were to be narrowly construed as applying only to lotteries to be drawn in British India, the object aimed at by the second prohibition, to prevent the mischief of people in British India being drawn into temptation by such publications, would be very nearly, if not utterly, defeated. The words of this section are wide enough to include foreign lotteries, and we have no reason to suppose the Legislature intended to exclude advertisements relating to them from the operation of s. 294-A."[1]

Ingredients.—The first part of the section deals with keeping a lottery office. It has two essentials:—

1. Keeping of any office or place for the purpose of drawing any lottery.
2. *Such lottery must not be authorized by Government.*

The second part of the section deals with the publisher of any proposal regarding a lottery.

1. **'Whoever keeps any office or place for the purpose of drawing any lottery.'**—The fact that an association of *persons*, the business carried on by which is in the nature of a lottery, is registered, does not exempt the persons keeping the office from liability under this section.[2]

'Keeps any office or place'—The offence is the keeping of an office or place for the purpose of a lottery. Using a place once is not keeping it for that purpose. In order to constitute a keeping there must be something habitual.[3] The members of the committee of a club who exercise full control over club matters, 'inclusive of the premises, 'keep' the *premises of the club.*[4]

The words "office or place" for the purpose of drawing any lottery mean an office or place intended to be the scene of the actual drawing of the lottery, and do not include an office or place kept only for the correspondence and other work connected with a lottery advertised "as going to be in some public place to be selected later on."[5] It is, however, not necessary that the place should be kept solely for the purpose of drawing a lottery.[6] Where a house is kept open for a *double purpose, viz., as an honest social club* for those who do not desire to play, as well as for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery.[7]

Clause (1) applies to cases in which it is shewn that the accused did keep an office where they carried on the necessary *preliminary work for running a lottery* and received the lottery moneys, and which they held out to the public as the place where the *lottery would* finally be drawn. It is not necessary that the

[1] Per Nanabhai Haridas, J., in *Manchersji Kavasji*, (1885) 10 Bom. 97, 101.
[2] *Ramanjam Chetti*, (1890) 1 Weir 252.
[3] *Martin v. Benjamin*, (1907) 1 K. B. 64.
[4] *Cooke*, (1914) 7 L. B. R. 310.
[5] *Madan Gopal*, (1910) P. R. No. 17 of 1910, P. L. R. No. 92 of 1910.
[6] *Chakrabatty*, (1916) 9 B. L. T. 134; *Cooke*, sup.
[7] *Cooke*, sup.

lottery should be actually drawn. It is enough if all the preliminary work is carried on and monies are received for the purpose of a lottery.[1]

'Lottery.'—A lottery is a game of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person concerned is made wholly dependent upon the drawing or casting of lot.[2] A lottery is a distribution of prizes by lot or chance.[3] It makes no difference that the distribution is part of a genuine mercantile transaction.[4] Where a scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits, in certain events by lots will not vitiate the scheme; and make it a lottery.[5]

The principle underlying a lottery is that there should be a distribution of prizes determined solely by chance; but if the results of the lotteries are such that no prize at all is distributed and the organiser of the lottery pockets the whole of the stakes adventured the transaction does not cease to be a lottery. The actual distribution of a prize or prizes and contribution of the whole stake by the adventurers are not essential, the essential factor in the case is that there should be a scheme for distribution of a prize or prizes to be determined solely by chance and if chance so decrees that no prize is to be distributed to the adventurers and the stakes are to be appropriated by the organizer of the lottery, the scheme is none the less a lottery.[6]

The necessary effect of a lottery is to beget a spirit of speculation and gaming that is often productive of serious evils.

A transaction is not necessarily a lottery simply because a matter of whatever kind is agreed to be decided by lot. Where twenty persons agreed that each should subscribe 200 rupees by monthly instalments of ten rupees, and that each in his turn as determined by lot should take the whole of the subscriptions for one month, it was held that the agreement was not illegal.[7]

Agreement for contributions to be paid by lot is not lottery.—An agreement whereby a number of persons subscribe, each a certain sum, by periodical instalments, with the object that each in his turn (to be decided by lot), shall take the whole subscription for each instalment, all such persons being returned the amount of their contributions, the common fund being lent to each subscriber in turn, was held to be not illegal.[8] Plaintiff and defendant promoted a "chit-fund." A capital fund of Rs. 500 a month was raised by 500 subscribing each one rupee per month. At the end of the month, there was a drawing by lot and the subscriber who drew the ticket was paid Rs. 50 and his connection with the transaction forthwith ceased. This process was repeated month after month, till the end of the 49th month. At the end of the 50th month, each of the remaining subscribers was paid Rs. 50 and the stake-holders divided the profit and the fund was dissolved. Defendant executed a promissory-note to the plaintiff, for money due on a settlement of accounts, in respect of this transaction. Plaintiff filed a suit on the promissory-note, but the same was dismissed as not being maintainable, the [illegible] held that the transaction was not [illegible]

2. [illegible] by G[illegible] lottery must have been authorized by the Indian Government. It would not be sufficient to show that it has been

[1] *Ramaswami Mudaliar*, (1922) 44 M. L. J. 595.

[2] *Kamalshi Achari* v. *Apparu Pillai*, (1863) 1 M. H. C. 448.

[3] Per Hawkins, J., in *Taylor* v. *Smetten*, (1883) 11 Q. B. D. 207.

[4] *Chaitrabaty*, (1916) 9 B. L. T. 124.

[5] *Shanmugha Mudali* v. *Kumaraswami Mudali*, (1925) 21 L. W. 403.

[6] *Mukundi Lal*, (1917) P. R. No. 35 of 1917.

[7] *Kamalshi Achari* v. *Apparu Pillai*, sup.

[8] *Vasudevan Nambudri* v. *Mommod*, (1898) 22 Mad. 212. See *Doraisami Mudaly*, (1890) 1 Weir 251; *Wallingford* v. *Mutual Society*, (1880) 5 App. Cas. 685; *O'Connor* v. *Bradshaw*, (1850) 20 L. J. Ex. 26.

[9] *Shanmugha Mudali* v. *Kumaraswami Mudali*, sup.

COMMENT.

This section was inserted by Act XXVII of 1870, s. 10. A lottery stands on the same footing as gambling because both of them are games of chance.

"Every lottery is either authorized or not authorized by Government. The section does not touch authorized lotteries, but intends to save people from the effects of those not authorized (1st) by prohibiting the keeping of offices or places for drawing them, and (2ndly) by prohibiting the publication of any advertisement relating to them. After the first prohibition, the chance of any office being kept in British India for drawing lotteries not authorized by Government is very small indeed. But people not subject to our laws may contrive to open offices for that purpose out of British India, but still near our own doors—at Navsari or Daman for instance, and then send advertisement to all the widely circulated newspapers throughout British India. In that case, if the section were to be narrowly construed as applying only to lotteries to be drawn in British India, the object aimed at by the second prohibition, to prevent the mischief of people in British India being drawn into temptation by such publications, would be very nearly, if not utterly, defeated. The words of this section are wide enough to include foreign lotteries, and we have no reason to suppose the Legislature intended to exclude advertisements relating to them from the operation of s. 294-A."[1]

Ingredients.—The first part of the section deals with keeping a lottery office. It has two essentials:—

1. Keeping of any office or place for the purpose of drawing any lottery.
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The second part of the section deals with the publisher of any proposal regarding a lottery.

1. 'Whoever keeps any office or place for the purpose of drawing any lottery.'—The fact that an association of persons, the business carried on by which is in the nature of a lottery, is registered, does not exempt the persons keeping the office from liability under this section.[2]

'Keeps any office or place.'—The offence is the keeping of an office or place for the purpose of a lottery. Using a place once is not keeping it for that purpose. In order to constitute a keeping there must be something habitual.[3] The members of the committee of a club who exercise full control over club matters, 'inclusive of the premises, 'keep' the premises of the club.[4]

The words "office or place" for the purpose of drawing any lottery mean an office or place intended to be the scene of the actual drawing of the lottery, and do not include an office or place kept only for the correspondence and other work connected with a lottery advertised "as going to be in some public place to be selected later on."[5] It is, however, not necessary that the place should be kept solely for the purpose of drawing a lottery.[6] Where a house is kept open for a double purpose, *viz.*, as an honest social club for those who do not desire to play, as well as for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery.[7]

Clause (1) applies to cases in which it is shewn that the accused did keep an office where they carried on the necessary *preliminary work for running* a lottery and received the lottery moneys, and which they held out to the public as the place where the lottery would finally be drawn. It is not necessary that the

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[4] *Cooke*, (1914) 7 L. B. R. 319.
[5] *Madan Gopal*, (1910) P. R. No. 17 of 1910, P. L. R. No. 92 of 1910.
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lottery should be actually drawn. It is enough if all the preliminary work is carried on and monies are received for the purpose of a lottery. [1]

'Lottery.'—A lottery is a game of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person concerned is made wholly dependent upon the drawing or casting of lot. [2] A lottery is a distribution of prizes by lot or chance. [3] It makes no difference that the distribution is part of a genuine mercantile transaction. [4] Where a scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits, in certain events by lots will not vitiate the scheme; and make it a lottery. [5]

The principle underlying a lottery is that there should be a distribution of prizes determined solely by chance; but if the results of the lotteries are such that no prize at all is distributed and the organiser of the lottery pockets the whole of the stakes adventured the transaction does not cease to be a lottery. The actual distribution of a prize or prizes and contribution of the whole stake by the adventurers are not essential, the essential factor in the case is that there should be a scheme for distribution of a prize or prizes to be determined solely by chance and if chance so decrees that no prize is to be distributed to the adventurers and the stakes are to be appropriated by the organizer of the lottery, the scheme is none the less a lottery. [6]

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A transaction is not necessarily a lottery simply because a matter of whatever kind is agreed to be decided by lot. Where twenty persons agreed that each should subscribe 200 rupees by monthly instalments of ten rupees, and that each in his turn as determined by lot should take the whole of the subscriptions for one month, it was held that the agreement was not illegal. [7]

Agreement for contributions to be paid by lot is not lottery.—An agreement whereby a number of persons subscribe, each a certain sum, by periodical instalments, with the object that each in his turn (to be decided by lot), shall take the whole subscription for each instalment, all such persons being returned the amount of their contributions, the common fund being lent to each subscriber in turn, was held to be not illegal. [8] Plaintiff and defendant promoted a "chit-fund." A capital fund of Rs. 500 a month was raised by 500 subscribing each one rupee per month. At the end of the month, there was a drawing by lot and the subscriber who drew the ticket was paid Rs. 50 and his connection with the transaction forthwith ceased. This process was repeated month after month, till the end of the 49th month. At the end of the 50th month, each of the remaining subscribers was paid Rs. 50 and the stake-holders divided the profit and the fund was dissolved. Defendant executed a promissory-note to the plaintiff, for money due on a settlement of accounts, in respect of this transaction. Plaintiff filed a suit on the promissory-note, but the same was dismissed as not being maintainable, the chit-fund itself amounting to a lottery. It was held that the transaction was not a lottery and the plaintiff's suit was maintainable. [9]

2. **'Not authorized by Government.'**—The lottery must have been authorized by the Indian Government. It would not be sufficient to show that it has been

[1] *Ramaswami Mudaliar*, (1922) 44 M. L. J. 595.

[2] *Kamalshi Achari* v. *Apparu Pillai*, (1863) 1 M. H. C. 448.

[3] Per Hawkins, J., in *Taylor* v. *Smetten*, (1883) 11 Q. B. D. 207.

[4] *Chakrabatty*, (1916) 9 B. L. T. 124.

[5] *Shanmugha Mudali* v. *Kumaraswami Mudali*, (1925) 21 L. W. 403.

[6] *Mukundi Lal*, (1917) P. R. No. 35 of 1917.

[7] *Kamalshi Achari* v. *Apparu Pillai*, sup.

[8] *Vasudevan Nambudri* v. *Mommod*, (1898) 22 Mad. 212. *See Doraisami Mudaly*, (1890) 1 Weir 251; *Wallingford* v. *Mutual Society*, (1880) 5 App. Cas. 685; *O'Connor* v. *Bradshaw*, (1850) 20 L. J. Ex. 26.

[9] *Shanmugha Mudali* v. *Kumaraswami Mudali*, sup.

American caramel. Several packets contained a half-penny in addition to a fair penny worth of sweets. There had been no advertisement as to these inclosures. *It was held that H was guilty of keeping a lottery.*[1] The proprietor of a paper conducted competitions *in the following manner: A sentence* was inserted in the paper with one word missing; intending competitors were required to cut out a coupon attached to the paper, to write the missing word on the [illegible] n, to the proprietor. [illegible] of the competition. [illegible] *titors. It was held* that the competition constituted a lottery.[2] A publican arranged at his beer house a sweepstake on a coming horse race. There were *sixty-one entries*, each person paying 6*d.* to the publican. Three prizes of 15 *s.*, 10 *s.* and 5 *s.*, respectively, were offered by the publican on the result of the race; and *one of the conditions of the* sweepstakes was that the person who won the first prize should pay the publican at the beer house for two gallons of beer to be consumed in his house, the person who won the second prize should pay for one gallon, and the person who won the third prize should pay for two quarts of beer. The winners of the prizes were ascertained by a drawing at the beer house, and the prizes were given by the publican to the winners, less the price of the beer which was deducted by him from the prizes. It was held that the sweepstake was an illegal lottery.[3]

The proprietors of a weekly newspa[illegible] medals to be distributed *gratuitously among members of the public;* [illegible] *and* the words, "Keep this, it may be worth [illegible] lay;" the winning numbers, which were *arbitrarily selected by the newspaper proprietors* and were unknown to the distributors, were published weekly in the newspaper. *There were no coupons, and it was not necessary* that the holder of a medal should purchase a copy of the paper as a condition of receiving a prize; information as to the winning numbers could be obtained without charge at the office of the newspaper. The object of the scheme was to induce persons to inspect or buy the paper, and the circulation in fact increased considerably during the progress of the scheme. It was held that, although it was possible for an individual holder of a medal to obtain a prize without paying anything for his chance, the medal-holders as a body collectively contributed sums of money to the fund out of which the money came for the prizes, and that the scheme was a lottery.[4]

Tickets, each bearing a different number were *sold for 6 d.* each upon the terms that the purchaser of the tickets bearing a number to be subsequently drawn by an independent person *should be entitled to a bicycle as a prize.* The bicycle was presented as a gift by a firm of cycle manufacturers for the purposes of advertisement, no part of the money paid by the purchasers of the tickets being used for acquiring the bicycle. It was held that as each purchaser of a ticket bought a chance, and the holder of the ticket bearing the winning number was *determined* by chance, the scheme constituted a lottery and it was immaterial that no part of the money paid by the purchasers of the tickets was used for the purchase of the prize.[5]

The res[illegible] of a music hall entertainment, who was giving a performa[illegible] announced to the audience that, "being possessed of [illegible]," he would distribute some of it, and his assistants w[illegible] *orders*, to be given away as he thought fit. Under his directions the assistants went along the seats, and they handed postal orders of small amounts to persons nearest them. Other postal orders of larger sums were handed to members of the audience who answered questions put by him to them from the stage as to their circumstances and in other instances

[1] *Hall* v. *Williams*, (1885) 52 J. P. 821.
[2] *Barclay* v. *Pearson*, [1893] 2 Ch. 154.
[3] *Hardwick* v. *Lane*, [1904] 1 K. B. 294.
[4] *Willis* v. *Young*, [1907] 1 K. B. 448.
[5] *Bartlett* v. *Parker*, [1912] 2 K. B. 477.

to persons who stated their circumstances and requested the gift of an order. It was held that the distribution of the postal orders was made and determined by chance and without the exercise of any real judgment on the part of the respondent; and that the respondent had, therefore, 'exercised a lottery' contrary to s. 2 of the Lotteries Act, 1699.[1]

Where the agreement for the sale of bonds was: "Every subscriber pays Rs. 10-8-0 and gets a bond for Rs. 10. This sum is guaranteed by one of seven banks and not only is negotiable, but can be cashed at the bank at par at any time. The draws were to start when 2,000 tickets had been sold, and at stated intervals further drawings were to be made until every one had got a prize or had his money returned. Those who did not draw prizes in the first draw would go on drawing at each distribution till they got a prize or decided to withdraw his money. Thus, the original ten rupees was absolutely safe, the extra eight annas was to cover the cost of correspondence, etc." It was held that the agreement showed that there was a scheme for the distribution of prizes by lot or chance and the accused who put forward the scheme were guilty of an offence within the second part of this section.[2]

Transaction requiring skill for winning prizes is not a lottery.—The accused published a newspaper containing an advertisement of a "coupon competition," which was to be carried out by means of coupons, to be filled up by the purchaser of the paper with the names of the horses selected by the purchases as likely to come in first, second, third, and fourth in a race. For every coupon filled up after the first the purchaser paid a penny, and the accused promised a prize of £ 100 for naming the first four horses correctly. It was held that the transaction did not amount to a lottery.[3] The accused published a newspaper containing an offer of a money prize for a correct prediction of the number of births and deaths in London during a named week. Competitors, who were not limited to one prediction, were to fill in the predicted numbers on coupons which were published in the issue of the paper which contained the offer. It was held that the competition, not being one the result of which depended entirely on chance, was not a lottery.[4] The proprietors of a newspaper published therein an advertisement of a competition for money prizes, the terms of which were that each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected, the initial letter of each word in the sentence to be a letter occurring in the selected word; that all the sentences reaching the editor of the newspaper should receive careful consideration; and that the decision of the editor as to the prize-winners should be final. It was held that as the competition was one involving some degree of skill on the part of the competitors, and as there was no evidence that the number of competitors was so large as to make it impossible for the sentences to be considered on their merits, the competition was not one the result of which depended entirely on chance, and that it was, therefore, not a lottery.[5]

Keeping a lottery.—The accused kept an eating house, exhibited placards headed "Great Eastern Money Club," "White Race Club for the Radcliffe Cup", etc., and sold tickets in respect thereof. Prizes were drawn and the holders of the ticket whose numbers were drawn for prizes received the same, and the accused delivered out the prizes to such ticket-holders, but there was no evidence to connect the defendant with any drawing by lottery or otherwise for the prizes. It was

[illegible] v. *Hulton*, (1891) 60 L. J. (M. C.) 116, 17 Cox [illegible] of 307.

[4] *Hall* v. *Cox*, [1899] 1 Q. B. 198.

[5] *Scott* v. *Director of Public Prosecutions*, [illegible]*ada* [1914] 2 K. B. 868.

held that this evidence was sufficient to support a conviction against the defendant of keeping a lottery.[1]

PRACTICE.

Evidence.—Prove (1) that the accused had kept an office or place.

(2) That the office or place was used for the purpose of drawing a lottery.

(3) That such lottery was not authorized by Government.

For the second clause of the section prove—

(1) That the accused published the proposal in question.

(2) That the nature of such proposal was to pay, etc., on an event or contingency as described in the section.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Summary trial.

Sanction.—No Court shall take cognizance of an offence under this section unless upon complaint made by order of, or under authority from, Government.[2]

[1] *James Crawshaw*, (1869) 8 Cox 375.

[2] Criminal Procedure Code, s. 196.

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION.

"THE principle on which this Chapter has been framed is a principle on which it would be desirable that all Governments should act, but from which the British Government in India cannot depart without risking the dissolution of society: it is this, that every man should be suffered to profess his own religion, and that no man should be suffered to insult the religion of another."[1]

Injuring or defiling place of worship, with intent to insult the religion of any class.

295. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons[2] with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section punishes the injury or defiling of a place of worship with intent to insult the religion of a class of persons. Intention is the gist of the offence under it. Mere defilement of a place of worship is not enough.

Ingredients.—The section requires two essentials:—

1. Destruction, damage, or defilement of (*a*) any place of worship, or (*b*) any object held sacred by a class of persons.

2. Such destruction, etc., must have been done (*i*) with the intention of insulting the religion of a class persons, or (*ii*) with the knowledge that a class of persons is likely to consider such destruction, etc., as an insult to their religion.

1. **'Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons.'**—Any person, whether a worshipper in the place or not, comes within the purview of this section by the use of the word 'whoever.'

'Defiles.'—The word 'defile' is not to be restricted in meaning to acts that would make an object of worship unclean as a material object, but extends to acts done in relation to the object of worship which would render such object ritually impure.[2] "The words 'destroy' and 'damage' have obviously a physical or material signification, and as the most principal of destruction [illegible] in the primary physical sense.[2]

[1] Note J. p. 136.

[2] Per Muttusami Aiyar, J., in *Sivakoti Swami*, (1885) 1 Weir 253; *Bheema Goundan*, (1891) 1 Weir 256; *Kuttichami Meothan* v. *Rama Pattar*, (1918) 41 Mad. 980.

[2] Per Burgess, J. C., in *Nga Pa San*, (1894) 1 U. B. R. (1892-1896) 199, 200.

This word does not include animate objects according to the Allahabad and Calcutta High Courts, but refers only to inanimate objects such as churches, mosques, temples and marble or stone figures representing gods.[1] The killing of a cow by a Mussalman, within sight of a public road frequented by Hindus, was held to be not punishable under this section.[2] Where a bull dedicated and set at large at the *shradh* of a Hindu in accordance with a religious usage was killed by certain Mahomedans secretly and at night in the presence of none but Mahomedans, it was held that no offence was committed.[3] Similarly, the killing of a cow with the intention or knowledge of offending the religious susceptibilities of Hindus is not an offence under this section.[4]

'Any place of worship or any object.'—"There is a distinction, not arbitrary, between objects which are objects of respect and even veneration and objects which are held sacred; as an example of the former, I may refer to a place of sepulture (not actually consecrated, as in the case of grounds specially consecrated for that purpose according to the rites of Christian churches), as distinguished from a place for worship to the deity or where an idol or altar is kept; and such distinction appears to have been kept in view by the Legislature, for while s. 295 deals with the latter class of objects and places, s. 297 deals more especially with trespasses on places of sepulture and places set apart for the performance of funeral rites and as depositories for the remains of the dead."[5]

'Any class of persons.'—This expression may include any religious sect, however small in number. The application of this section is not limited only as between those who follow different religions. It also applies to different sects or classes of Hindus who are animated by sectarian feelings.[6]

2. **'With the intention of thereby insulting the religion of any class of persons, etc.'**—The authors of the Code say: "The question whether insults offered to a religion ought to be visited with punishment does not appear to us at all to depend on the question whether that religion be true or false. The religion may be false, but the pain which such insults give to the professors of that religion is real. It is often, as the most superficial observation may convince us, as real a pain and as acute a pain as is caused by almost any offence against the person, against property or against character. Nor is there any compensating good whatsoever to be set off against this pain. Discussion, indeed, tends to elicit truth; but insults have no such tendency; they can be employed just as easily against the purest faith as against the most monstrous superstition. It is easier to argue against falsehood than against truth; but it is as easy to pull down or defile the temples of truth as those of falsehood; it is as easy to molest with ribaldry and clamour men assembled for purposes of pious and rational worship, as men engaged in the most absurd ceremonies. Such insults, when directed against erroneous opinions, seldom have any other effect than to fix those opinions deeper, and to give a character of peculiar ferocity to theological dissension: instead of eliciting truth they only inflame fanaticism.

"All these considerations apply with peculiar force to India. There is perhaps no country in which the Government has so much to apprehend from religious excitement among the people. The Christians are numerically a very small minority of the population, and in possession of all the highest posts in the Government, in the tribunals and in the Army. Under their rule are placed millions of Mahomedans, of differing sects, but all strongly attached to the fundamental articles of the Mahomedan creed, and tens of millions of Hindoos, strongly attached

[1] *Imam Ali*, (1887) 10 All. 150, F.B.; *Romesh Chunder Sannyal* v. *Hiru Mondal*, (1890) 17 Cal. 852; *Ali Muhammad*, (1917) P. R. No. 10 of 1918, F.B., overruling *Hakim*, (1884) P. R. No. 27 of 1884.

[2] *Imam Ali*, sup.

[3] *Romesh Chunder Sannyal* v. *Hiru Mondal*, sup.

[4] *Ali Muhammad*, sup.

[5] Per Brandt, J., in *Ratna Mudali*, (1886) 10 Mad. 126, 127.

[6] *Sivakoti Swami*, (1885) 1 Weir 253.

to doctrines and rites which Christians and Mahomedans join in reprobating. Such a state of things is pregnant with dangers which can only be averted by a firm adherence to the true principles of toleration. On those principles the British Government has hitherto acted with eminent judgment, and with no less eminent success; and on those principles we propose to frame this part of the Penal Code."[1]

Under this section it must be distinctly proved that there was an intention on the part of the accused to insult the religion of a class of persons. This intention could be ascertained from the nature of the act done. Where there is no intention to wound the religious susceptibilities there will be no offence. Where a person,

this section.[2] The defendants (Hindus) were charged under this section, in that they removed some old building materials belonging to a mosque, and thereby insulted the religious feelings of Mahomedans. They were acquitted on the finding that the mosque was, at any rate its roof was, in a rotten condition, and that no one had any particular claim to it. The complainant applied to the High Court for revision. It was held that there was no reason to believe that the defendants, in

gion.[3] Where a Hindu had sexual intercourse with a woman secretly and at night within an enclosure surrounding the tomb of a Mahomedan fakir, it was held that he had committed an offence under s. 297 and not under this section.[4] Where the accused, a goldsmith by caste, performed certain ceremony by pouring cocoanut water over the idol of god Shiva, it was held that if the temple in which the ceremony was performed was one of a class in which the worshippers were not allowed to touch the idol or pour cocoanut water on it, except through persons specially appointed for the purpose, and bound to observe certain special rules, and if the accused performed the ceremony with the object of ridiculing openly the established rule, a conviction under this section might be supported.[5] The presence of Moothans, a sub-caste of Sudras, whose status is equal to that of Nairs, in such portions of a Hindu temple as are open to non-Brahmins is not a 'defilement' within the meaning of this section.[6]

Place of worship.—A *kyaung* is held to be a place of worship.[7] Where the accused, who were of low caste, entered into the precincts of a temple, it was held that unless there was an intention to insult the religion of a class of persons they could not be convicted of an offence under this section.[8]

PRACTICE.

Evidence.—Prove (1) that the place was one of worship, or that the object was a sacred one.

(2) That the same was held sacred by a class of persons

(3) That the accused destroyed, damaged, or defiled the same

(4) That he did so (*a*) with the intention of thereby insulting the religion of a class of persons; or (*b*) with the knowledge that a class of persons is likely to consider such destruction, etc., as an insult to their religion.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency or first or second class.

[1] Note J, p. 130.

[2] *Woman Lalchand*, (1888) Unrep. Cr. C. 958.

[3] *Jan Mahammad* v. *Narain Jair*, (1883) 3 A. W. N. 59.

[4] *Ratna Madah*, (1886) 10 Mad. 126.

[5] *Sowdri Sowmi*, (1885) 1 Weir 252. See *Ratna Madah*, sup.

[6] *Kuchchami Kuthan* v. *Kama Pattar*, (1918) 41 Mad. 900.

[7] (1896) 1 U. B. R. (1897-1901) 127.

[8] *Mt. Zingro*, (1899) 7 C. P. L. R. (Cr.) 65.

Charge.—I (*name and office of the Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, destroyed (*or* damaged, *or* defiled) a certain place of worship, to wit——, [*or* a certain object, to wit——, [illegible] *persons*) with the intention *of thereby insulting* [illegible] *persons insulted*) [*or* with the knowledge, etc.]; [illegible] ce punishable *under s.* 295 *of the* Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Disturbing religious assembly.

298. Whoever voluntarily causes disturbance[1] to any assembly lawfully engaged in the performance of religious worship,[2] or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

Assemblies held for religious worship, or for the performance of religious ceremonies, are hereby protected from intentional disturbance.

I: [illegible] the following ingredients:—

[illegible] voluntarily.

[illegible] be caused to an assembly lawfully engaged in religious worship or religious ceremonies.

1. **'Voluntarily causes disturbance.'**—See *s. 39, supra. Under this section* proof of intention is unnecessary, as the Code supposes an intention to insult, if the disturbance, in fact, follow immediately as the result of the offender's act. *Assemblies lawfully engaged in the performance of religious worship or religious ceremonies are hereby protected from voluntary disturbance and insult, be that religion true or false.*

To constitute a 'disturbance' within the meaning of this section, a religious service need neither be stopped nor actually prevented from being carried on; nor need a religious assembly be really disturbed.[1] The word 'disturb' means 'molest' or 'vex.' Peaceful worship must not be interfered with. Where one party could hear little or nothing of what the other recited, it was *held that no disturbance* "was caused within the meaning of this section."[2] Where the accused spread false rumours which caused a religious procession to come to an end, it was held that they could not be convicted of causing disturbance within the meaning of this section.[3]

2. **'Lawfully engaged in the performance of religious worship.'**—The assembly must have been lawfully engaged in the performance of such worship or ceremonies, *i.e.*, they must be doing what they have a right to do.[4] If the ceremony is commenced by an act which is not lawful, it cannot be said that the persons engaged in it are lawfully engaged from the mere circumstance of their falling into a posture of worship though such worship may be real.[5]

A religious assembly held in a public street, or thoroughfare, so as to cause obstruction, cannot be said to be "lawfully engaged" within the meaning of this section. In a Full Bench case Subrahmania Ayyar, J., said: "The object of section 296 of the Indian Penal Code presumably is to secure freedom from molestation when people meet for the performance of acts in a quiet spot vested

[1] *Selvarajalu Naiker*, (1889) I Weir 259.
[2] *Vijiaraghava Chariar*, (1903) 26 Mad. 554, F. B.
[3] *Mohammad Husain*, (1919) 17 A. L. J. R. 520.
[4] *Jaipal Gir v. H. Dharmapala*, (1895) 23 Cal. 60, *Ramzan*, (1895) 7 All. 461, 464, F. B.
[5] *Jaipal Gir v. H. Dharmapala*, *ibid.*

for the time in the assembly exclusively; and not when they engage in worship *in an unquiet place open to all the public as a thoroughfare. The user of a highway* for religious worship is altogether wanting in lawfulness." Bhashyam Ayyangar, J., expressed the same opinion. But Davies and Benson, JJ., while agreeing that no disturbance was caused by the accused in the case before them, did not share the same view as Subrahmania Ayyar and Bhashyam Ayyangar, JJ., did as to the lawfulness of religious worship on the highway.[1] The former Chief Court of the Punjab adopted the view of Subrahmania Ayyar and Bhashyam Ayyangar, JJ. Where some boys were beating drums to summon people for joining a Moharram Procession and on being asked by the accused, whose horse was frightened, they did not stop, and the accused then seized the drums, but restored them the next day, it was held that the accused's acts did not constitute an offence under this section, inasmuch as no assembly could be "lawfully engaged" within the meaning of this section on a highway.[2] But where certain Lodhas, who, with the sanction of the public authorities, had been carrying flags to a temple in procession through a public street were attacked by persons who objected to the procession, it was held that such attack constituted a disturbance to the performance of a religious ceremony.[3]

The worship must be a real worship and not a cloak for doing something else, and the assembly must be lawfully engaged in worship.[4].

CASES.

Disturbance caused by saying 'amin.'—A mosque was used by the members of a sect of Mahomedans called the Hanifis, according to whose tenets the word 'amin' (amen) should be spoken in a low tone of voice. While the Hanifis were at prayers, R, a Mahomedan of another sect, entered the mosque, and in the course of the prayers, according to the tenets of his sect, called out "amin" in a loud tone of voice. For this act he was convicted of voluntarily disturbing an assembly engaged in religious worship under this section The Allahabad High Court ordered the case to be re-tried.[5] But in a subsequent case it has held that a mosque is a place where all sects of Mahomedans are entitled to go and perform [illegible] and a Mahomedan pro- [illegible] of conscience, commits [illegible] cause annoyance to his fellow-worshippers in the mosque.[7] Any person, Mahomedan or not, who goes into a mosque not *bona fide* for a religious purpose, but *mala fide*, for the purpose of disturbing others engaged in their devotions, will render himself criminally liable.[8]

Disturbance caused by saying 'mantra.'—Where the worshippers were reciting one *mantram* (precept from a religious work) and the accused recited another [illegible] ner [illegible] sed [illegible] ion. [illegible] or interruption of the service.[9]

Disturbance caused by music.—Where the accused passed in procession before a mosque with music while religious worship was going on between certain hours which, to the knowledge of the accused, were fixed for such worship by the District Magistrate, it was held that the accused by their action disturbed the worship and

[1] *Vijaraghava Chariar*, (1903) 26 Mad. 554, F. B.

[2] *Dhalu Ram*, (1909) P. W. R. (Cr.) No. 33 of 1909.

[3] *Masit*, (1911) 34 All. 78.

[4] *Jaipal Gir* v. *H. Dharmapala*, (1895) 23 Cal. 60

[5] *Ramzan*, (1885) 7 All. 461, F. B.

[6] *Ata-ullah* v. *Azim-ullah*, (1889) 12 All. 494, F. B. See *Fuzul Karim* v. *Haji Moula Bukh*, (1891) 18 I. A. 59; *Moulvie Abdus Subhan* v. *Kurban Ali*, (1908) 12 C. W. N. 289.

[7] *Jangu* v. *Ahmad Ullah*, (1889) 13 All. 419, F. B

[8] *Ibid.*

[9] *Krishnatatachari*, (1884) 1 Weir 259.

unlawfully within the mosque with intent thereby to insult or annoy them and that on the facts a conviction under this section was wrong.[1]

Where a joint owner of property entered a grave for the purpose of demarcating his share and in doing so dug up certain graves, and exposed the bones of the persons buried in spite of the remonstrances of the relations of the buried persons it was held that he had committed an offence under this section.[2] Similarly, the erection of a shed over a visible grave belonging to the complainant's family in a disused grave-yard claimed to be private property of the trespasser, with the knowledge that the feelings of the complainant would be likely to be thereby wounded, was held to be an offence under this section.[3] The accused dug up and levelled certain graves existing on a plot of land which had been sold to him by the *mujawars* of an adjoining shrine whose names appeared as owners in the revenue records. The relatives of the persons buried in those graves prosecuted the accused. It was held that he was guilty under this section for the act of a person who destroyed or disturbed a place of sepulture with the intention of wounding the feelings of any person or with the knowledge that the feelings of any person were likely to be wounded was wrongful and amounted to a trespass, no matter whether the land in which the place of sepulture was included did or did not belong to such person.[4]

4. **'Place of worship.'**—The trespass must be in a place of religious worship with the knowledge that the feelings of persons would be wounded thereby.[5] Where a *mahar*, a low caste man, entered into a temple, an offence under this section was committed.[6] A Hindu, who had sexual intercourse with a woman within an enclosure surrounding the tomb of a Mahomedan *fakir* was convicted under s. 295. It was held that in the absence of proof that the place was used for worship or otherwise held sacred, the conviction was bad, and that it should be altered to a conviction under this section.[7] Persons having sexual connection inside a mosque are guilty of an offence under this section.[8]

5. **'Funeral rites.'**—The section contemplates disturbance of persons engaged in performing funeral ceremonies. Obstruction to the performance of obsequies comes under this section.[9] But a Moharram procession is not a funeral ceremony within the meaning of this section.[10]

6. **'Offers any indignity to any human corpse.'**—Where certain persons were convicted of having offered an indignity to a human corpse, inasmuch as they had by using their influence prevented the grave diggers from digging a grave for the corpse of the complainant's son, on account of the complainant not having joined the Khilafat party, it was held that the accused had not committed any criminal offence. The Court observed: "I do not propose to expatiate upon the mentality of persons who, to support their views as to what they conceive desirable in politics, use their influence to prevent a man from burying his little child. But as the law stands they have not committed any criminal offence in this particular case. The act was an act of boycotting and was not a criminal act either under the Penal Code or any other law."[11]

7. ***'Causes disturbance to any person, etc.'***—The word 'disturbance' implies some active interference in, or hindrance to, the performance of the funeral ceremonies. The grand-daughter-in-law of the complainant having died, the complainant and his relations took the body out to the cremation ground and were preparing to cremate it when the accused came there and asked them not to cremate the body, and on being asked why, said that they would state the reason to the police. It was

[1] *Mustan*, (1923) 1 Rang. 690.
[2] *Ram Prasad*, (1911) 33 All. 773
[3] *Jhulan Sain*, (1913) 40 Cal. 548
[4] *Umar Din*, (1915) P. R. No. 23 of 1915.
[5] *Bhagya*, (1880) Unrep. Cr. C. 148.
[6] *Ibid.*
[7] *Ratna Mudali*, (1886) 10 Mad. 126; *Nga Po San*, (1894) 1 U. B. R. (1892-1896) 199; *Gaja*, (1882) 5 C. P. L. R. (Cr.) 32.
[8] *Maqrud Husain*, (1923) 45 All. 529.
[9] *Subramania Ayyan* v. *Venkata Rayar*, (1883) 6 Mad. 254, 257.
[10] *Ghosita* v. *Kalka*, (1885) 5 A. W. N. 49.
[11] *Amanat*, (1921) 20 A. L. J. R. 93.

held that the mere utterance of the words "do not cremate the body" unaccompanied by any attempt to prevent the cremation or by any manifestation on the part of the accused of their intention to interfere if the complainant and his relations should persist in having the body cremated, could not be regarded as a disturbance to the persons assembled for the performance of the funeral ceremonies within the meaning of this section.[1]

PRACTICE.

Evidence.—Prove (1) that the place in question was (*a*) a place of worship; or (*b*) a place of burial, etc.

(2) That the accused committed trespass therein.

(3) That he did so (*i*) intending thereby to wound the feelings of some person, or to insult the religion of some person; or (*ii*) with the knowledge that the feelings of some person would be likely to be wounded thereby, or that the religion of some person would be likely to be insulted thereby.

Or prove the following points:—

(1) The existence of the human corpse.

(2) That the accused offered an indignity thereto.

(3) That he, when offering such indignity, intended or knew, etc., as in (3) above.

Or prove the following points:—

(1) That persons were assembled for performing funeral ceremonies.

(2) That the accused caused disturbance to such persons when assembled.

(3) That he did so intending thereby, or knowing, etc., as in (3) above.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Magistrate, Presidency, or first or second class.

Charge.—I (*name and office of the Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, with the intention of wounding the feelings of—— (*or* of insulting the religion of——) [*or* with the knowledge that the feelings of——are likely to be wounded (*or* that the religion of——is likely to be insulted thereby)] committed a trespass in a place of worship, to wit——, (*or* on a place of sepulture, to wit——, *or* etc.), and thereby committed an offence punishable under s. 297 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Uttering words, etc., with deliberate intent to wound religious feelings.

298. Whoever, with deliberate intention of wounding the religious feelings[1] of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

Object.—The authors of the Code say: "In framing clause 282, we had two objects in view: we wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. We do not conceive that any person can be justified in wounding with deliberate intention the religious feelings of his neighbours by words, gesture or exhibition. A warm expression dropped in the heat of controversy, or an argument urged by a

[1] *Mangat*, (1918) P R No. 2 of 1919.

[illegible] nd annoying the professors of a different [illegible] vindicating his own, will not fall under [illegible]

1. **'Deliberate intention of wounding the religious feelings.'**—The Law Commissioners observe: "The intention to wound must be *deliberate*, that is, not conceived on the sudden in the course of discussion, but premeditated; it must appear, not only that the party, being engaged in a discussion with another on the subject of the religion professed by that other, in the course of the argument consciously used words likely to wound his religious feelings, but that he entered into the discussion with the deliberate purpose of so offending him. In other places in the Code a party is held to be guilty if he causes a certain effect the causing of which is an offence, intending to cause that effect, *or knowing that his act was likely to cause it.* Here there is a marked difference. Although the party uttering offensive words might be conscious at the moment of uttering them that they were likely to wound t[illegible] uttered them on the sp[illegible] ment—that he did not [illegible] of a deliberate purpose to offend—he would not, we think, be liable to conviction under clause 282 (this section). If however a party were to force himself upon the attention of another, addressing to him, an involuntary hearer, an insulting invective against his religion, he would, we conceive, fall under the definition, for the reasonable inference from his conduct would be that he had a deliberate intention of wounding the religious feelings of his hearer."[2]

"We are, though not without hesitation, inclined to think that in the very peculiar circumstances of this country, discourse addressed to any person with the intention of converting him from the faith he professes, which, however it [illegible] language, nor forced [illegible] crime."[3] [illegible] eligion of the country [illegible] offence; to attempt the same thing by contemptuous or vituperative language is an offence which would be severely punished in practice. But the reason is that conversion is not recognised as a legitimate object. The law assumes the truth of Christianity. But it is manifest that the Law and the Legislature of this country cannot assume the truth of any religion. And, as free discussion, or, in other words, attempts at conversion, is the best criterion of the truth of anything the truth or falsehood of which is not already assumed by law to be beyond controversy, it seems to follow that a *bona fide* attempt to convert ought not in this country to be treated as a crime, even though the intention to convert be an intention to do so by wounding the religious feelings of the persons addressed. We apprehend it is almost impossible to convert a sincere or ardent votary of any faith without wounding his religious feelings in the early stages of the process."[4]

Deliberate intention of the accused may be inferred from his words as well as from his acts.

CASES.

Deliberate intention to wound religious feelings.—**Interpolation of a forbidden chant.**—Interpolation of a forbidden chant in an authorized ritual is held to be this offence[5]

Exhibiting flesh.—Exhibiting cow's flesh by carrying it in an uncovered state round a village with the deliberate intention of wounding the religious feelings of

[1] Note J, p. 137.
[2] 2nd Rep., s. 252.
[3] *Ibid*, s. 254.
[4] *Ibid*, s. 255.
[5] *Narasimha* v. *Shree Krishna*, (1892) 2 Mad. Jur. 236.

the Hindus is held to be an offence under this section.[1] But it has been held that religious feelings of Mahomedans are not wounded by the slaughter of goats by *jhatka* and exposing the carcass outside or selling its flesh inside a shop, as Mahomedans do not worship goats.[2]

No offence if religious feelings are not wounded.—Swearing on cow's flesh.—Where the accused, while his caste-people were sitting to dine at the complainant's house, called out in the hearing of all that they would be eating cow's flesh if they took food without them, which made them leave their dishes untouched, it was held that the accused could not be convicted under this section.[3]

Wilful pollution of food served at a caste dinner.—Where certain Hindus present at a caste dinner had sat down to partake of the food which had been served to them, when certain other members of the caste came, and after telling those who were seated to move to another place, which they refused to do, threw down a shoe amongst the men who were seated, and who in consequence left the food untouched, it was held that the persons who threw the shoe could not be convicted under this section.[4] This decision does not seem to be satisfactory. The authors of the Code have said that "the rendering the food of a Hindoo useless to him by causing it to be in what he considers as a polluted state is an injury" necessitating punishment.[5]

Throwing dirty clothes.—Where a woman threw a cloth which she had been wearing [illegible] birth to an illegitimate child on [illegible] s held that that did not amount [illegible] ences relating to religion and not to castes.[6]

PRACTICE.

Evidence.—Prove (1) that the accused uttered the words, or made the gesture, etc.

(2) That he did so, intending to wound the religious feelings of any person.

(3) That such intention was deliberate.

To hold a person liable under this section the intention with which the words were uttered must be strictly proved; and it is not sufficient to show that the utterer knew that his act was likely to wound the religious feelings of anybody.[7]

"It is not sufficient for conviction that a person should do one of the acts described with the knowledge that he is thereby likely to wound the religious feelings of any person, nor even that he should do it with that intention, unless the intention be deliberate."[8]

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Magistrate, Presidency, or first, or second class.

Charge.—I (*name and office of the Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, uttered the word (*specify it*) in the hearing of——[*or* made a sound, to wit——, in the hearing of——; *or* made a gesture, to wit——, in the sight of——; or placed a certain object, to wit——, in the sight of——] with the deliberate intention of wounding the religious feelings of the said person, and thereby committed an offence punishable under s. 298 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

[1] *Rahman*, (1893) 13 A. W. N. 144.
[2] *Kirpa Singh*, (1897) P. W. R. (Cr.) No. 26 of 1912.
[3] *Dagadi*, (1892) Unrep. Cr. C. 592.
[4] *Moti Lal*, (1901) 24 All. 155.
[5] Note J, p. 137.
[6] *Tukaram* v. *Zeli*, (1892) 6 C. P. L. R 7.
[7] *Narasimha* v. *Shree Krishna*, (1892) 2 Mad Jur. 236.
[8] Per Plowden, J., in *Habibullah*, (1889) P. R. No. 4 of 1890.

CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

THE following offences affect the human body, *viz.* :—

1. Unlawful homicide.
   (*a*) Culpable homicide.
   (*b*) Murder.
   (*c*) Homicide by rash or negligent act.
   (*d*) Suicide.
2. Causing miscarriage.
3. Exposure of infants and concealment of births of children.
4. *Hurt.*
   (i) Simple.
   (ii) Grievous.
5. Wrongul restraint and wrongful confinement.
6. Criminal force.
7. Assault.
8. Kidnapping.
9. Abduction.
10. Slavery and forced labour.
11. Rape.
12. Unnatural offence.

Of Offences affecting Life.

Culpable homicide.

299. Whoever causes death [1] by doing an act [2] with the intention of causing death,[3] or with the intention of causing such bodily injury as is likely to cause death,[4] or with the knowledge that he is likely by such act to cause death,[5] commits the offence of culpable homicide.

ILLUSTRATIONS.

(*a*) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(*b*) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause, Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(*c*) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or cause death by doing an act that he knew was likely to cause death.

Explanation 1.[6]—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.[7]—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.[8]—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

COMMENT.

[illegible]
three [illegible]
deat [illegible]

Homicide.—Homicide is the killing of a human being by a human being.[1] It is either (A) lawful, or (B) unlawful.

Lawful homicide, or simple homicide, includes several cases falling under the General Exceptions (Ch. IV).

Unlawful homicide includes (1) culpable homicide not amounting to murder; (2) murder (s. 300); rash or negligent homicide (s. 304 A); and (4) suicide (ss. 305, 306).

(A) Lawful or simple homicide.—This may be divided into two classes—

1. **Excusable homicide.**—This class includes the following cases:—

(1) Where the death is caused by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act, in a lawful manner, by lawful means, and with proper care and caution (s. 80).

(2) Where the death is caused by a child, or a person of unsound mind, or an intoxicated person, as will come under ss. 82, 83, 84 and 85.

(3) Where the death is caused unintentionally by an act done in good faith for the benefit of the person killed, when

(i) he or, if a minor or lunatic, his guardian has expressly or impliedly consented to such an act (ss. 87, 88), or

(ii) where it is impossible for the person killed to signify his consent, or where he is incapable of giving consent, and has no guardian from whom it is possible to obtain consent in time for the thing to be done with benefit (s 92).

All the above cases are dealt with in the General Chapter of Exceptions.

2. **Justifiable homicide.**—This class includes cases where the death is caused

(1) By a person, who is bound, or by a mistake of fact, in good faith, believes himself bound, by law (s 76).

(2) By a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law (s. 77).

(3) By a person acting in pursuance of the judgment or order of a Court of Justice (s. 78).

(4) By a person who is justified or who by reason of a mistake of fact, in good faith, believes himself to be justified by law (s. 79).

(5) By a person acting without any criminal intention to cause harm, and in good faith, for the purpose of preventing or avoiding other harm to person or property (s. 81).

(6) Where the death is caused in exercising the right of private defence of person or property (ss. 100, 103).

(B) Unlawful homicide.—Culpable homicide is the first kind of unlawful homicide. It is the causing of death by doing—

(i) an act with the intention of causing death;

(ii) an act with the intention of causing such bodily injury as is likely to cause death; or

([illegible] ise death.

[illegible] be in its nature crimi [illegible] nce of culpable homicide.[2]

The existence of an evil motive is not at all necessary. Malice is not made a necessary ingredient of the definition. Whatever may be the motive which incites the action and whether or not any motive whatsoever be discoverable, if the act

[1] Stephen's Dig. of Cr. L., Art. 239. [2] *Rakee*, (1866) Unrep. Cr. C. 6.

relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die. It is difficult to say whether a Penal Code which should put no omissions on the same footing with acts, or a Penal Code which should put all omissions on the same footing with acts, would produce consequences more absurd and revolting. There is no country in which either of these principles is adopted. Indeed, it is hard to conceive how, if either were adopted, society could be held together.

"It is plain; therefore, that a middle course must be taken; but it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn, it will, we fear, include some cases which we might wish to exempt, and will exempt some which we might wish to include...

"What we propose is this, that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause, a certain evil effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause, the same effect shall be punishable in the same manner, provided that such omissions were, on other grounds, illegal. An omission is illegal (see clause 28) if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.

"We cannot defend this rule better than by giving a few illustrations of the way in which it will operate. A omits to give Z food, and by that omission voluntarily causes Z's death. Is this murder? Under our rule it is murder if A was Z's gaoler, directed by the law to furnish Z with food. It is murder if Z was the infant child of A, and had therefore a legal right to sustenance, which right a Civil Court would enforce against A. It is murder if Z was a bedridden invalid, and A a nurse hired to [illegible] and had thus [illegible] continuance of the confinement, with necessaries. It is not murder if Z is a beggar, who has no other claim on A than that of humanity.

"A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death. This is murder, if A is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder if A is a guide who had contracted to conduct Z. It is not murder if A is a person on whom Z has no other claim than that of humanity.

"A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off, it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal (Clause 273). But if A be a mere passer-by it is not murder."[1]

It will, therefore, appear that if death is caused—

(i) by an illegal omission with the intention that such omission should cause death;

[illegible] tion that such omission should cause [illegible] ledge that death is likely to be the result of such omission;

it will be culpable homicide.

See cases under s. 300 relating to neglect to supply medical aid or food.

[1] Note M, pp. 139, 140.

Death caused by the effect of words on the imagination or the passions.—The authors of the Code say: "The reasonable course in our opinion is to consider [illegible] as an act, and to treat A as guilty of [illegible] he has voluntarily caused Z's death, [illegible] inducing Z to swallow poison or directly by throwing Z into convulsions.

"...It would be most difficult to prove to the conviction of any Court that death had really been the effect of excitement produced by words; it would be still more difficult to prove that the person who spoke the words anticipated from them an effect which, except under very peculiar circumstances, and on very peculiar constitutions, no words would produce. Still it seems to us that both these points might be made out by overwhelming evidence; and, supposing them to be so made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol or a sword. Suppose it to be proved to the entire conviction of a criminal Court that Z, the deceased, was in a very critical state of health; that A, the heir to Z's property, had been informed by Z's physicians that Z's recovery absolutely depended on his being kept quiet in mind, and [illegible] Z [illegible] caused the death of Z; nor do we perceive any reason for not punishing A in the same manner in which he would have been punished if he had mixed arsenic in Z's medicine."[1]

T[illegible] (" [illegible] tidings to Z, [illegible] A has comm[illegible]

(*b*) A, with the intention and knowledge aforesaid, gives Z his choice whether Z will kill himself, or suffer lingering torture; Z kills himself in consequence. A has committed the offence of culpable homicide.

The Commissioners in their First Report[2] say: "Having maturely considered the matter, we come to the same conclusion with the authors of the Code, that if death is certainly caused by words deliberately used by a person with the intention of causing that result, or with the knowledge that in the condition of the party to whom the words are spoken it is likely that they will make such an impression upon him as to cause his death, and without any such excuse as is admissible under any of the provisions in the chapter of General Exceptions, there is no sufficient reason why that person should be excepted from the penalty of culpable homicide, any more than one who has caused death by the infliction of a bodily injury which he knew to be likely to cause death. Here is the wilful doing of that which is known to be likely to produce evil, manifesting the *mens rea* essential to criminal responsibility; the evil produced is death; the efficient cause, the words spoken. It is scarcely agreeable to reason, that having traced the effect to its cause, the law should refuse to acknowledge it as an effective cause; or that the Judge should be obliged to say, it is true the effect was produced by the operation of words, but words in law are not an act, therefore the speaker is not criminally responsible."

English law.—The English law takes no cognizance of homicide unless death results from bodily injury, caused by some act or omission, as distinguished from death occasioned by an influence on the mind, or by any disorder or disease arising from such influence.

"If a man either by working upon the fancy of another, or possibly by harsh or unkind usage puts another into such passion of grief or fear, that the party

[1] Note M, pp. 142, 143. [2] Section 249.

The authors of the Code observe: "We long considered whether it would be advisable to except from this definition any description of acts or illegal omissions, on the ground that such acts or illegal omissions do not ordinarily cause death, or that they cause death very remotely. . .

"There is undoubtedly a great difference between acts which cause death immediately, and acts which cause death remotely; between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the effect of the evidence in a particular case, not by the legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death; but if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide."[1]

"To justify a conviction of culpable homicide of any sort against an offender who has committed an intentional act causing bodily injury to another and which act was intended for some particular individual, there must at least be a finding that the offender intended by his act to cause bodily injury likely to cause death."[2]

'Intention of causing death' and 'intention of causing such bodily injury as is likely to cause death.'—The difference between these two is a difference of degrees in criminality. The latter is a degree lower in the scale of criminality than the former. But as, in both cases, the object is the same, the law does not make any distinction in punishment.[3]

Cases.—Where the accused stuffed a cloth into the deceased's mouth in order to silence him, not with any idea of killing him, it could only be presumed that the accused knew they were likely in so doing to cause his death, and so were guilty of offences under ss. 304 and 305 and not under ss. 302 and 396.[4] Where the accused caused the death of a man by an unmerciful beating mostly on the legs and arms but no bones were broken and not a single one of the injuries individually amounted to more than simple hurt, it was held that he was guilty of the offence of culpable homicide not amounting to murder.[5]

5. **'With the knowledge that he is likely by such act to cause death.'**—Knowledge is a strong word and imports a certainty and not merely a probability.

If a man intentionally commits an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under ss. 336, 337, 338, or 304-A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender and placed in their appropriate place in the class of offences of the same character.[6]

In judging of knowledge had by the accused, we must consider the circumstances; the blow that to one person, or under ordinary circumstances, may not,

[1] Note M, pp. 141, 142.
[2] [illegible] in Shwe Ein (1905) 3 L.B.R. [illegible] U. B. R. 247; Nga Shwe Baw, (1900) 7 Burma L. R. 250.
[4] Sengoda Goundan, [1915] M. W. N. 621.
[5] Jaggu, (1925) 2 L. C. 112
[6] Ketabdi Mundul, (1879) 4 Cal. 764.

in the ordinary course of nature, be likely to cause death, may yet be imminently dangerous to another, or under special circumstances. Where the accused kicked his wife, eight or nine years of age, on the back with his bare foot, from which kick she fell down and died immediately, it was held that he was guilty of culpable homicide not amounting to murder. The Court said : " To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such a character that no reasonable man could be ignorant of the likelihood of its causing death."[1] Where three persons attacked a fourth with *lathis*, the blows being directed at the head of that fourth, it was held that they must be fixed with the knowledge that they were likely to cause death.[2]

Cross negligence may amount to knowledge.—If a person without exercising due care and caution does any act under a sudden impulse he will be presumed to have knowledge of the consequences arising from his act. Where the accused struck at with a club and killed a man, being at the time under the *bona fide* belief that the object at which he struck was not a human being but something supernatural, but, through terror, having taken no steps to satisfy himself that it was not a human being, he was held to have committed the offence of culpable homicide not amounting to murder.[3]

'Intention of causing such bodily injury as is likely to cause death' 'Knowledge that he is likely by such act to cause death.'—The practical difference between these two phrases is expressed in the punishment provided in s. 304. But the phrase 'with the knowledge that he is likely by such act to cause death' includes all cases of rash acts by which death is caused, for rashness imports a knowledge of the likely result of an act which the actor does in spite of the risk.

If a man causes death by doing an act merely with the knowledge that he is likely by such act to cause death, the act comes within this section, and not within s. 300.[4]

Cases.—Knowledge of probable consequence of act—Beating.—Where the prisoner assaulted a thief so severely that one hundred and forty-one marks of separate blows were found on his body and several of his ribs were broken and he died[5] where the husband and the father of a woman, who had been enticed away, lay in wait for the offender and beat him with sticks on the back and chest and he died from the effect of the blows[6], and where a man killed his wife by a single blow[7], or a single forcible kick on her side[8], it was held that they had committed culpable homicide and that their offence fell under the latter part of s. 304.

[illegible]

to cause the death of such person.[9] R struck G three blows with a *lathi* (stick). One blow fractured the bones of the left forearm, another fractured a bone in the right hand, [illegible] In the case of the third injury [illegible] It was held that R was guilty [illegible] der under s. 304 or causing grievous hurt.[10] Where the accused inflicted four wounds none of which was on vital parts of the body, and the deceased died owing to sceptic poisoning in respect of two of them, two and a half months after the occurrence, and was

[1] [illegible] No. 10 [illegible]

[7] *Karm*, (1892) P. R. No. 5 of 1893.

[8] *Marimuthu* (1923) 18 L. W. 188.

[9] *Gujjar*, (1911) P. R. No. 12 of 1911.

[10] *Rama Singh*, (1920) 42 All. 302. See *Ram Asre*, (1922) 26 O. C. 18, which dissents from this case. It holds that the words in s. 299 "or with the knowledge that he is likely by such act to cause death" must be interpreted in the light s 300 and similarly are inapplicable to a case where specific bodily injury is intentionally caused to a particular person.

sentenced to death under s. 302, it was held that the accused's intent was not to inflict bodily injury sufficient in the ordinary course of nature to cause death, but to cause bodily injury which was likely to cause death, the degree of probability as to death ensuing not being so high as to justify a finding of murder, and the conviction was altered to one under the first part of s. 304 and the sentence reduced to ten years' rigorous imprisonment.[1]

Exorcising evil spirit.—Where the accused, in exorcising the spirit of a girl, whom they believed to be possessed, subjected her to a beating which resulted in her death, they were held guilty of culpable homicide.[2] Although the intention of the persons who inflict beating in such circumstances is not to cause death but to exorcise the spirit they must be taken to have known that they are likely to cause death.[3] But where the injuries caused under like circumstances were not severe, the accused was acquitted.[4] Where a man deliberately murdered his wife under the belief that she was haunted by evil spirits and that if he killed her the evil spirits would leave her, he was held guilty of murder.[5] Where the accused murdered the deceased knowing full well the nature of his act, but under the belief that by so doing he was helping in the recovery of his wife and children, whose illness he attributed to the deceased, whom he believed to be a witch, it was held that the accused was guilty of murder.[6] Where the accused possessed by a superstitious belief made an offering of his child to a crocodile in a certain tank, with a pure heart, believing that though the crocodile would doubtless take the child away, but would return the child unharmed and the child would thereafter lead a charmed life and attain to a good old age [illegible] death to the child, he [illegible] s. 304, as what he did, he did with knowledge that [illegible] of the child.[7]

Unskilful medical treatment.—Where a man of full age submitted himself to emasculation, performed neither by a skilful hand nor in the least dangerous way, and died [illegible] the act were held guilty of culpable [illegible]

Any [illegible] who deals with the life or health of another person is bound to use competent skill and sufficient attention; if the patient dies for want of either, the person is guilty of manslaughter.[9]

Causing a person to be bitten by a snake.—A snake-charmer exhibited in public a venomous snake, whose fangs he knew had not been extracted, and to show his own skill and dexterity, but without any intention to cause harm to anyone, placed the snake on the head of one of the spectators. The spectator in trying to push off the snake was bitten, and died in consequence. It was held that the snake-charmer was guilty of culpable homicide not amounting to murder.[10] The accused, who professed by tatooing to render persons immune from the effect of snake bite, caused a poisonous snake to bite the deceased whom he had tatooed but who died. It was held that the burden of proving that the accused was justified in believing and did believe that he could give immunity lay on the accused and that as he failed to discharge the burden, he was guilty of culpable homicide not amounting to murder.[11]

Squeezing testicles.—Where a woman, by gripping and squeezing the testicles of her husband, reduced them to a pulp condition, thereby causing an injury

[1] *Nga Po Chet*, (1923) 2 B. L. J., 239.
[2] *Jamaludin*, (1892) Unrep. Cr. C. 603. In a similar case the accused were held guilty of an offence under s. 304-A, because the girl had consented to the beating: *Nga Po Kyaw*, (1902) 1 U. B. R. (P. C.) 1.
[3] *Nga Po Thu*, (1917) 3 U. B. R. 54.
[4] *Dhondi*, (1895) Unrep. Cr. C. 785.
[5] *Seat Ali*, (1917) 3 P. L. W. 356.
[6] *Mato Ho*, (1920) 1 P. L. T. 282.
[7] *Bharat Bipari*, (1920) 33 C. L. J. 179, 25 C. W. N. 676.
[8] *Baboolun Bijirah*, (1866) 5 W. R. (Cr.) 7.
[9] *Burdee*, (1916) 25 Cox 598.
[10] *Ganeth Dooley*, (1879) 5 Cal. 351. See *Poonai Pattemah*, (1869) 12 W. R. (Cr.) 7.
[11] *Nga Ba Tu*, (1921) 11 L. B. R. 56.

which resulted in death due to the shock so inflicted on the nervous system, it was held that she was guilty of culpable homicide.[1] Here the violence of the attack on the husband's delicate parts was sufficient to justify an inference that the wife had knowledge of the likely effect of her attack. But where death was caused not by the squeezing of the testicles but owing to the unsound bodily condition of the deceased and the medical evidence showed that the injury inflicted upon the deceased would not in normal conditions have endangered his life, it was held that the accused was guilty of hurt only.[2]

English cases.—Where a person in *loco parentis* inflicted corporal punishment on a child, and compelled it to work for an unreasonable number of hours, and beyond its strength, and the child died, the death being from consumption, he was held guilty of manslaughter.[3] A schoolmaster, on the second day after a boy's return to school wrote to the parent saying the boy was extremely obstinate, and ought to be severely and frequently beaten. The father replied, "I do not wish to interfere with your plan." Accordingly the schoolmaster beat the boy for two hours and a half secretly in the night with a thick stick until he died. It was held that, such punishment being excessive and unreasonable, the schoolmaster was guilty of manslaughter.[4] Where a father who, for some childish fault, gave an infant of two years and a half about a dozen strokes with a strap an inch wide and eighteen inches long, from the effects of which the child died, it was held that he was guilty of manslaughter.[5]

Death caused without intention or 'knowledge' is not culpable homicide.—The offence of culpable homicide supposes an intention, or knowledge of likelihood, of causing death. The intention must be directed either deliberately to putting an end to human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed and the intention demanded by the section must stand in some relation to a person who either is alive or who is believed by the accused to be alive.[6] In the absence of such intention or knowledge, the offence committed may be the offence of causing grievous hurt,[7] or simple hurt.[8]

As noticed before, even in the case of gross negligence a man is liable for the natural consequence of his act. But where death results not as a direct consequence of the act of the accused but from some other cause of which he was unaware then the accused cannot be charged with culpable homicide. Where death is caused owing to the rupture of a diseased spleen and not violence, it is on this principle that the accused is convicted of hurt or grievous hurt.

Cases.—Where the accused by a single blow with a deadly weapon killed another who was entering at dead of night into a dark room, where the accused and his wife were [illegible] it was held that [illegible] of a trivial dispute, [illegible] caused him to fall o[illegible] falling the deceased [illegible] his death on the fifth day after, it was held that this was simply a case of using

[1] *Kaliyani*, (1806) 19 Mad. 356.
[2] *Bai Jiba*, (1917) 10 Bom. L. R. 823, 4 Bom. Cr. C. 144.
[3] *Cheeseman*, (1836) 7 C. & P. 455
[4] *Hopley*, (1860) 2 F. & F. 202.
[5] *Griffin*, (1869) 11 Cox 402.
[6] *Palani Goundan*, (1919) 42 Mad. 547, F. B.; *Naja*, (1919) 1 L. L. J 247.
[7] *Megha Meeah*, (1865) 2 W. R. (Cr.) 39; *Chullundee Poramanick*, (1865) 3 W. R. (Cr.) 55, *Bhadoo Poramanick*, (1865) 4 W. R. (Cr.) 23; *Sheikh Solim*, (1866) 5 W. R. (Cr.) 41; *Madur Jolaha*, (1867) 8 W. R. (Cr.) 28; *O'Brien*, (1880) 2 All. 766; *Idu Beg*, (1881) 3 All. 770. See, for further cases, Comment on s. 321.
[8] *Punchanun Tantee*, (1866) 5 W. R. (Cr.) 97; *Byagoo Noshyo*, (1867) 8 W. R. (Cr.) 29, *Safatulla*, (1879) 4 Cal. 815; *Fox*, (1879) 2 All. 522, *Randhir Singh*, (1881) 3 All. 597; (1881) 1 Weir 288.
[9] *Chullundee Poramanick*, sup.

criminal force.[1] According to the English law this would have been treated as manslaughter. The accused, while engaged in a verbal wrangle with his wife, struck her a blow on the left side with great force, the result of which was that she vomitted and bled from the nose, and within little more than an hour died. The death was caused by the rupture of the spleen. It was held that he was guilty of grievous hurt only.[2] Where three persons attacked a fourth with clubs, and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt as to which of the three assailants struck that blow, it was held that the offence of which the three assailants were guilty was grievous hurt rather than culpable homicide not amounting to murder.[3] Where two persons on receiving provocation delivered an unpremeditated attack on the deceased and one blow only was given which caused his death, but it was not shown who struck the fatal blow, it was held that both were guilty of grievous hurt but not of culpable homicide.[4]

Where a man struck another on the head with a stick, and believing him to be dead set fire to the hut with a view to remove all evidence of the crime and it was found that the blow only stunned the deceased and the death was really caused by the injuries from the burning when the accused set fire to the hut, it was held that the offence committed was that of attempt to murder.[5] The accused assaulted his wife and gave her kicks, blows and slaps. The kicks were given below the naval. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up the unconscious body of his wife, thinking it to be a dead body and hung it by a rope. The *post mortem* examination showed that death was due to hanging. It was held that the accused could not have intended to kill his wife, if he thought that she was already dead, and he could not be convicted of murder; and that the offence committed was one under s. 325 for having given her kicks, blows and slaps before she fell down.[6] Where the accused struck his wife a blow on her head with a ploughshare which, though not shown to be a blow likely to cause death, did in fact render her unconscious and, believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation, it was held that the accused was not guilty of either murder or culpable homicide not amounting to murder but was guilty of grievous hurt.[7]

L, who had a stick in his hand, attacked B who had none. Learning that G was coming to help B, L entered his house whence he fetched a chopper and renewed his attack on B inflicting more than one injury. L allowed himself to be disarmed by G who got some slight injuries in the scuffle that ensued. B was sent to the hospital where he died of septic pneumonia. It was held that there being no intention to cause death L could only be convicted of having caused grievous hurt.[8]

A youth of about eighteen had, without any ancillary violence, sexual intercourse with a well-developed girl probably under twelve years of age; the girl did not consent; her vagina was ruptured and, as a result, she died of shock. It was held that, as death was not the natural consequence to be expected from a simple sexual offence, the accused was not guilty of culpable homicide.[9]

D. [illegible] gave a blow [illegible] deceased,

[1] *Acharjya* (1877) 1 Mad. 224.
[2] *Idu Beg*, (1881) 3 All. 776.
[3] *Bhola Singh*, (1907) 29 All. 282. See *Gulab*, (1918) 40 All. 686, overruling *Chandan* [illegible] *Pattu Nana Patwat*, [illegible] Cr. C. 157. [illegible] No. 2 of 1920, 21 P. L. R. 5.
[4] *Khandu valad Bhavani*, (1890) 15 Bom. 194.
[5] *Dalu Sardar*, (1914) 18 C. W. N. 1279.
[6] *Palani Goundan*, (1919) 42 Mad. 547, F.B.
[7] *Lalk Singh*, (1918) 17 A. L. J. R. 56; 1 U. P. L. R. 42. See *Mussammat Siryan*, (1915) P. W. R. (Cr.) No. 48 of 1915.
[8] *Shambhu Khatri*, (1924) 3 Pat. 410.

[illegible] suffering from a diseased spleen, on the region of that organ, he was held [illegible] went to a place where a cart was [illegible] man who was sleeping on a cot close [illegible] the cart. The man explained that the cart did not belong to him and remarked at the same time that he was ill. The accused, thereupon, got irritated and pulled the cot about, causing the man to fall out of it, kicked him and struck him on the side or on the ribs with a stick. Owing to the injuries he had received, the man died very soon after. It was held that as the deceased was suffering from a diseased spleen the accused was guilty of causing grievous hurt.[2]

(2) *Hurt.*—Where the prisoner, having received great provocation from his wife, pushed her with both arms so as to throw her with violence to the ground, and after she was down slapped her with his open hand, and the woman died on account of rupture of her spleen which was diseased, it was held that the prisoner was guilty of causing hurt.[3] Similarly, where a wife died from a chance kick in the spleen inflicted by her husband on provocation given by her, the husband not knowing that the spleen was diseased, he was held guilty of causing hurt.[4] The prisoner, dissatisfied and irritated by the lazy and inefficient manner in which a punkha cooly was managing a punkha, went up to him and struck him one or more blows. The cooly was suffering from a diseased spleen and died from the injuries he had received. It was held that the prisoner was guilty of causing hurt.[5] Where the accused threw a piece of a brick at the deceased which struck him in the region of the spleen and ruptured it, the spleen being diseased, it was held that the offence committed was that of causing hurt.[6] The accused was charged with having caused the death of one N by kicking him over the regions of the spleen, being enraged at the latter having allowed his goats to stray into his field The medical evidence showed that the spleen of the deceased was enormously large, and slight injuries over the region of the spleen would be sufficient to cause its rupture which generally ends fatally. It was held that in the absence of satisfactory evidence to prove knowledge of the state of health of the deceased on the part of the accused, the conviction should be for hurt only.[7]

6. **Explanation 1.**—A person causing bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerating the death of that other, is deemed to have 'caused his death.' But one of the elements of the offence of culpable homicide must be present.[8]

"An offence affecting the life of a person who must soon die either from a mortal disease or in course of nature from old age and decay, is not a less offence than one which affects the life of a person in strong health. The offender causes death in the one case by accelerating that event by a few months, or days, or hours; in the other case, possibly, he hastens the event by many years. The real difference between the two cases is not in point of law, but in respect of the degree of proof, requisite to show the cause of death. For where the death of a person who receives some bodily injury while labouring under a disease is the subject of enquiry, the Court in estimating the evidence must consider whether it is sufficiently proved which of the two causes, the disease or the bodily injury to the deceased person, is the cause of his dying on the day when his death occurs. It is not necessary (if it were possible) that the evidence should enable the Court to apportion the two causes and the degree in which each of them contributes to the result. But the Court must be satisfied (1) that the death at the time when it occurs is not caused solely by the disease; and (2) that it is caused by the bodily injury to this extent,

[1] *Megha Meeah*, (1865) 2 W. R. (Cr.) 39.
[2] *O'Brien*, (1880) 2 All. 766.
[3] *Punchanun Tanter*, (1866) 5 W. R. (Cr.) 97.
[4] *Byagoo Noshyo*, (1867) 8 W. R. (Cr) 29.
[5] *Fox*, (1879) 2 All. 522.
[6] *Randhir Singh*, (1881) 3 All. 597; (1881) 1 Weir 288.
[7] *Aiman*, (1904) 1 A. L. J. R. (Notes) 162
[8] *Fox*, sup

criminal force.[1] According to the English law this would have been treated as manslaughter. The accused, while engaged in a verbal wrangle with his wife, struck her a blow on the left side with great force, the result of which was that she vomitted and bled from the nose, and within little more than an hour died. The death was caused by the rupture of the spleen. It was held that he was guilty of grievous hurt only.[2] Where three persons attacked a fourth with clubs, and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt as to which of the three assailants struck that blow, it was held that the offence of which the three assailants were guilty was grievous hurt rather than culpable homicide not amounting to murder.[3] Where two persons on receiving provocation delivered an unpremeditated attack on the deceased and one blow only was given which caused his death, but it was not shown who struck the fatal blow, it was held that both were guilty of grievous hurt but not of culpable homicide.[4]

Where a man struck another on the head with a stick, and believing him to be dead set fire to the hut with a view to remove all evidence of the crime and it was found that the blow only stunned the deceased and the death was really caused by the injuries from the burning when the accused set fire to the hut, it was held that the offence committed was that of attempt to murder.[5] The accused assaulted his wife and gave her kicks, blows and slaps. The kicks were given below the naval. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up the unconscious body of his wife, thinking it to be a dead body and hung it by a rope. The *post mortem* examination showed that death was due to hanging. It was held [illegible] he thought that she was [illegible] and that the offence com- [illegible] lows and slaps before she [illegible] her head with a plough-share which, though not shown to be a blow likely to cause death, did in fact render her unconscious and, believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation, it was held that the accused was not guilty of either murder or culpable homicide not amounting to murder but was guilty of grievous hurt.[7]

L, who had a stick in his hand, attacked B who had none. Learning that G was coming to help B, L entered his house whence he fetched a chopper and renewed his attack on B inflicting more than one injury. L allowed himself to be disarmed by G who got some slight injuries in the scuffle that ensued. B was sent to the hospital where he died of sceptic pneumonia. It was held that there being no intention to cause death L could only be convicted of having caused grievous hurt.[8]

A youth of about eighteen had, without any ancillary violence, sexual intercourse with a well-developed girl probably under twelve years of age; the girl did not consent; her vagina was ruptured and, as a result, she died of shock. It was held that, as death was not the natural consequence to be expected from a simple sexual offence, the accused was not guilty of culpable homicide.[9]

I [illegible] gave a blow [illegible] ceased,

[1] *Acharjya* (1877) 1 Mad. 224.
[2] *Idu Beg*, (1881) 3 All. 776.
[3] *Bhola Singh*, (1907) 29 All. 282. See *Gulab*, (1918) 40 All. 686, overruling *Chandan Singh*, (1917) 40 All. 103; *Datta Nana Pawar*, (1917) 19 Bom. L. R. 902, 4 Bom. Cr. C. 157.
[4] *Ramzan*, (1919) P. W. R. (Cr.) No. 2 of 1920, 21 P. L. R. 5.
[5] *Khandu valad Bhavani*, (1890) 15 Bom. 194.
[6] *Dalu Sardar*, (1914) 18 C. W. N. 1279.
[7] *Palani Goundan*, (1910) 42 Mad. 547, F.B.
[8] *Lail Singh*, (1918) 17 A. L. J. R. 56; 1 U. P. L. R. 42. See *Musammat Siryan*, (1915) P. W. R. (Cr.) No. 48 of 1915.
[9] *Shambhu Khairi*, (1924) 3 Pat. 410.

who was suffering from a diseased spleen, on the region of that organ, he was held guilty of causing grievous hurt.[1] The accused went to a place where a cart was standing, and presuming that it belonged to a man who was sleeping on a cot close by, roused him and told him to let him have the cart. The man explained that the cart did not belong to him and remarked at the same time that he was ill. The accused, thereupon, got irritated and pulled the cot about, causing the man to fall out of it, kicked him and struck him on the side or on the ribs with a stick. Owing to the injuries he had received, the man died very soon after. It was held that as the deceased was suffering from a diseased spleen the accused was guilty of causing grievous hurt.[2]

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6. Explanation 1.—A person causing bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerating the death of that other, is deemed to have 'caused his death.' But one of the elements of the offence of culpable homicide must be present.[8]

"An offence affecting the life of a person who must soon die either from a mortal disease or in course of nature from old age and decay, is not a less offence than one which affects the life of a person in strong health. The offender causes death in the one case by accelerating that event by a few months, or days, or hours; in the other case, possibly, he hastens the event by many years. The real difference between the two cases is not in point of law, but in respect of the degree of proof, requisite to show the cause of death. For where the death of a person who [illegible]

[illegible]

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[4] *Byagoo Noshyo*, (1867) 8 W. R. (Cr.) 29.
[5] *Fox*, (1870) 2 All. 522.
[6] *Randhir Singh*, (1881) 3 All. 597; (1881) 1 Weir 288.
[7] *Aiman*, (1904) 1 A. L. J. R. (Notes) 162
[8] *Fox*, sup

that it is accelerated by such injury. Suppose A is ill of small-pox, and Z gives him pills in such doses that the disease is aggravated and death is accelerated ; Z has *caused death*, notwithstanding that it may be proved that A must have eventually died of the small-pox."[1]

The English law is to the same effect.[2] The accused one night came home before his wife, and he was in a condition of violent excitement, and was overheard to express a determination of "giving his wife something" when she came in. When the woman did come home there were at once sounds of an altercation, and shortly afterwards the woman was seen by several witnesses to rush from the house into the road closely pursued by the accused, who was at the same time using violent threats towards her. She was then seen to fall into the roadway, and lying there she was kicked on the left forearm by the accused. When picked up she was found to be dead. The *post-mortem* examination showed that the deceased was suffering from a persistent thymus gland, and the medical evidence was to the effect that any combination of physical exertion and fright or strong emotion might occasion the death of the person having such gland.' It was held that the evidence that the death of the deceased was due to a combination of physical exertion and fright, or strong emotion caused by an illegal act of the accused, was sufficient to support a conviction for manslaughter without proof of actual violence on his part occasioning the death.[3]

The Calcutta High Court has held that if a person was suffering from an injury which would render injuries (which would not have a fatal effect to one ordinary man) fatal to that person, it does not necessarily follow, as it would in the case of a healthy man, that the person inflicting those injuries knew it to be likely that death would be caused thereby.[4]

7. Explanation 2.—'By resorting to proper remedies death might have been prevented.'—The explanation reproduces the English law. The authors of the Code say : "We see no reason for excepting such cases [the cases of persons who die of a slight wound, which, from neglect or from the application of improper remedies, has proved mortal] from the simple general rule which we propose. It will, indeed, be in general more difficult to prove that death has been caused by a scratch than by a stab which has reached the heart ; and it will, in a still greater degree, be more difficult to prove that a scratch was intended to cause death than that a stab was intended to cause death ; yet both these points might be fully established. Suppose such a case as the following :—It is proved that A inflicted a slight wound on Z, a child who stood between him and a large property, it is proved that the ignorant and superstitious servants about Z applied the most absurd remedies to the wound ; it is proved that under their treatment the wound mortified, and the child died. Letters from A to a confident are produced ; in those letters, A congratulates himself on his skill, remarks that he could not have inflicted a more severe wound without exposing himself to be punished as a murderer, relates with exultation the mode of treatment followed by the people who have charge of Z, and boasts that he always foresaw that they would turn the slightest incision into a mortal wound. It appears to us, that if such evidence were produced, A ought to be punished as a murderer.

"Again, suppose that A makes a deliberate attempt to commit assassination ; in the presence of numbers he aims a knife at the heart of Z, but the knife glances aside, and inflicts only a slight wound...In such cases there is no doubt whatever as to the intention. Suppose that the person who received the wound is under the necessity of exposing himself to a moist atmosphere immediately afterwards, and that, in consequence, he is attacked with tetanus and dies. Here, again,

[1] M. & M. 257.
[2] *Murton*, (1862) 3 F. & F. 492, *Martin*, (1832) 5 C. & P. 128
[3] *Hayward*, (1908) 21 Cox 692.
[4] *Ainuddi Chowkidar*, (1921) 34 C. L. J. 515.

however slight the wound may have been, we are unable to perceive any good reason for not punishing A as a murderer."[1]

"Although proof be given that the wound or other bodily injury if skilfully treated might not have resulted in death, yet if in fact death is the result, the wound 'causes' death. And it does not avail the offender to prove that the first might have been removed or rendered inoperative by the application of proper remedies and that death might thus have been prevented. 'Proper remedies and skilful treatment' may not be within the reach of the wounded man; or, if they are at hand, he may be unable or unwilling to resort to them. But this is immaterial so far as relates to the due interpretation of the words 'cause of death' The primary cause which sets in motion some other cause, —as the severe wound which induces gangrene or fever,—and the ultimate effect, death, are sufficiently connected as cause and effect, notwithstanding that the supervening sickness or disease might have been cured by medical skill. All that it is essential to establish is, that the death has been caused by the bodily injury, and, if there be any intervening cause, that it is connected with a sufficient degree of probability with the primary one.

"Cases not reached by either of the above explanations may occur, in which there will be some perplexity in determining the cause of death. Suppose a person who has receiv
skilful treatm
sequence, the
and death ensues—or suppose he drinks spirit immoderately in a hot climate or suppose he is carried to a hospital where erysipelas happens at the time to be prevalent, and catches the disorder and dies of it—or again suppose the bodily injury renders the amputation of a limb necessary, and that the patient is soon afterwards attacked by some complaint innocuous to a person in sound health, but which proves fatal to him in his weakly condition In all these cases, if no bodily injury had been received, the man would not have died; and it may therefore be said that the injury is in some sense the cause of death But it seems indispensable that the death should be connected with the act of violence or other primary cause not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances.

"In each of the instances we have last supposed, the bodily injury caused death under extraordinary circumstances Its direct influence in producing that result was small, and the intervening circumstances which more immediately caused death could scarcely have been foreseen. Nevertheless the use of the words 'to cause death' without qualification or exception, brings such cases within this term of the definition of the offence of culpable homicide. The difference between these cases and others of less complexity is a matter to be considered by the Court in estimating the effect of the evidence. But it is difficult to conceive any evidence sufficient to establish an intention to cause death on the part of a person who inflicts a bodily injury which ends so unexpectedly in death."[2]

Cases.—Where a wound is inflicted under circumstances that immediate death would make the person inflicting it guilty of murder, he will be liable for murder even if the death ensues from an operation thought necessary and performed by competent medical advisers, who considered that the wound was dangerous[3];

[1] Note M, p. 143.
[2] M. & M. 228.
[3] *Edward Lawes Pym*, (1846) 1 Cox 339.
[4] *Joseph Holland*, (1841) 2 Mood. & R. 351,

Explanation.[9]—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

ILLUSTRATIONS.

(*a*) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(*b*) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(*c*) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(*d*) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(*e*) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(*f*) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.[10]—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

ILLUSTRATION.

Z attempts to horsewhip A not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A, believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.[11]—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.[12]—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.[13]—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

ILLUSTRATION.

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

COMMENT.

In this section the definition of culpable homicide appears in an expanded form. In the Penal Code 'culpable homicide' is used as a generic term, and is exhaustively sub-divided into two species, namely, culpable homicide amounting to murder (s. 300, cls. 1, 2, 3, 4) and culpable homicide not amounting to murder (s. 299 and exceptions to s. 300). According to Sir Fitz-James Stephen the definitions of 'culpable homicide' and 'murder' are the weakest part of the Code as they are defined in terms closely resembling each other.

The Code nowhere makes premeditation a necessary concomitant to murder. Whatever the motive may be, or whether or not any motive whatsoever be discoverable, the sole point for enquiry is, whether the person inflicting the injury did so with the intention or knowledge as specified above.[1]

Scope—An offence cannot amount to murder, unless it falls within the definition of culpable homicide; for this section merely points out the cases in which culpable homicide amounts to murder. But an offence may amount to culpable homicide and yet may not amount to murder.

In deciding the question whether culpable homicide amounts to murder, it will be erroneous to convict the prisoner [illegible] to bring an accused person under any [illegible] not amounting to murder, and it is t[illegible] place, whether the element or elements which constitute the offence of murder, as defined in this section, exist.[2] In the Full Bench case of *Sheikh Bazu*,[3] Peacock, C. J., observed: "It does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions in s. 300. To render culpable homicide murder, the case must come within the provisions of clauses 1, 2, 3 or 4 of s. 300."

English law.—Murder is unlawfully causing the death of another with malice aforethought, express or implied. Malice aforethought, in murder, practically means—

(1) [illegible] ho is killed.

(2) [illegible]

(3) [illegible] ause death or grievous bodily harm to some one.

(4) An intent to oppose by force any officer of justice who is lawfully arresting or keeping in custody some one whom he is entitled to arrest or keep in custody, provided the prisoner knows that he is such officer of justice.

The law of British India, differing from the law of England, does not regard every case of homicide as *prima facie* murder: it throws on the prosecution the

[1] *Mahomed Elim Abdool Kurreem*, (1865) 3 W. R. (Cr.) 40.

[2] *Pasput Gope* v. *Ram Bhajan Ojha*, (1897) 1 C. W. N. 545; *Attra*, (1891) P.-R. No. 9 of 1891; *Sheikh Pyao*, (1883) P. R. No. 27 of 1883.

[3] (1867) 8 W. R. (Cr.) 47, 51. F. B.

burden of proving a certain intent or knowledge.[1] The English law looks to the act and throws on the accused the b[illegible] from the circumstances of the case, [illegible] does not amount to murder.[2] The [illegible] knowledge of the accused and not to the effect caused by the act.

Culpable homicide and murder distinguished.—The distinction between these two offences is very ably set forth by Melvill, J., in R. v. Govinda,[3] in which case the prisoner knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain and she died in consequence. The Court held that there being no intention to cause death, and the bodily injury not being sufficient in the ordinary course of nature to cause death, the offence committed was not murder but culpable homicide. The learned Judge said :

"For convenience of comparison, the provisions of ss. 299 and 300...may be stated thus :—

SECTION 299.	SECTION 300.
A *person commits culpable homicide*, if the act by which the death is caused is done.	Subject to certain exceptions, culpable homicide is murder, if the act by which the death is caused is done.
(*a*) With the intention of causing death ;	(1) With the intention of causing death ;
(*b*) With the intention of causing such bodily injury as is *likely* to cause death ;	(2) With the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of *the person to whom the harm is caused* ; (3) With the intention of causing bodily injury to any person, and the bodily injury *intended to be inflicted is sufficient in the ordinary course of nature* to cause death ;
(*c*) With the knowledge that...the act is *likely* to cause death.	(4) With the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death.

"I have *underlined* the words which appear to me to mark the differences between the two offences.

"(*a*) and (1) show that where there is an intention to kill, the offence is always murder.

"(*c*) and (4) appear to me intended to apply (I do not say that they are [illegible] bodily [illegible] cases of this description. Whether the offence is [illegible] depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide ; if it is the most probable result, it is murder.

"The essence of (2) appears to me to be found in the words which I have underlined. The offence is murder, *if the offender knows that the particular person injured* is likely, either from peculiarity of constitution, or immature age, or other special circumstance, to be killed by an injury which would not ordinarily cause death. [illegible] the following :—

"A, [illegible] blow is likely to cause hi[illegible] y injury. Z dies [illegible] of the blow. A is guilty of murder, although the blow might not [illegible] course of nature to cause the death of a person

[1] (1881) 1 Weir 788.
[2] *Greenwood*, (1837) 6 C. & P. 35
[3] (1876) 1 Bom. 342, 344-46.

"T [illegible] these
two cla [illegible] The
offence [illegible] *likely*
to cause death; it is murder, if such injury is *sufficient in the ordinary course of nature* to cause death. The distinction is fine, but appreciable. It is much the same distinction as that between (c) and (4), already noticed. It is a question of degree of probability. Practically, I think it will generally resolve itself into a consideration of the nature of the weapon used. A blow from a fist or a stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death."

As regards (c) Peacock, C. J., observes in *Gora Chand Gopee's case*[1]: "There are many cases falling within the words of s. 299 'or with the knowledge that he is likely by such act to cause death' that do not fall within the 2nd, 3rd, or 4th clauses of s. 300, such for instance as the offences described in ss. 279, 280, 281, 282, 284, 285, 286, 287, 288 and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But, although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in clause 2 or 3 of s. 300.

"As an illustration, suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill anyone [illegible]

cause death or such bodily injury, etc., as to bring the case within the 4th clause of s 300 In an ordinary case of furious driving, the facts would scarcely warrant such a finding. If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, etc., as in clause 4, s. 300.

"From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case.

"E [illegible]
way St [illegible]
of the [illegible]
particu [illegible]
ness by any other train; that at the time of the furious driving it wanted only two minutes to the time of the train's starting, that the road was so crowded that he must have known that he was likely to run over some one, and to cause death, would anyone under the circumstances presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train? If the Judge or jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing of death was such that he must have known, and did

[1] (1866) 5 W. R. (Cr.) 45, 46, r. a.

know, that his act must in all probability cause death, etc., within the meaning of clause 4, s. 300.

"If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder, and liable to capital punishment."

"It may be useful here to point out that the Indian Penal Code contemplates that when an act is culpable homicide, whether amounting to murder, or not amounting to murder, by reason of the act being done with the knowledge described in clause (3) of s. 299 (or with the knowledge described in clause 4 of s. 300, which knowledge satisfies the definition in clause 3 of s. 299), an intention to cause death or to cause such bodily injury as is likely to cause death must be absent. When intention of either kind co-exists with the knowledge described, the knowledge merges in the intention, and a higher degree of guilt is imputable. That the degree of guilt is higher when a murderous intention exists (which intention seems to be deemed to import the specified knowledge), and is lower when the knowledge is unaccompanied by such intention, seems a necessary inference from the language of s. 304 as to punishment."[1]

"Putting it shortly, all acts of killing done with the intention to kill, or to inflict bodily injury likely to cause death, or with the knowledge that death must be the most probable result, are *prima facie* murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder."[2]

Where, therefore, the act of the accused does not fall within the first clause of s. 300, that is, where the act was done not *with the intention of causing death*, the difference between culpable homicide and murder is merely a question of different degrees of probability that death would ensue. It is culpable homicide where death must have been known to be *a probable* result. It is murder, where it must have been known to be *the most probable* result.

Culpable homicide may, therefore, be not murder (1) where notwithstanding the mental state is sufficient to constitute murder, still one of the exceptions to s. 300 applies, or (2) where the mental state, though within the description of s. 299, is not of the special degree of criminality required by s. 300.

In cases where it is difficult to determine whether the offence committed by the accused is culpable homicide or culpable homicide amounting to murder, the accused should be convicted of the lesser offence.[3]

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as if [illegible]
his child with [illegible] the consequences,
and the child [illegible]

'Death' means the death of a human being (s. 46). It will be murder whether deat [illegible] child.[5]
[illegible] bs another
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[2] Per Straight, J., in *Idu Beg.*, (1881) 3 All. 776, 778; *Girdharee Singh*, (1873) 6 N. W. P. 26.

[3] *Nga Po Aung*, (1889) S. J. L. B. 459

[illegible] 44; *Ram* [illegible] C. 401, [illegible] 171. [illegible] (1865)

3 W. R. (Cr.) 40.

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'Death' *means the death of a human being* (s. 46). It will be murder whether death is caused of a grown-up person or a newly-born child.[5]

As to 'intention,' see Comment on s. 299, *supra*. Where a man stabs another in a vital part he must be held to have intended to cause death, and if death ensues *either directly from the wound or in consequence of the wound creating conditions*, which give occasion to the appearance of a fatal disease, the person inflicting the wound is guilty of murder.[6] Absence of premeditation will not reduce the crime of murder to culpable homicide not amounting to murder.[7] But where there is

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[3] *Nga Po Aung*, (1889) S. J. L. B. 459

[4] *Gunga Singh*, (1873) 5 N. W. P. 44; *Ram Prasad*, (1883) 3 A. W. N. 231.

[5] *Irowa*; *Basapa*, (1888) Unrep. Cr C. 401.

[6] *Nga Dwe*, (1904) 10 Burma L. R. 171.

[7] *Mahomed Elim Abdool Kurreem*, (1865) 3 W. R. (Cr.) 40.

nothing more than a fatal result to indicate an intention to cause death and no weapon is used, it is unsafe to convict of murder.[1]

Cases.—Neglect to provide medical aid or food.—Infant—Where A was convicted of the manslaughter of his son of tender years, who died of confluent small-pox, and A, though able to do so, did not, owing to certain religious views he held, employ any medical practitioner, nor afford to the child any medical aid and attendance, and it was proved that proper medical aid and attendance might have saved or prolonged the child's life, it was held that the conviction could not be sustained. It is not enough to show neglect of reasonable means for preserving or prolonging the child's life; but to convict of manslaughter it must be shown that the neglect had the effect of shortening life. In order to sustain the conviction affirmative proof is required.[2] In an earlier case it was distinctly shown, and found by the jury, that the child's death was caused by the neglect to provide medical aid, and [illegible] upheld.[3] Where the death of a child [illegible] proper nourishment, it was said that [illegible] wicked negligence.[4] These cases are decided under the Prevention of Cruelty to Children Act, which is in force in England. To warrant the conviction of a woman for manslaughter of her new-born child, whose death is caused by want of proper care at birth, it is not enough to show that such woman was guilty of criminal negligence by purposely arranging to be unattended at her confinement. She must also be proved to have been further guilty of negligence towards the child after it was completely born.[5]

Neglect to provide medical aid or food—Adults—A girl of eighteen was taken in labour in the house of her step-father The mother did not procure the aid of a midwife, in consequence of which the daughter died. The evidence did not show that she had means to pay the midwife. It was held that she was not legally bound to procure the aid of a midwife and that she could not be convicted of manslaughter.[6] Where a mistress omitted to supply her servant with proper food and lodging and so caused her death, it was remarked . "The law clearly is that, if a person has the custody and charge of another and neglects to supply proper food and lodging, such person is responsible, if from such neglect death results to the person in custody; but it is also equally clear that, when a person, having the free control of her actions and able to take care of herself, remains in a service where she is starved and badly lodged, the mistress is not criminally responsible for any consequences that may ensue."[7] The accused, a woman of full age and without any means of her own, lived with, and was maintained by, the deceased, her old aunt. No one lived with them. For the last ten days of her life the deceased suffered from a disease which prevented her from moving or doing anything to procure assistance; during this time the accused lived in the house and took in the food supplied by the tradesman, but, apparently gave none of it to the deceased, nor did she procure for her any medical or nursing attendance or inform anyone of the condition of the deceased. The death of the deceased was substantially accelerated by want of food, nursing, and medical attendance. It was held that a duty was imposed upon the accused under the circumstances to supply the deceased with sufficient food to maintain life, and that the death of the deceased having been accelerated by the neglect of such duty, the accused was guilty of manslaughter.[8]

Mere presence not sufficient for conviction of murder: common intention is necessary.—Mere presence as a member of a gang which has committed murder is insufficient to support a conviction for murder. It must be shown that murder was the common object of the gang and that the accused did some act in furtherance

[1] *Daude Gangadu*, (1881) 1 Weir 299

[2] Per Coleridge, C. J., in *Morby*, (1881) 8 Q B. D. 571, 574.

[3] *Downes*, (1875) 1 Q B. D. 25

[4] *Nicholls*, (1874) 13 Cox 75.

[5] *Izod*, (1904) 20 Cox 690.

[6] *Shepherd*, (1862) 31 L. J. (M. C.) 102.

[7] Per Erle, C. J., in *Smith*, (1863) L & C. 607, 624.

[8] *Instan*, [1893] 1 Q. B. 450.

of the common object.[1] Where the accused are present at the time of a murder and thereby give moral support to it, they are as much guilty of murder as the murderer himself.[2] Where the accused, a menial servant, accompanied his master with the intention of rendering such assistance as might be required when the latter had announced his intention of committing murder, it was held that the accused was guilty of murder.[3] Where a blow was struck by A in the presence of, and by the order of, B, both were held to be principals in the transaction; and where two persons joined in beating a man, and he died, it was held not necessary to ascertain exactly what the effect of each blow was.[4] Where three prisoners assaulted the deceased, and gave him a beating, in the course of which one of the prisoners struck the deceased a blow on the head, which resulted in death, it was held that, in the absence of proof that the prisoners had the common intention to inflict injury likely to cause death, they could not be convicted of murder.[5] But if two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of any one of them to allege that his individual act did not cause death, and that by his individual act he cannot be held to have intended death.[6]

2. Clause 2.—'With the intention of causing such bodily injury as the offender knows to be likely to cause the death.'—See Comment on s. 299. If a man strikes another on the head with a stick when he is asleep, and fractures his skull, knowledge of likelihood of causing death must be presumed; and the offence committed is murder.[7]

This clause also applies in special cases where the person injured is in such a [illegible] to be caused by an injury [illegible] sound health, and where the person inflicting the injury knows that owing to such condition or state of health it is likely to cause the death of the person injured.[8]

Cases.—Where A several times kicked B, who, after having been severely beaten, fell down senseless, it was held that A was guilty of murder as he must have known that such kicks were likely to cause death in B's state at that time.[9] Where four men beat another so severely that death ensued from the injuries received, it was held that they must be presumed to have known that by such acts they were likely to cause death, and that the offence of murder was not reduced to culpable homicide not amounting to murder by the absence of intention to cause death.[10] Where a man struck another on the head with a stick when he was asleep, and fractured his skull, it was held that knowledge of likelihood of causing death must be presumed, and that he was guilty of murder.[11] A cut Z on the head, with a heavy chopper, slicing off a bit of the frontal bone and cutting the brain. Z died [illegible] and that the wound was [illegible] st be [illegible] tself, and as the natural consequence of an act of the kind in question would be death, A must be presumed to have intended to cause death.[12] A attacked his mother-in-law, Y, a woman of fifty-five, with an edged instrument but by mistake cut another woman, Z, on the arm. Z, who was sixty-one years of age, died from the effects of

[1] *Wankarapu Baladu*, (1881) 1 Weir 296; *Kammari Kannappa*, (1881) 1 Weir 297.
[2] *Tulli*, (1924) 22 A. L. J. R. 1075.
[3] *Golla Sanyasi*, (1881) 1 Weir 296.
[4] *Mohamed Ameer*, (1874) 23 W. R. (Cr.) 11; *Gour Chunder Das*, (1875) 24 W. R. (Cr.) 5.
[5] *Duma Baidya*, (1896) 19 Mad. 483; [illegible]
[7] *Sheikh Choollye*, (1865) 4 W. R. (Cr.) 35.
[8] See *Nga Maung*, (1907) 4 L. B. R. 132; *Ram Asre* (1922) 26 O. C. 18.
[9] *Nilmadhub Sircar*, (1865) 3 W. R. (Cr.) 2.
[10] *Pooskoo*, (1865) 4 W. R. (Cr.) 23; *Garib*, (1919) 17 A. L. J. R. 935.
[11] *Sheikh Choollye*, s p.
[12] *Po Tu*, (1908) 4 L. B. R. 206.

the wound, although the Civil Surgeon considered that the injury was not sufficient in the ordinary course of nature to cause death to a woman of her age. The Sessions Judge considered that this clause was applicable on account of Y's age. It was held that this clause was not applicable because (1) as the injury was actually caused to Z, although intended for Y, Y's age did not affect the question at all, and (2) in view of the medical evidence and of the fact that the injury was not on a vital part of the body, A could not be held to have intended such bodily injury as he knew to be likely to cause the death of either Y or Z, or such bodily injury as was likely to cause death.[1] Where a person struck the deceased with a highly lethal weapon with the knowledge that the act was such as was likely to cause death, he was held guilty of murder.[2] It was held likewise where a blow was given with a bottle full of liquid.[3] A body of six persons attacked another with cattle goads in a violent and determined manner, inflicting sixteen wounds on his body and causing several and severe ruptures of his spleen, and so caused his death. The person attacked was a strongly built man of thirty-five years of age, and his spleen was in a healthy state. It was held that such acts, committed by several persons on one, in such a manner, apparently regardless of the consequences, and with such results, warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause his death; and that the offence amounted to murder.[4]

In the course of a murderous attack on his wife by the accused, the former ran to the deceased woman for protection and clasped her arms round her waist. The accused thereupon gave a fatal stab to the deceased with the sole object of making her let go his wife, so that he might wreak his vengeance on her. The accused had no quarrel with the deceased and had no intention of killing her. It was held that the accused was only guilty of culpable homicide not amounting to murder, as he did not intend to inflict such injury on the deceased as was likely to cause her death or was sufficient in the ordinary course of nature to cause her death.[5]

The two accused, brothers, between whom and the deceased and his son was bad feeling, came upon the deceased in the fields and setting upon him, beat him with sticks so severely that he died within a few minutes, no less than fourteen ribs being fractured resulting in the rupture of both lungs and of the spleen. It was held that the crime fell under the first or second clause of s. 300 as the intention was clear whether to kill or to cause a dangerous injury and thus the case was taken out of the purview of clause 4 which applied to cases in which there was no wish to kill or to hurt.[6]

Dhatura poisoning.—Where a woman of twenty years of age was found to have administered *dhatura* (a poisonous herb) to three members of her family, who ultimately recovered, it was held that she was guilty of attempt to commit murder as she must be presumed to have known that the administration of *dhatura* [illegible] the persons to whom she administered the *dhatura* in order that she might run away with her lover. The same High Court in a subsequent case said: "*Dhatura* is not exactly a deadly poison, and may often be given for the purpose of merely

[1] *Bin U*, (1908) 4 L. B. R. 367.
[2] *Sobeel Mahee*, (1866) 5 W. R. (Cr.) 32.
[3] *Shwe Hla U*, (1903) 2 L. B. R. 125, 10 Burma L. R. 29.
[4] *Elem Molla*, (1907) 37 Cal. 315. See *Naba*, (1910) P. W. R. (Cr.) No. 12 of 1911, to the same effect.
[5] *Perumal Nadien*, [1912] M. W. N. 193, per Abdur Rahim and Sundara Aiyar, JJ. (Spencer, J., dissenting).
[6] *Nawab*, (1914) P. R. No 31 of 1914.
[7] *Tulsha*, (1897) 20 All. 143.

stupefying a victim." On this ground it held, where, for the purpose of facilitating roberry, *dhatura* was administered by two persons to certain travellers, in consequence of which one of the travellers died and others were made seriously ill, that, in respect of the traveller who died, the offence committed was that of grievous hurt (s. 325), and, in respect of the travellers who did not die, the offence committed was that under s. 328.[1] This case is of doubtful authority. The same Court has now laid down that a person who recklessly administers *dhatura* to another is guilty, if death ensue, of the offence of murder, and not merely of culpable homicide not amounting to murder or of grievous hurt.[2] Where *dhatura* was administered with the object of facilitating roberry but in such quantity that the person to whom it was given died in the course of a few hours, it was held that the person so administering *dhatura* was guilty of murder.[3] The former Chief Court of the Punjab followed this case where the accused administered *dhatura* to A and B, both of whom died from the effects thereof and on the following date he administered the same poison to C and D, the former got ill and recovered but the latter died. It held that the accused was guilty of the offence of murder, for, when he administered *dhatura* poison he committed an act which, even if not committed with the intention of causing death or causing bodily injury likely, to the knowledge of the offender, or in the ordinary course of nature sufficient, to cause death, was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death; and that the accused was guilty of an offence under s. 307 as regards the poison administered to C.[4] The Court observed: "It would be putting a premium on murder to hold that the giving of *dhatura* in this reckless fashion is comparatively a minor offence. We cannot agree with the *dicta* in the judgment of the Allahabad High Court in the case of *Emperor* v. *Bhagwan Din*[5] and we prefer, in the interests of public safety, to follow the ruling of the same High Court in the case of *Emperor* v. *Gutab*.[6] As remarked by the learned judges in the latter case, 'Although death does not always follow from *dhatura* poisoning, yet it does follow in a considerable proportion of cases.'" In this case it was found by the Court that the accused was an expert in *dhatura* poisoning and knew well that the poison worked in a most effective and dangerous manner upon his victims. But where the accused caused the death of two persons by administering to them *dhatura* in order to facilitate the commission of roberry, the same Court, in another case, held that they were guilty of an offence under s. 326 and not under s. 302. It said that "no hard and fast rule can be laid down as to the section of the Indian Penal Code applicable, and that the circumstances of the particular case must be taken into consideration." It further observed that it had not been shown that the accused administered *dhatura* with such intention or knowledge as would make them guilty of murder.[7] In case of murder by *dhatura* poisoning it is to be determined with what object it is administered. Its use may be merely in order to facilitate the commission of roberry and it does not *per se* and necessarily import contemplation of the victim's death as means towards or as incidental to the main end of that offence. The point is to be decided with regard to the circumstances of each case and the best indication of the intention of the offender can be gathered from the amount of *dhatura* which he administers. Where a large quantity of *dhatura* is administered the offender shall be presumed to intend to cause the death of the victim for the successful termination of his crime.[8]

Arsenic.—A person who administers a well-known poison like arsenic to another must be taken to know that his act is so imminently dangerous that it must in all

[1] *Bhagwan Din*, (1908) 30 All. 568.
[2] *Nathu*, (1923) 45 All. 557.
[3] *Gutab*, (1908) 31 All. 148.
[4] *Lolo*, (1910) P. L. R. No. 22 of 1911, p. 171.
[5] (1908) 30 All. 568, 571.
[6] (1908) 31 All. 148.
[7] *Sadhu*, (1918) P. R. No. 19 of 1919.
[8] *Kesar Din*, (1919) 21 P. L. R. 6.

probability cause death or such bodily injury as is likely to cause death, and, if death ensues, he is guilty of murder, notwithstanding that his intention may have been to cause death. Where the accused administered arsenic to a boy nine years of age with the object of preventing the father of the boy from appearing as a witness against himself in a criminal case, but in such quantity that the boy died in the course of three days, it was held that he was guilty of murder, though his intention might not have been to cause death.[1] The accused sent sweetmeats poisoned with arsenic to A, with the intention of causing her death and that A, as well as D and C to whom she gave a part of the sweetmeat, all became seriously ill as a consequence of partaking of it but they all recovered from the effect of the poison. It was held that the accused was guilty of attempting to murder B and C as well.[2]

3. Clause 3.—'With the intention of causing bodily injury to any person ...sufficient in the ordinary course of nature to cause death.'—The distinction between this clause and clause 2 depends upon the degree of probability of death from the act committed. If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury *sufficient* in the ordinary course of nature to cause death; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury *likely* to cause death.[3]

In the case of some classes of injuries, it is easy to say what was intended; for instance, in a wound with a knife in the abdomen. A man who inflicts such a wound intends to inflict a wound which we must know will be dangerous to life. But in the case of wounds with blunt instruments, the intention is not so clear. The effect of a severe blow upon one man will be very different from what it will [illegible] d
[illegible] d
[illegible]
hood of death is so great that the bodily injury intended to be inflicted must be held to be an injury sufficient in the ordinary course of nature to cause death so as to bring the case within the third clause of s. 300. Where the likelihood is not sufficiently high, the offence is that of culpable homicide not amounting to murder.[5]

It cannot always be assumed that, when a man strikes a blow on the head, he intends to cause death or injury sufficient to cause death or even injury likely to cause death.[6] Owing to a quarrel which the deceased had with the accused, the latter armed himself with an iron-shod stick and struck one blow with it on the head of the deceased which caused his death. He was convicted of murder. It was held that, inasmuch as it was possible that the blow struck by the accused exceeded in violence the injury he had in view at the moment of striking it, the conviction should be altered from murder to culpable [illegible] der.[7] Where a person who struck a blow on the h [illegible] with such violence as to cut through the skull, [illegible] the intention of causing death or such bodily injury as is likely to cause death and was guilty of murder.[8]

Cases.—Stabbing in a vital part.—The accused stabbed the deceased with a dagger in the back The wound, though not severe, was in such a part of the body

[1] *Gauri Shankar*, (1918) 40 All. 360.
[2] *Ladha Singh*, (1920) 3 L. L. J 191.
[3] *Po Sin* alias *Po Sin Gyi*, (1909) 5 L. B R. 80; *Ayalu*, (1923) 1 Rang. 285
[4] *Murvala Kondaiya*, (1882) 1 Weir 300.
[5] *Ayalu*, sup.
[6] *Nga Tun Bar*, (1907) 14 Burma L. R. 264; *Ramza*, (1922) 6 L. L. J. 533.
[7] *Sardarkhan Jardikhan*, (1916) 18 Bom. L. R. 793, 3 Bom. Cr. C. 211, 44 Bom. 27, followed in *Ghulam Jilani*, (1925) 26 P. L. R. 430, 2 L. C. 37.
[8] *Tek Singh*, (1925) 7 L. L. J 175, 26 P. L. R. 221.

that it was considered dangerous; but the dagger did not penetrate to any great length. The wound healed in about seven days, at the end of which time symptoms indicative of tetanus were observed and the deceased died from that cause on the following day. According to the medical evidence in the case, tetanus was caused by a bacillus, which entered the body through the breach of surface, caused by a wound. It was held that there was no reasonable doubt that tetanus, which was the cause of the death of the deceased, was due to the wound inflicted by the accused; that when there was a natural explanation of the appearance of tetanus, it was unreasonable to conjecture that tetanus might have resulted independently of the normal cause, and had been the effect of some rare and unexplained conditions.[1] The accused inflicted a stab with a sharp-pointed weapon which entered the upper part of the deceased's stomach, causing rupture of it and of the peritoneum, it was held that his act came within this clause.[2]

Assaulting—A man who has either hacked a fellow-creature about in a most merciless fashion or has practically pounded him to death, cannot escape conviction of murder merely by urging that he was careful to avoid injuring a vital part.[3] Where the accused caused the death of another person by giving him an unmerciful thrashing with sticks, smashing both bones of each forearm, the right elbow and right knee cap, and the occipital area on the right temporal area of the skull, it was held that he was guilty of murder.[4] The accused killed a person by striking him one blow on the head with a long and heavy bamboo. The nature of the injury indicated that very great force was used. It was held that although the weapon used was not one that would of necessity cause fatal injury, the force used was so great as to show that the accused intended to cause injury sufficient in the ordinary course of nature to cause death, and that he was guilty of murder.[5] There can be no doubt that a person delivering a violent blow with a lethal weapon like a *dang* (club) on a vulnerable part of the body such as the head must be deemed to have intended to cause such bodily injury as he knew was likely to cause the death of the person to whom the injury was caused.[6] In the course of a riot the accused attacked and killed a man with dangerous weapons. It was held that the acts of the accused having caused the death of the man, and there being nothing to suggest that they were not sufficient to cause death as their ordinary and natural result, in the absence of proof of circumstances sufficient to give the accused the benefit of any of the exceptions, they must be taken to have intended to kill the man.[7] If a person stabs another in the abdomen with sufficient force to penetrate the abdominal walls, and the internal viscera, he must undoubtedly be held, whatever his station in life, to have intended to cause injury sufficient in the ordinary

grave and sudden.[1] Where death was caused by an act done while in a state of intoxication, voluntarily induced, and the accused was convicted of causing grievous hurt, it was held that the accused should have been charged with culpable homicide not amounting to murder.[2]

4. Clause 4.—'Person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death ... without any excuse for incurring the risk of causing death.'—" To cause death merely by doing an act with the knowledge that it is so imminently dangerous that it must in all probability cause death, does not constitute murder as defined in cl. 4 of s. 300, but is mere culpable homicide not amounting to murder. In order that an act done with such knowledge should constitute murder, it is also necessary that it should be committed 'without any excuse for incurring the risk of causing death or such bodily injury.' An act done with such knowledge alone is not *prima facie* an act of murder, subject to proof that there is some excuse. It becomes an act of murder only if it can be positively affirmed that there was no excuse. The requirements of this clause are not satisfied by the act of homicide being an act of extreme recklessness : it must be a wholly inexcusable act of extreme recklessness. It follows that when in view of all the circumstances found to exist in a particular case, it cannot be affirmed of [illegible]

[illegible]

under s. 299, cl. (3). It is culpable homicide because the act causing death is done with the knowledge that the actor is thereby likely to cause death ; it is not murder because it does not satisfy both parts of the definition of murder in cl. 4 of s. 300. Being culpable homicide and not being murder, the act is necessarily culpable [illegible] at class of cases where [illegible] many persons in jeopardy without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequence. As, for example, where death is caused by firing a loaded gun into a crowd (*vide* ill. (*d*)), by poisoning a well from which people are accustomed to draw water, by opening the draw of a bridge just as a railway passenger train is about to pass over it. In such and the like cases, the imminently dangerous act, the extreme depravity of mind and the regardlessness of human life, properly place the crime upon the same level as the taking of life by deliberate intention.[4]

Scope.—This clause cannot be applied until it is clear that clauses 1, 2 and 3 of the section each and all of them fail to suit the circumstances.[5] It does not apply to a case in which death has been caused by an act done with the intention of causing bodily injury to a particular person. In such a case the question whether the offence is murder or not must be decided by reference to the first three clauses of the section and the exceptions.[6] The cases in which this clause has any application are extremely rare, and though it is not easy to attempt to define with any strictness the kind of cases in which that clause comes in, there is one broad distinction between it and the first three clauses—in the first three clauses the important thing is an intention to kill or to hurt, while the fourth clause says nothing about intention.[7]

1 [illegible]
2
3
4
5 *Ghufar*, (1887) P. R. No. 62 of 1887.
6 *Shwe Ein*, (1905) 3 L. B. R. 122, 12 Burma L. R. 171, followed in *Nga Nu Ban*, (1906) 13 Burma L. R. 199.
7 *Abdul Karim*, (1914) P. R. No. 32 of 1914.

Provocation caused by words or gestures.—According to English law mere words, or gestures, not accompa [illegible] a blow will not, in point of law, [illegible] This, however, is a general rule of law, and under special circumstances there may be such a provocation of words as will have the effect of reducing the crime to manslaughter; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter.[2] The reason for this exception is that a sudden confession is treated as equivalent to discovery of the act itself.[3] Mere suspicion of a wife's adultery is not sufficient to reduce a husband's homicide of the suspected person to manslaughter.[4] A statement by the wife that she was going to live with another man, or was about to commit adultery, does not amount to provocation so as to reduce the crime of killing from murder to manslaughter.[5] But the law as to provocation sufficient to reduce homicide to manslaughter is not the same in the case of unmarried as of married persons. "It is a grave offence against the husband for the wife to commit adultery, but there is no such offence when a man is living with another woman. He has no right to object to her going to a house of ill-fame; the case is entirely different."[6]

The authors of the Code remark: "We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact, that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries; nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is any thing but a proof that he is a man of a peculiarly bad heart. It would be a fortunate thing for mankind if every person felt an outrage which left a stain upon his honour more acutely than an outrage which had fractured one of his limbs. If so, why should we treat an offence produced by the blameable excess of a feeling which all wise legislators desire to encourage, more severely than we treat the blameable excess of feelings certainly not more respectable?...

"A person who should offer a gross insult to the Mahomedan religion in the presence of a zealous professor of that religion, who should deprive some high-born Rajput of his caste; who should rudely thrust his head into the covered palanquin

reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder (*e.g.*, a person afflicted with defective control and want of mental balance) of his self-control.[1] The provocation must be such as will upset, not merely a hasty and hot-tempered person, but one of ordinary sense and calmness.[2] The act must be done whilst the person doing it is deprived of self-control by grave and sudden provocation. That is, it must be done *under the immediate impulse of provocation.*[3] *The deprivation of the power of* self-control must continue in order to benefit a man who kills another under circumstances of grave provocation.[4] The fatal blow should be clearly traced to the passion arising from that provocation. Therefore, if, from the circumstances, it appear that the party, before any provocation given, intended to use a deadly weapon towards anyone who might assault him, this would show that a fatal blow given afterwards was not to be attributed to the provocation, and the crime would therefore be murder.[5] Again, if the act was done after the first excitement had passed away, and there was time to cool, it is murder.[6]

As to the question how long the law will allow for the blood continuing heated under the circumstances, and what shall be considered as evidence of its having cooled, it is laid down in East,[7] that in every case of homicide, howgreatsoever the provocation may have been, if there be sufficient time for the passion to subside and for reason to interpose, such homicide will be murder. With respect to what interval of time shall be allowed for passion to subside the immediate object of enquiry should be whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given : for if from any circumstances whatever it appear that the party reflected, deliberated [illegible] or if in legal presumption there [illegible] vill amount to murder ; as be [illegible] to human frailty. Such malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature. The killing will amount to murder if between the provocation received and the stroke given, the party giving the stroke fall into other discourse, or diversions, and continue so engaged, during a reasonable time for cooling ; or if he take up and pursue any other business or design, not connected with the immediate object of his passion, or subservient thereto, so that it may reasonably be supposed that his intention was one called off from the subject of his provocation ; or if it appear that he meditated upon his revenge, or used any trick or circumvention to effect it, which shows a deliberation inconsistent with the excuse of sudden passion. It may be further observed, in respect to time, that in proportion to the lapse of time between the provocation and the stroke, less allowance ought to be made for any excess of retaliation, either in the instrument, or the manner of it. The mere length of time intervening between the injury and the retaliation is evidence in itself of deliberation.

The question to be determined in every case will be : " Was there time for the blood to cool and for reason to resume its seat "?[8] If there was, the offence will be murder ; if there was not, the offence will be culpable homicide not amounting to murder.

'Grave and sudden provocation.'—The provocation must be grave and sudden and of such a nature as to deprive the accused of the power of self-control. In determining whether the provocation was so, it is admissible to take into account

[1] *Lesbini*, [1914] 3 K. B. 1116.
[2] *Sohrah*, (1924) 5 Lah. 67.
[3] *Nokul Nushyo*, (1867) 7 W. R. (Cr.) 27 ; *Ghausar Singh*, (1884) P. R. No. 33 of 1884.
[4] *Bechoo Saout*, (1873) 19 W. R. (Cr.) 35.
[5] *John Thomas*, (1837) 7 C. & P. 817.
[6] *Yasin Sheil*, (1869) 12 W. R. (Cr.) 68, 4 Beng. L. R. 6 ; *Lochan*, (1886) 8 All. 635.
[7] Pleas of the Crown, Vol. I, p. 252.
[8] *Dhira*, (1877) Unrep. Cr. C. 122.

the condition of the mind in which the offender was at the time of the provocation.[1] But it is not a necessary consequence of anger, or other emotion, that the power of self-control should be lost.[2] It must be shown distinctly not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause.[3] It has, therefore, been held in a series of cases that the commission of adultery by a wife within the sight of her husband is a sufficient grave provocation to bring the husband within this exception if he kills her. In such cases very mild punishment is usually inflicted.

"It must not, however, be understood that any trivial provocation, which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter...For, where the punishment for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty, it is one of the true symptoms of what the law denominates malice, and therefore the crime will amount to murder notwithstanding such provocation."[4]

When the derangement of the mind reaches that degree that the judgment and reason ceases to hold dominion over it—their authority being suspended and yie[illegible] who was before a rat[illegible] becomes incapable of [illegible] It is to such a state of mind that the law in judging of acts [illegible] tions. And no mental perturbation [illegible] leaves sway to reason and the power of self-control, can reduce a murder to an offence within the range of this mitigating exception.[5]

The provocation must be such as will upset not merely a hasty and hot-tempered person, but one of ordinary sense and calmness.

'Sudden.'—Grave provocation, arising from injuries extending over a long series of years, has been held to be insufficient, in the absence of evidence of recent and sudden provocation to reduce the off[illegible] to murder. The accused killed the decea[illegible] the deceased had seduced his cousin, had [illegible] cut down trees, had persuaded the woman, whose land he cultivated to turn him away, had usurped his share in the village, and had struck him and constantly behaved towards him in an insolent manner, it was held that there was nothing in the circumstances mentioned by him which could be taken as provocation so grave and sudden as to reduce the offence to culpable homicide not amounting to murder.[6] Where the accus[illegible]'s concubine refused to abandon another [illegible] with the woman and leaving her, [illegible] stated he had purchased with the [illegible] the provocation may have been [illegible] reduce the offence to culpable homicide not amounting to murder.[7] The refusal of a wife to have connection with her husband is held not to constitute a grave and sudden provocation.[8]

[1] *Khogayi*, (1879) 2 Mad 122; *A. We*, (1900) 1 U. B. R. (1897-1901) 291.

[2] *Deoji Govindji*, (1895) 20 Bom. 215; [illegible] (1900) 24 Bom. 561;

[4] 1 East P. C. 234.

[5] M. & M. 212.

[6] *Moni Prodhano*, (1882) 1 Weir 306.

[7] *Ghuntappa*, (1882) 1 Weir 306.

[8] [illegible] (1882) 1 Weir 308; [illegible] R [illegible] Cr.) [illegible] nce [illegible] ent [illegible] in such a case.

(1866) 5 W. R. (Cr.) 43.

'**Causes the death of the person who gave the provocation**'.—The first exception only applies when the death of the person giving provocation has been caused. Cases like those which are not unfrequent of a person under excitement running amock and killing all whom he meets; are not mitigated by this exception.

'**Mistake.**'—See s. 76, *supra*. This exception treats the case of a person killed by mistake or accident as culpable homicide not amounting to murder.

'**Accident**'—See ills. (*a*) and (*b*) and s. 80, *supra*.

6. Proviso 1.—'Provocation is not sought or voluntarily provoked.'—Where the provocation is sought by the prisoner, it cannot furnish any defence against the charge of murder. A and B were at some difference. A bade B take a pin out of the sleeve of A, intending thereby to take an occasion to strike or wound B, and B did so accordingly, and then A struck B whereof he died. This was held to be murder because there was no provocation, since the act was done with the cons [illegible] ke occasion to ki [illegible] n sought to be m [illegible] [2] [illegible] would give B a [illegible] t was held that A had committed murder as the provocation given was courted by him.[3]

As to the definition of the word 'voluntarily,' see s. 39, *supra*.

7. Proviso 2.—The wording of this provision does not limit its provisions to public servants only, but includes all persons acting according to the commands of law.[4] The Law Commissioners in their First Report[5] say: "We apprehend that grave provocation given by anything done under cover of obedience to the law, or under cover of its authority, or by a public servant, or in defence, *in excess* of what is strictly warranted by the law, in point of violence, or as regards the means used, or the manner of using them, and the like, would be admissible in extenuation of homicide under this clause." As to 'public servant,' see s. 21, *supra*.

8. Proviso 3.—A person lawfully exercising the right of private defence may give provocation to the aggressor, but the aggressor is thereby not entitled to take shelter under the first exception. "For example, take the case of Wat Tyler. He was a public officer, a tax gatherer, who came to 'exercise his lawful powers' in that capacity, but doing so in a manner unwarranted and highly offensive, Tyler was excited to 'violent passion', and in his rage killed him on the spot. The Commissioners upon this say, 'so far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a Judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter.'"[6] See ill. (*e*) to Exception 1. As to the right of private defence, see ss. 96-106, *supra*.

9. Explanation.—The Calcutta High Court has laid down that provocation is a question of fact, and where the Judge and assessors have found on the evidence that the accused is not guilty of murder, the High Court cannot interfere, as no question of law is involved.[7] But in a similar case the Allahabad High Court has treated this question as one of law.[8] The Allahabad view is not in accordance with the present state of law in England and is contrary to the principle of this explanation.

[1] 1 Hale 457; 1 East P. C. 239.
[2] *Mohan*, (1886) 8 All. 622; *Lochan*, (1886) 8 All. 635.
[3] 1 Hawk, P. C. c. 31, s. 24.
[4] *Vide* s. 79, *sup.*
[5] Section 277.
[6] *Ibid.*
[7] *Hari Giree* (1868) 10 W. R. (Cr.) 26; 1 Bing. L. R. (A. Cr. J.) 11.
[8] *Lochan*, *sup.*

raised against the accused, he *turned and shot dead* one of his pursuers. The *accused was held to have committed culpable homicide* and not murder.[1]

11. Exception 3.—Public servant or person aiding him exceeding the powers given by law.—This exception protects a public *servant, or a person* aiding a public servant *acting for the advancement* of public justice, if either of them exceed the powers given to them by law and cause death. It *gives protection so long as the public servant acts in good faith*; but if his act is illegal and unauthorized by law, or *if he* glaringly exceed the powers given to him by law, the exception will not protect him.

As to 'good faith,' see s. 52, *supra*; and as to 'public servant,' *see s. 21, supra.*

Cases.—*Public* **servant exceeding the power given by law.**—Where the prisoners, fearful of being punished if they allowed an outlaw to escape, and thinking that they were acting lawfully, [illegible] n by a Police Constable, and the *lumberd* [illegible] aw, for whose arrest a reward had been [illegible] *him while he* was endeavouring to escap [illegible] came under this exception *and amounted to culpable homicide not amounting to murder.*[2]

Public **servant doing an unlawful Act.**—Where death was caused by a constable under the orders of a superior officer, it being found that neither he nor his superior officer believed that it was necessary *for the public security* to disperse *certain* reapers by firing on them, it was held that he was guilty of *murder, since he was "not protected in that he obeyed* the orders of his superior officer."[3]

12. Exception 4.—Death caused without premeditation in a sudden fight in the heat of passion without taking undue advantage or acting in a cruel manner.—The exception directs the attention to the distinction between the present and some of the preceding exceptions. In many cases of mutual contest, homicide caused by the person who received the first blow or the provocation, would, under *these* [illegible] But if that person's death had been c [illegible] not have been within the reach of any [illegible] tion is meant to apply *to cases in which* [illegible] been struck or some provocation given [illegible] oever way the quarrel may have origina [illegible] parties puts them, in respect of *guilt*, [illegible] *for, there* is a mutual combat, and blows on each side. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood already heated warms at every subsequent stroke, and the voice of reason is heard on neither side in the heat of passion. Under such circumstances there cannot be much room for discriminating between the respective degrees of blame with reference to the state of things at *the commencement of the fray.*[4]

This exception requires three things:

(1) Sudden fight;

(2) absence of premeditation; and

(3) no undue advantage.

It matters not what the cause *of* the quarrel is, whether real or imaginary, or who draws or strikes first; provided *the occasion* be sudden, and not urged as *a cloak for pre-existing malice.*[5]

To bring a case within this exception all the facts mentioned in it must be *found.*[6] *If* two men are fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have *taken an*

[1] *Sher Baz*, (1879) P. R. No. 1 of 1880.

[2] *Amân*, (1873) 5 N. W. P. 120; *Fatirgada*, (1882) Weir (3rd Edn.) 180.

[3] *Subba Naik*, (1888) 21 Mad. 249.

[4] M. & M 264.

[5] 1 East P. C. 241.

[6] *Alut Mahomed*, (1865) 3 W. R. (Cr.) 18.

undue advantage and is not entitled to the benefit of this exception.[1] This exception applies to cases in which there is no wish to kill or to hurt.[2]

'Sudden.'—This word implies that the fight should not have been pre-arranged. A fight is not *per se* a palliating circumstance, only an unpremeditated fight is such.[3] If, on any sudden quarrel, blows pass without any intention to kill or injure another materially, and, in the course of the scuffle, after the parties are heated by the contest, one kills the other with a deadly weapon, it is culpable homicide and not murder.[4] The lapse of time between the quarrel and the fight is therefore a very important consideration. If there intervenes a sufficient time for passion to subside and for reason to interpose, the killing will be murder.[5] The occasion must not only be sudden, but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is peculiarly requisite where the attack is made with deadly or dangerous weapons.[6] If A has formed a deliberate design to kill B, and, after this, they meet and have a quarrel, and many blows pass, and A kills B, this will be murder, if the jury are of opinion that the death was in consequence of previous malice, and not of the sudden provocation.[7]

"If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things, first, that there should be that provocation, and, secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation...If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which the law terms the 'malice,' in the definition of wilful murder, then the offence would not be manslaughter. Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows, then you could not attribute that act to the passion of anger, and the offence would be murder And so if you find that, before the stroke is given there is a determination to punish any man who gives a blow, with such an instrument as the one which the prisoner used (*viz*, a sword stick), because, if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving such a wound to the passion of anger excited by that blow, for no man who was under proper feelings,—none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument."[8] "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter: but it depends upon the time elapsing between the blow and the injury; and also, whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place.. If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter But if you think that the act was the act of a wicked, *malicious and diabolical mind...then you will find him guilty of murder.*"[9]

Duelling does not come within this exception. It is not protected at all. For it is never without premeditation. Where two persons deliberately agree

[1] *Po Kin*, (1904) 2 L. B. R. 320
[2] *Nawab*, (1914) P. R. No. 31 of 1914.
[3] *Rohimuddin*, (1879) 5 Cal. 31.
[4] *William Snow*, (1776) 1 Leach 151.
[5] Foster, 296.
[6] 1 East P. C. 242.
[7] *William Kirkham*, (1837) 8 C. & P. 115.
[8] Per Park, B., in *John Thomas*, (1837) 7 C. & P 817, 819
[9] Per Lord Tenterden in *Lynch*, (1832) 5 C. & P. 324.

to fight, and meet for that purpose, and one is killed; the other cannot help himself by alleging that he was first struck by the deceased, or that he had often declined to meet him and was urged by importunity, or that he meant not to kill, but only to disarm his adversary; for since he deliberately engaged in an act highly culpable in defiance of the laws, he must at his peril abide the consequence.[1] All persons who are present, encouraging and promoting a duel that results in death, will be guilty of murder.[2]

Without the offender's having taken undue advantage or acted in a cruel or unusual manner.—Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly [illegible] and dangerous in its nature, the accused c[illegible]

"When persons fight on fair terms, [illegible] with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to cause death, if death ensues—it is manslaughter; and if persons meet originally on fair terms, and, after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder."[3]

Cases.—*Sudden fight.*—An unpremeditated assault (ending in an affray in which death is caused) committed in the heat of passion upon a sudden quarrel (it being immaterial which party offers the provocation, or commits the first assault) comes within this exception.[4] Where the accused while smarting from a severe blow from a stick in the midst of a sudden fight and possibly apprehensive of further violence, finding a knife at hand, took it up, and in the *melee* inflicted the wound which caused the death of the deceased, it was held that the case fell within this exception.[5]

A conviction for murder was held to be wrong in a case where the accused taking advantage of an incident which occurred in what till then had been a fair fight, struck his opponent, and knocked him over.[6] Where a person, under heat of passion, on a sudden quarrel, snatched up a log of a heavy wood and struck another with it on a vital part [illegible] ich force and vindictiveness as to cause that [illegible] ot, it was held that the offence committe [illegible] to murder.[7] A dispute having sudde[illegible] -cane crop three men armed wi[illegible] in cutting the crop and beat [illegible] broken in three places. It did not [illegible] injuries had been caused by which of the assailants who were acting in concert. It was held that the accused were guilty of culpable homicide not amounting to murder inasmuch as the matter was sudden and the injuries had been inflicted in the heat of passion.[8]

Undue advantage.—Where a person, during the course of a sudden fight, without premeditation and probably in the heat of passion, took undue advantage and acted in a cruel manner in using a knife or a dagger, it was held that there was no ground for holding that his act did not amount to murder.[9] If two men are fighting and one of them is unarmed while the other uses a deadly weapon,

[1] 1 East P. C. 242.

[2] *Cuddy*, (1843) 1 C. & K. 210; *Murphy*, (1833) 6 C. & P. 103; *Rice*, (1803) 3 East 581.

[3] Per Bayley, J., in *Whitely*, (1820) 1 Lewin 173, 175.

[4] *Zalim Ras*, (1864) 1 W. R. (Cr.) 33; *Ameera*, (1866) P. R. No. 12 of 1866.

[5] *Somiruddin*, (1875) 24 W. R. (Cr.) 48; *Feroz*, (1924) 28 P. L. R. 620.

[6] *Kewal Dosad*, (1864) W. R. (Gap No.) Cr. 36.

[7] *Rajoo Ghose*, (1867) 7 W. R. (Cr.) 70 [106]. (In the original Edition of the Weekly Reporter there is a misprint in numbering the [illegible]

the one who uses such a weapon must be held to take an undue advantage and not entitled to the benefit of this exception.[1] Fighting under an advantage is always murder.[2] The two accused, brothers, between whom and the deceased and his son was bad feeling, came upon the deceased in the fields and setting upon him, beat him with sticks so severely that he died within a few minutes, no less than fourteen ribs being fractured resulting in the rupture of both the lungs and of the spleen. It was held that they were guilty of murder as the intention was clear whether to kill or to cause dangerous injury.[3]

Where the accused's party pursued the complainants in three boats for a long distance and then when they had them in their power landed and attacked them with spears and killed three of them, it was held that their action did not come within this exception.[4]

13. Exception 5.—Death caused by consent of persons above the age of eighteen years.—The authors of the Code give the following reasons for not punishing homicide by consent so severely as murder: "In the first place, the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honour, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain, the friend who supplies laudanum to a person suffering the torment of a lingering disease, the freed man who in ancient times held out the sword that his master might fall on it, the high-born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law as assassins.

"Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not produce terror through society. When we punish murder with such signal severity, we have two ends in view; one end is, that people may not be murdered, another end is, that people may not live in constant dread of being murdered. The second end is perhaps the more important of the two. For if assassination were left unpunished, the number of persons assassinated would probably bear a very small proportion to the whole population; but the life of every human being would be passed in constant anxiety and alarm. This property of the offence of murder is not found in the offence of voluntary culpable homicide by consent. Every man who has not given his consent to be put to death is perfectly certain that this latter offence cannot at present be committed on him, and that it never will be committed unless he shall first be convinced that it is his interest to consent to it. We know that two or three midnight assassinations are sufficient to keep a city of a million of inhabitants in a state of consternation during several weeks, and to cause every private family to lay in arms and watchmen's rattles. No number of suicides, or of homicides committed with the unextorted consent of the person killed, could possibly produce such alarm among the survivors."[5]

Duelling will not be protected under this exception, for in a duel the object of each party is to kill his assailant.

This exception refers to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be the likely result; but it does not refer to the running of a risk of death

[1] *Po Kin*, (1904) 2 L. B. R. 320.
[2] *Whiteley*, (1829) 1 Lewin 173.
[3] *Nawab*, (1914) P. R. No. 31 of 1914.
[4] *Adil Mohamed*, (1908) 8 C. L. J. 561.
[5] Note M, pp. 145, 146.

from something which a man intends to assert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated.[1] It should receive a strict and not a liberal construction, and in applying the exception it should be considered with reference to the act consented to or authorized, and next with reference to the person or persons authorized, and as to each of these some degree of particularity at least should appear upon the facts proved before the exception can be said to apply. It must be found that the person killed, with a full knowledge of the facts, determined to suffer death, or take the risk of death; and that this determination continued up to, and existed at, the moment of his death.[2]

'Consent' It must be such as has been defined in s. 90, *supra*.

'Illustration'—The case supposed in the illustration to this exception is one of the offences expressly made punishable by s. 305.

English law.—Homicide is neither justified nor extenuated by reason of any consent given by the party killed. Exception 5, therefore, is a departure from the English law.

Cases.—Death caused by consent—Where the accused caused a pile to be lighted, and persuaded a *suttee* to ascend it, after she had once left it, and she was burnt[3]; where the accused acting upon the express desire of an adult emasculated him, and death ensued owing to the rough manner of the operation[4]; where the accused was repeatedly requested by his wife, who was over-whelmed with grief at the death of her child, to kill her, did kill her one night while she was asleep[5]; where certain snake-charmers, by professing themselves able to cure snake bites, induced several persons to let themselves be bitten by a poisonous snake, and from the effect of the bite three of such persons died[6]; and where the accused finding that his life had become unbearable owing to domestic troubles, decided to take his own life and began to load a gun for the purpose, but this having come to the knowledge of his wife, she pressed him hard to kill her first, and in consequence of what she said and the taunts then given to him by his parents, he took her life by firing a shot at her[7]; it was held in all those cases that the accused came under this exception, because in all of them the element of consent had entered in a greater or less degree. The accused killed his step-father, who was an infirm old man and an invalid, with the latter's consent, in order to get three innocent men, his own enemies, hanged. It was held that his act fell within this exception and he was punishable under s. 304.[8]

Premeditated fight—This exception was held not to apply to a case where two bodies of men, for the most part armed with deadly weapons, deliberately entered into an unlawful fight, each being prepared to cause the death of the other, and aware that his own might follow, but determined to do his best in self-defence, and in the course of the struggle death ensued.[9] In a case in which it was found that all the accused were armed with deadly weapons and were guilty of rioting, that the fight was premeditated and pre-arranged, a regular pitched battle or trial of strength between the two parties concerned in the riot, and that one of the accused in the course of the riot, and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that his act amounted to an attempt to murder, the question arose whether that act could

[1] *Rohimuddin*, (1879) 5 Cal. 31. See *Po Set*, (1910) 5 L. B. R. 160.

[2] *Nayamuddin*, (1891) 18 Cal. 484, F. B., overruling *Samshere Khan*, (1880) 6 Cal. 154, in which it was said that this exception protected duelling.

[3] *Saheboll Reetioll*, (1863) 1 R. J. P. J. 174.

[4] *Baboolun Hyrah*, (1866) 5 W. R. (Cr.) 7.

[5] *Ananto Rurnagat*, (1866) 6 W. R. (Cr.) 57.

[6] *Poonai Fattemah*, (1869) 12 W. R. (Cr.) 7, 3 Beng. L. R. 25.

[7] Per Aston and Heaton, JJ., in *Purushotam Nilkant Kasbekar*, Criminal Confirmation Case No. 9 of 1906, decided on the 2nd August 1906.

[8] *Ujagar Singh*, (1917) P. R. No. 45 of 1917.

[9] *Rohimuddin*, sup.

be said to bear a less grave character by reason of this exception. It was held that upon such finding the case did not fall within the exception.[1]

Death caused by the voluntary act of the deceased resulting from fear of violence.—If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result.[2] "If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them and tumble over a precipice to avoid them, then murder would have been committed."[3] "A man may throw himself into a river under such circumstances as render it not a voluntary act; by reason of force, applied either to the body or the mind. It then becomes the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was *no* other way of escape, but that it was such a step as a reasonable man might take."[4] The act of the person attacking will, in such a case, amount to murder. Where the deceased was on horse-back, and the accused struck him with a stick, and the deceased, from a well grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened, and threw him, giving him a mortal fracture, it was held that the accused was guilty of murder.[5] Similarly, where the accused in unlawfully assaulting a girl, who at that time had in her arms an infant, so frightened the infant that it had convulsions, although previously healthy, and from the effects of which it eventually died in about six weeks, it was held that the accused was guilty of manslaughter.[6]

It is, however, submitted that the wording of this section and s. 307 does not seem to cover such acts.

Culpable homicide by causing death of person other than person whose death was intended.

301. If a person by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

COMMENT.

The doctrine inculcated in this section is called, by Hale and Forster, a transfer of malice. Others describe it as a transmigration of motive. Coke calls it coupling the event with the intention and the end with the cause. If the killing take place in the course of doing an act which a person intends or knows to be likely to cause death, it ought to be treated as if the real intention of the killer had been actually carried out.

"It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the

[1] *Nayamuddin*, (1891) 18 Cal. 484, F.B., overruling *Samshere Khan*, (1880) 6 Cal. 154.

[2] Per Coleridge, C. J., in *Halliday*, (1899) 61 L. T. 701, 702; *Martin*, (1881) 8 Q. B. D. 54.

[3] Per Denman, J., in *Towers*, (1874) 12 Cox 530, 533.

[4] Per Erskine, J., in *Pitts*, (1842) Car. & M 284, 285.

[5] *Hickman*, (1831) 5 C. & P. 151.

[6] *Towers*, sup

from the illustration to the section; and the rule then goes on to state that the *quality* of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured, and not with reference to his intention or knowledge with reference to the person actually killed, a rule deducible from the language of the ss. 299 and 300 though not, perhaps, lying on their very surface." Sundara Aiyar, J., said :—"That section apparently [illegible] nded or known [illegible] occur but the [illegible] It evidently does not apply where the death both of the person whose death was in contemplation and of another person or persons, has occurred Can it be said that, in such a case, the doer of the act is guilty of homicide with reference to those whose death was not intended by him and could not have been foreseen by him as likely to occur? Are we to hold that a man who knows that his act is likely to cause the death of one person is guilty of the death of all the others who happen to die, but whose death was far beyond his imagination? Such a proposition it is impossible to maintain in criminal law. Section 301.. has reference to a case where a person intending to cause the death of A, say by striking or shooting him, kills B because B is in the place where he imagined A to be, or B rushes in to save A and receives the injury intended for A The reason for not exculpating the wrong-doer in such cases is that he must take the risk of some other person being in the place where he expected to find A, or, of some one else intervening between him and A. The section is a qualification of the rule laid down in s. 299 and is evidently confined to cases where the death of the person intended or known to be likely to be killed does not result. If a person is intended by s. 299 to be held to be guilty for deaths which are not known to be likely to occur, then that section might itself have been worded differently so as to show that the particular death caused need not have been intended or foreseen and, what is more important, s. 301...would not be limited to cases where the death of the particular individual intended or foreseen does not occur. The general theory of the criminal law is that the doer of an act is responsible only for the consequences intended or known to be likely to ensue; for otherwise he could not be said to have caused the effect 'voluntarily,' and a person is not responsible for the involuntary effects of his acts. Illustrations A and B in my opinion support this view. Sections 323 and 324 show that a person is responsible in the case of hurt or grievous hurt only for what he causes voluntarily; and s. 321 shows that hurt to the particular person in question must have been intended or foreseen In the eye of the law, no doubt, a man will be taken to have foreseen what an ordinary individual ought to foresee, and it will not be open to him, to plead that he himself was so foolish as, in fact, not to foresee the consequence of his act. A person might in some cases be responsible for effects of which his act is not the proximate cause where the effect is likely to arise in the ordinary course of events to result from the act. This rule will certainly hold good where a person's act set in motion only physical causes which lead to the effects actually occurring; when the effect is not due merely to physical causes set in operation by an act, but other persons' wills intervening are equally necessary [illegible]

[illegible]

to be the cause of a consequence which would not result without the intervention of another human agency." Abdur Rahim, J., observed :—"Obviously it is not possible to lay down any general test as to what should be regarded in criminal law as the responsible cause of a certain result when that result as it often happens is due to a series of causes. We have to consider in each case the relative

value and efficiency of the different causes in producing the effect and then to say whether responsibility should be assigned to a particular act or not as the proximate and efficient cause. But it may be observed that it cannot be a sufficient criterion in this connection whether the effect could have been produced in the case in question without a particular cause, for it is involved in the very idea of a cause that the result could not have been produced without it. Nor would it be correct to lay down generally that the intervention of the act of a voluntary agent must necessarily absolve the person between whose act and the result it intervenes. For instance, if A mixes poison in the food of B with the intention of killing B and B eats the food and is killed thereby, A would be guilty of murder even though the eating of the poisoned food which was the voluntary act of B intervened between the act of A and B's death. So here the throwing aside of the sweetmeat by Appala Narasimhulu and the picking and the eating of it by Rajalakshmi cannot absolve the accused from responsibility for his act. No doubt the intervening acts or events may sometimes be such as to deprive the earlier act of the character of an efficient cause."

The Allahabad High Court has approved of the view of the majority of the learned Judges in the Madras case. A woman was carrying on an intrigue with a man who gave her some poison to administer to her husband. She prepared sweetmeats mixed with the poison which was eaten by one M who died as the result thereof. The husband and three others also partook of the sweetmeats and suffered considerably but did not die. She, however, intended to kill her husband and not M. It was held that she was guilty of murder.[1]

CASES.

Where the accused intending to kill the husband of a woman, with whom he was carrying on an adulterous intrigue, waylaid him in the dusk, but by mistake killed a third party who came along the road[2]; where the accused intending to kill B, killed A by a blow with a highly lethal weapon whom he had no intention [illegible] n old woman [illegible] effect of the [illegible] was that of murder.

302. Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine.

Punishment for murder.

COMMENT.

Where the legislature recognizes two sorts of punishment it implicitly recognizes the existence of degrees in crimes technically the same. These degrees are to be determined by the circumstances of the case, and among them, and perhaps the most important of them, are the state of mind of the offender and the degree of moral obliquity displayed by the act. There is an undoubted connection, though one not easily formulated, between the ethical quality of a crime and its proper punishment.

"Although the law has provided an alternative punishment, either is not to be passed indifferently at the discretion of a Judge; but...where the accused has been found guilty of deliberate murder, he must pass sentence of death, and... the minor sentence should only be awarded when there is some extenuating circumstance, some excuse which, though the law does not regard it as sufficient

[1] *Jeoli*, (1916) 39 All. 161.
[2] *Government* v. *Govinda Ballajee*, (1828) 1 M. Dig. N. S. 125.
[3] *Phomonee Ahum*, (1867) 8 W. R. (Cr. 78.
[4] (1869) 12 W. R. (Cr. L.) 2.

to reduce the killing to the offence of culpable homicide not amounting to murder, still is ground for looking leniently on the act."[1]

According to the Bombay High Court the sentence consequent upon a conviction for murder must be death. If there exist any grounds for mercy, that circumstance will have to be considered by the Crown or its executive minister, and all that a Court of Justice can do is to submit a recommendation after passing the sentence of law.[2] The Calcutta High Court, however, is of opinion that attention should be paid to the age of the accused. Where, therefore, a girl of sixteen was charged with deliberately killing her husband by administering arsenic she was transported for life in consideration of her age.[3] The sentence of death is not passed if there are some extenuating circumstances. Where the accused murdered his wife under an unfounded suspicion as to her chastity, the sentence was reduced to transportation.[4] When convicting of murder the only discretion which the law allows to the Court is to determine which of the two punishments prescribed should be awarded, regard being had to the circumstances of the particular case.[5] The fact that the accused had the capital sentences suspended over their heads for nearly six months is a matter for the consideration of the High Court. The sentence of death which might have been rightly passed by the Sessions Judge in the first instance ought not to be confirmed unless he thinks that such sentence should be carried out at the time final orders are passed.[6]

In Burma, where knives are freely used on the lightest occasion, it is unsafe to lay down as a general rule that mere absence of premeditation or deliberate intent to kill is a good ground for abstaining from passing a capital sentence in a case where a knife is used. To justify the passing of a sentence of transportation for life in cases of murder the Judge should find that there are really extenuating circumstances, not merely an absence of aggravating circumstances. The extreme sentence is the normal sentence, the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death but whether there are reasons for abstaining from doing so.[7] It is not necessary to pass sentences of death on all the persons taking part in an ordinary murder as distinguished from murder in dacoity. A death sentence should be reserved for the principal offenders.[8] In a Burma case the following are stated as some of the reasons which appear to be sufficient for not passing a capital sentence upon a conviction under s. 302:—

"(1) The offender being under eighteen years of age.

(2) There having been no intention to commit murder, the offence falling under the fourth clause of s. 300, Indian Penal Code.

(3) The murder, though intentional, having been committed without premeditation, and in the heat of passion, without special brutality.

(4) The murder having been committed upon grave provocation, the provocation not being both grave and sudden so as to reduce the offence to culpable homicide not amounting to murder.

(5) Reasonable doubt as to the sanity of the offender at the time of committing murder, actual insanity not being proved.

(6) Where murder has been committed by more than one person, and it appears that the offender acted under the instigation of another, and [illegible]

[illegible]

[1] Per Wilkinson, J., in *Kamal*, (1873) P. R. No. 13 of 1873.

[2] *Abdurrahman Said*, (1896) Unrep. Cr. C. 852.

[3] *Jasha Bewa*, (1907) 11 C. W. N. 904.

[4] *Dina Bandhu Moitra*, (1903) 8 C. W. N. 218.

[5] *Dewan Singh*, (1895) 22 Cal. 805.

[6] *Autor Singh*, (1913) 17 C. W. N. 1213.

[7] *Nga Tha Sin*, (1902) 1 L. B. R. 216; *Nga Shwe Gon*, (1903) 10 Burma L. R. 123. See also *Shwe Cho*, (1905) 3 L. B. R. 111.

[8] *Mi Shabi*, (1899) P. J. L. B. 564.

with deliberation. The extreme penalty of the law should be reserved for cases of deliberate murder, for cases where murder is committed to facilitate the commission of some other offence or to avoid arrest for an offence and for other heinous cases of murder."[1] In passing sentence on a youth the general principle to be observed is that ordinarily youth is in itself an extenuating circumstance. This circumstance must be taken into consideration by the Court in exercising the discretion vested by this section.[2]

Murders among Jats are actually committed from motives of pride to avenge what appear to be comparatively harmless insults.[3]

Punishment where doubt exists.—L, C, K and D conspired to kill S. In pursuance of such conspiracy, L first, and then C, struck S on the head with a club, and S fell to the ground. While S was lying on the ground, K and D struck him on the head with their club; it was held that, inasmuch as K and D did not commence the attack on S, and it was doubtful whether S was not dead when they struck him, transportation for life was an adequate punishment for their offence.[4]

PRACTICE.

Evidence.—Prove (1) that the death of a human being has actually taken place.

That a murder has been committed by some one, is essentially necessary to be proved.

(2) That such death has been caused by, or in consequence of, the act of the accused.

Where there is no evidence to prove that the accused had anything to do with the death of the deceased, no conviction could stand.[5]

(3) That such act was done with the intention of causing death;[6] or

that it was done with the intention of causing such bodily injury as (*a*) the accused knew to be likely to cause death; or (*b*) was sufficient in the ordinary course of nature to cause death, or

that the accused caused death by doing an act known to him to be so imminently dangerous that it must [illegible] ility cause (*a*) death, or (*b*) such [illegible] sed having no excuse for incurring [illegible]

The mere fact that the [illegible] course of nature, does not [illegible] such bodily injury.[7] There [illegible] the death was done with the intention either [illegible] to cause death. A finding of injury sufficient in the ordinary course of nature to cause death would not of necessity inflicting an injury that was merely likely to cause death would not of necessity amount to murder.[8] The intention or knowledge with which the act which caused death was committed is not constructive or a presumption of law, but a matter of fact to be judged of in each case, and proof of collateral facts to explain the motives and designs of the accused is admissible.[9]

Proof or motive or previous ill-will is not necessary to sustain a conviction for murder in a case where a person is coolly and barbarously put to death.[10] Where the fact of murder has been clearly established, it is by no means incumbent on the prosecution to show what particular motive actuated the criminal's mind

[1] Per Hosking, J. C., in *Maung U*, (1894) P. J. L. B. 112, 114. See to the same effect *Mangray*, O. S. C. 210.

[2] *Chit Thu*, (1918) 9 L. B. R. 165; *Nga Pyan*, (1902) 1 L. B. R. 359, dissented from.

[3] *Pohlo*, (1925) 7 L. L. J. 442.

[4] *Chattar Singh*, (1878) 2 All. 33.

[5] *Rajani Kanta Koer*, (1903) 8 C. W. N. 22.

[6] *Ananda Bhau*, (1905) 7 Bom. L. R. 985.

[7] *Hla Tun*, (1898) P. J. L. B. 452.

[8] *Apalu*, (1923) 1 Rang. 285.

[9] See ill. (*a*) to s. 6, ills. (*b*) and (*c*) to s. 7, ill. (*a*) to s. 8, and ill. (*o*) to s. 14 of the Indian Evidence Act.

[10] *Jaichund Mundle*, (1867) 7 W. R. (Cr.) 60.

and induced him to commit the particular crime.[1] Where, however, the prosecution puts forward a substantive case as to the motive for the crime, the evidence regarding the motive has got to be considered in order to judge of the probabilities. Failure to prove motive, however, cannot outweigh the positive evidence as to the crime.[2]

In cases in which death ensues from violence used, and there is no evidence of intention other than what is to be inferred from the accused's act, it is necessary to consider whether the accused must have known, when committing the act, that—

(a) it might possibly, but was unlikely to, cause death, or injury sufficient in the ordinary course of nature to cause death;

(b) it was likely to cause death or injury sufficient in the ordinary course of nature to cause death;

(c) it probably would cause death or injury sufficient in the ordinary course of nature to cause death.

If the act falls within the first category, it would not amount to more than hurt or grievous hurt; if under the second category, it would be culpable homicide not amounting to murder; if under the third category, it would amount to murder.[3]

Onus.—The prosecution must prove the circumstances which ordinarily constitute the offence of murder; and the accused, the circumstances, if any, of exceptions which take the case out of that category.[4] If a man takes away the life of another, the onus is on him to show circumstances which justify his doing so.[5]

A trustworthy dying declaration corroborated by surrounding circumstances is sufficient to support a conviction for murder.[6]

The accused on his trial is merely on the defensive and owes no duty to any one but himself He cannot be convicted because he has not tried to explain to the Court how a death has occurred or by whose means.[7] Where a Sessions Judge in a trial on a charge of gun-shot murder against N found that N and another person L were seen immediately after the report of the gun at the scene of occurrence each with a gun in his hand, but he did not find which of them fired the fatal shot, his only finding being that either N or L fired the shot that killed the deceased, and there was no finding in the judgment that N and L had a common intention and acted in concert and that the gun was fired in furtherance of their common intention, it was held that the legal inference from those findings must be that neither N or L was guilty of the offence of murder.[8]

In a case of murder it is unsafe to rely upon the evidence of witnesses who have resiled from their previous statements. Where the evidence given at the trial did not implicate the accused but the earlier statements recorded under ss. 288 and 164, Criminal Procedure Code, tended to implicate him and the motive alleged was not proved, it was held that the conviction for murder could not be sustained.[9]

Circumstantial evidence.—A conviction on circumstantial evidence cannot be based unless and until all the inferences to be drawn from the whole history of the case point so strongly to the commission of the crime by the accused that the defence theory appears on the face of it impossible or highly improbable. The

[1] *Lakshman Narayan* Criminal Appeal No. 256 of 1912, decided on 22nd July, 1912, by Chandavarkar and Batchelor, JJ.; *Mohna*, (1924) 7 L. L. J. 69.

[2] *Nishi Kanta Banikya*, (1924) 41 C. L. J. 35.

[3] *Shwe Hla U*, (1903) 10 Burma L. R. 29; *Nga Nu Ban*, (1906) 13 Burma L. R. 199.

[4] *Sheikh Choollye*, (1865) 4 W. R. (Cr.) 35; *Asiruddin Ahmed*, (1904) 8 C. W. N. 714.

[5] *Asiruddin Ahmed*, sup; *Jhakri Chamar*, (1912) 16 C. L. J. 440.

[6] *Karim Khan*, (1908) P. W. R. No. 4 of 1909.

[7] *Jethmal Narayan*, (1894) Unrep. Cr. C. 686.

[8] *Nibaran Chandra Roy*, (1907) 11 C.W.N. 1085.

[9] *Ayyamperumal Pillai*, [1925] M. W. N. 319.

charge of murder, like any other charge of an offence, can be established by inferences, but when there is extremely little in the way of direct evidence it is due to the accused that there should be no exaggeration of minor incidents in the case and that each inference against him should be verified with scrupulous accuracy.[1] In a case of murder by opium poisoning the prosecution evidence that the accused put some sugar into the vessel in which milk was given to the deceased and stirred the milk with his finger after putting the sugar into it and the deceased died a few hours afterwards, was held to be not sufficient for convicting the accused particularly when the motive for murder was not strong and the habit of eating opium was common among the class of people to which the deceased belonged.[2] If it is proved that a person was found soon after the murder of another person, in possession of property which was on the person of the latter when last seen alive, an inference might be drawn in some circumstances that he obtained possession of the property by the murder of the deceased; but it is essential to justify the inference that there is satisfactory proof that the property was in fact in the possession of the deceased when last seen alive.[3] Where the wife of the accused met her death by an unnatural cause, for instance, breaking of her several ribs, the husband was held to be not guilty of murdering her simply on suppositions, as there was nothing very strong connecting him with causing her death intentionally. The mere fact of his trying, with the help of others, to burn the body secretly or taking it in a bundle instead of, as usual, on a bed or litter though suspicious was considered by the Court to be not sufficient evidence of his guilt. An effort to dispose of the body of a dead person in an unusual way is sometimes due to fright of a weak-minded person which can be based on several grounds But no person can be convicted of an offence on pure circumstancial evidence so long as it is compatible with his innocence.[4] A conviction of murder cannot be sustained where the only circumstantial evidence against the accused was that the deceased was seized by the accused and the husband of the deceased in the road, placed on a camel, carried towards a canal in which her body was afterwards found completely dismembered, specially when the evidence of identification of the body is unsatisfactory and there is no direct evidence connecting the accused with the commission of the crime.[5]

Confession.—If A and B are jointly tried for the murder of C, a confession of A is admissible against B.[6] If A is accused of killing C, any statement made by C before his death as to the cause of it is receivable in evidence.[7]

Discovery of the body of the person murdered not absolutely necessary.—Lord Hale has laid down: "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or, at least, the body found dead."[8] This is a rule of caution and not of law. If the circumstantial evidence is very strong a conviction could be made.[9]

The term *corpus delicti* is an invention of the jurists of the middle ages, and was used by them to denote the whole of the facts which constituted the crime of killing when the body of the killed had been found. A mixture of German and Roman views led to the proposition (which has found its way into English penal law) that the proof of the aggregate of facts constituting the offence failed when the body was not found. The expression was then extended to other offences, and was used to denote that the qualities necessary to bring a fact within the opera-

[1] *Bhagwan Kaur*, (1911) P. W. R. No. 16 of 1911; *Ahmed*, (1912) P. W. R. No. 23 of 1913. See *Raghunandan, Koeri* (1920) I P. L. T. 684; *Majhi*, (1924) 7 L. L. J. 48.

[2] *Kala Singh*, (1911) P. W. R. No. 25 of 1911, P. L. R. No. 241 of 1911.

[3] *Movila Kurmiah*, (1913) M. W. N. 145; *Chiareddi Munayya*, (1911) 2 M. W. N. 478, 21 M. L. J. 1071.

[4] *Lachhman Singh*, (1910) P. W. R. No. 11 of 1911.

[5] *Chuhar Singh*, (1914) P. L. R. No. 221 of 1914.

[6] Ill. (a) to s. 30, Indian Evidence Act.

[7] Ill. (a) to s. 32, *ibid.*

[8] 1 Hale P. C. 290.

[9] *Hindmarsh*, (1792) 2 *Leach* 569; *Cheverton*, (1862) 2 F. & F. 833.

tion of a rule of criminal law had been shown to attach to that fact. The jurists of the middle ages, however, never conceived the dead body in murder, or the object stolen in theft, to be that 'corpus.' The expression itself has many vices, but in the sense in which its authors used it is at least intelligible.[1]

The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict the accused person of murder. To recognize any such condition precedent, as being absolutely necessary to conviction in all cases, would be to afford complete immunity and certain escape to those murderers who are cunning or clever enough to make away with, or destroy the bodies of, their victims. Such a principle, once admitted, would, in some instances, render the administration of justice impossible.[2] But when the body of the person said to have been murdered is not forthcoming, the strongest possible evidence as to the fact of the murder should be insisted on before an accused is convicted.[3] Where the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was so committed is as safe as any other such inference.[4] But a judge exercises a proper discretion in not passing a sentence of death in a case in which the dead body has not been found.[5]

If the accused confess in the most circumstantial manner to having committed a murder, the finding of the body is not absolutely essential to a conviction.[6] The Bombay High Court in a case held the accused guilty of attempt to murder where the body was not found but the accused had admitted that he had thrown a girl of less than two years of age into a canal, where the water was deep, and swollen by the monsoon.[7] Before a conviction of murder can be obtained, the Court must be satisfied that the person alleged to have been murdered is actually dead. A man was brutally beaten with *lathis* into unconsciousness by the accused who, subsequently, dragged him along the ground up to a certain river, leaving traces of blood both on the fields and on the railway line. The man had never been seen since It was held that the conclusion that he was dead could not be arrived at though it was exceedingly unlikely that he was alive. In the circumstances the accused were not convicted of murder under s. 302 but of an attempt to murder under this section.[8]

In a charge of child murder, the only evidence was the confession of the accused, and no dead body of the child was found. The jury acquitted the accused of murder, and found her guilty of concealment of birth. It was held that there was no sufficient evidence of a separate existence of the child to convict of murder, but sufficient to convict for concealment of birth, although no dead body had been found.[9]

Bombay Circular.—*Police officer conducting the inquiry is a necessary witness.*—In murder cases the constable or other person, who takes the corpse to the medical officer for *post-mortem* examination, should always be sent to the Sessions Court as a witness.[10] In all important criminal cases, and especially in cases of murder and dacoity, it is desirable that the Police Officer by whom the investigation was conducted should be in readiness to be examined, if necessary, as a witness in regard to the circumstances of the investigation. The Police Officer should bring with him his diary of the case and also the memorandum of the statements of the witnesses taken down by him under s. 161 of the Code of Criminal Procedure.[11]

[1] 7 M. H. C. App. 10.
[2] Per Straight, J., in *Bhagirath*, (1880) 3 All. 383; *Roy*, (1881) 1 A. W. N. 112; *Sedhu*, (1882) 2 A. W. N. 160; *Pooruoollah Sikhdar*, (1867) 7 W. R. (Cr.) 14.
[3] *Adu Shikdar*, (1885) 11 Cal. 635.
[4] *Mehr Khan*, (1886) P. R. No. 6 of 1886. See also *Biru*, (1890) P. R. No. 15 of 1890.
[5] *Budduruddeen*, (1869) 11 W. R. (Cr.) 20.
[6] *Petta Gazi*, (1865) 4 W. R. (Cr.) 19.
[7] *Kashna*, (1894) Cr. R. No. 7 of 1894, Unrep Cr. C. 687.
[8] *Bandhu*, (1924) 22 A. L. J. R. 340.
[9] *Maud Kersey*, (1908) 21 Cox 690.
[10] B. H. C. Cr. C., Ch. V, s. 78, p. 53.
[11] *Ibid*, s. 81, p. 54.

When death or grievous hurt has been caused by a blow from a stick or other weapon, the weight and dimensions of the weapon should be stated in the Sessions Court proceedings, with such particularity as may enable the High Court (which has no opportunity of seeing it) to form an opinion as to the character of the weapon and the intention with which it was probably used.[1]

The Punjab Rule.—In all cases of homicide, where the body is found, the identity of the body with the person said to be deceased must be fully established before the Magistrates trying or inquiring into the case.

In such cases, where there has been a *post-mortem* examination, evidence must be recorded by the Magistrate to prove the custody of the body of the deceased after death, and its delivery for the purpose of *post-mortem* examination to the Medical Officer.[2]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session.

Where culpable homicide has been committed, *prima facie*, the principal issue is: whether the culpable homicide does or does not amount to murder. In all ordinary cases, the issue ought to be tried, and ought not to be prejudged by any authority less than the authority of a Court of Session.[3]

If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why a sentence of death was not passed.[4]

If the case falls under one of the exceptions to s. 300 and the Judge convicts the accused on the charge of culpable homicide not amounting to murder, he should record under which of the exceptions the case falls.[5]

In cases where it is difficult to determine whether the offence committed by the accused is culpable homicide or culpable homicide amounting to murder the accused should be convicted of the lesser offence.[6]

Direction as to commitment.—**Calcutta Circular.**—In cases where death appears to have resulted from injuries voluntarily inflicted by the party accused, Magistrates ought to be very careful not to take it upon themselves to absolve the accused from the graver charge and convict him of hurt or grievous hurt only, unless they are quite clear that there is no sufficient evidence to warrant a commitment to the Sessions for murder, or culpable homicide not amounting to murder.[7]

Chemico-legal and post-mortem examinations.—See Chapter X of the Madras High Court Rules of Criminal Practice; the Pulot h Rules; s. 105 of the Oudh Criminal Digest; and s. 218 of the Upper Burmav pers Manual.

Poisoning.—Judges who try cases of murder by poisoning should invariably put beyond the possibility of doubt the identification of every single thing that is suspected to contain any poison. The evidence should be complete as to the history of such articles and it should be shown that they were kept in proper custody throughout if they are to be relied on as supporting a conviction, and there should be no possibility of any question being raised as to the identity of any such article.[8]

Pleader for defence.—See Bombay High Court Criminal Circular Orders, s. 71, as regards the orders issued for the appointment of pleaders for the defence in murder cases.[9]

Plea of guilty.—' Murde tec and unless it is explained as directed by s. 300, the y accepted. The nature of the

1 See B. H. C. Cr. C., 6. *Misser*, (1866) 1 Agra 3.
2 P. C. C. R. & O., Vo. 26 *Aung*, (1889) L. B. 459.
p. 109. & R. O c. L, s. 45,
o Weir 157.
ana, (L. R. 640.
de r, (1899)
3 *Subbappa Channappa*)
L. R. 303, 2 Cr. C.
P. W. R. 911.
4 Cr Cod

offence should be properly explained to the accused.[1] In capital cases where there is any doubt as to whether an accused person fully understands the meaning and effect of a plea of guilty it is advisable for the Court to take evidence and not to convict solely on the plea of the accused.[2] It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence will be a sentence of death.[3] Before such a plea can be accepted the record should clearly shew that the person who is charged understands and admits such facts as would bring his offence within the definition of murder.[4]

If the accused in answer to a charge of murder states that he committed the offence but alleges provocation, such a statement does not amount to a plea of guilty on the charge. He must be put on his trial in order to ascertain whether the provocation was grave and sudden enough to prevent the offence from amounting to murder.[5]

Charge to the jury in case of provocation.—In charging the jury on the point of provocation in a case of culpable homicide a judge should tell the jury that, to bring the case within the exception, the prisoner must have been deprived of the power of self-control by grave and sudden provocation, that there ought to have been sufficient cause for such loss of self-control, and that the provocation was not voluntarily provoked by the prisoner as an excuse for doing harm.[6]

It is the duty of the judge to explain the distinctions between murder and culpable homicide, and the jury as judges of facts have to decide the issue about sufficient provocation.[7]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, did commit murder by intentionally (*or* knowingly) causing the death of (*specify the name of the deceased*), and thereby committed an offence punishable under s. 302 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

The intent or knowledge necessary to constitute murder should be set out in the charge.[8] The charge should follow the language of s. 300.[9]

Punishment.—"The extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so."[10] If the presiding Judge does not pass the sentence of death, he is bound to record the reasons why death sentence was not passed, that is to say, he must find that there are really extenuating circumstances and [illegible] by the High Court before the sentence is confirmed. Where a sentence for transportation for life has been passed, there are manifest objections to enhancing it even when a sentence of death ought to have been passed. There is no such objection to commuting a sentence of death to one of transportation for life, and such commutation should not be considered as any reflection on the way in which the Sessions Judge has exercised the discretion given him by law.[12] If the

[1] *Aiyavu*, (1885) 9 Mad. 61.
[2] [illegible]
[3] [illegible] 240, [illegible] R. 3
[4] *Nga Han*, (1919) 3 U. B. R. 137.
[5] *Sakharam Ramji*, (1890) 14 Bom. 564; *Nelai Luskar*, (1885) 11 Cal. 410.
[6] *Guneeh Luskur*, (1868) 9 W. R. (Cr.) 72.
[7] *Dadubhai*, (1895) Unrep. Cr. C. 766, Cr. R. No. 30 of 1895.
[8] Per Hosking, J. C., in *Nga Nge*, (1897) P. J. L. B. 328.
[9] [illegible]
[10] [illegible]
[11] [illegible]
[12] [illegible]

Court is satisfied beyond reasonable doubt that the accused is guilty of murder and the circumstances require the imposition of the death penalty, the fact that the conviction is based on circumstantial evidence is not a reason for passing the lesser sentence allowed by law.[1] In passing sentence on an accused person convicted of the offence of murder, regard should be had to the circumstances of the case. Where the accused is convicted of murder only by reason of his case coming under cl. 4 of s. 300, a sentence of death is uncalled for.[2]

The mere absence of premeditation may or may not form in every case of murder a sufficient ground for imposing the lesser penalty.[3]

An accused person is entitled to the benefit of a reasonable doubt in the matter of sentence as in the matter of conviction.[4]

Where the provocation caused to the accused is very grave though not sudden the Court is justified in not inflicting sentence of death and recommending the case to the Government for reduction in sentence.[5]

Although s. 86 attributes to a drunken man the knowledge of a sober man when judging of his action, it does not give him the same intention, and, therefore, drunkenness or a state of intoxication affords a sufficient excuse for not exacting the extreme penalty of the law.[6]

Youth alone in every case is not such an extenuating circumstance as would justify the imposition of the lesser penalty.[7]

A person did not inflict any injury on the deceased and it appeared that he was acting under the influence of his brother when he accompanied the latter to the place where the offence was committed. It was held that under these circumstances the extreme penalty of law should not be exacted in his case.[8]

The usual practice in the Punjab is to avoid the imposition of fines where death sentences has been given.[9]

Where the facts proved established that the accused was not actuated by any 'baser motive', but he committed the offence of murder in the honest, though unfounded, belief that by so doing he was saving the life of, and alleviating the sufferings of, others, the sentence of transportation, instead of a death sentence, was held to be the proper sentence.[10]

As to the punishment in the Frontier districts, see the Frontier Crimes Regulation,[11] and as to Burma, see the Burma Laws Act.[12]

Sex of the accused.—The sex of the offender ought not to be taken into account in passing sentence, unless there are extenuating circumstances. Women who [illegible] and more [illegible] tradi- [illegible] tions and antecedents of women who commit this class of offence [illegible] tisfied that the sentence of death is by no means a harsh sentence to pass on such women. Cases of this kind stand upon a footing different from the cases where women are led into killing their children to cover their own shame because of the cruelty of social customs and laws which their society enforces, with relentless rigour. Where, therefore, a barren woman killed another's child to get children, the Court passed a sentence of death.[13] The Court sometimes takes into consideration the age of the

[1] *Public Prosecutor* v. *Paramandi*, (1921) 44 Mad 443.

[2] *Nga Po Aung*, (1889) S. J. L. B. 459.

[3] *Bhyri Rajayya*, (1920) 13 L. W. 612; *Pirthi*, (1924) 6 L. L. J. 323.

[4] *Ma Shwe Yi*, (1923) 1 Rang. 751.

[5] *Goshain*, (1920) 18 A. L. J. R. 851, 2 U. P. L. R (A.) 281.

[6] *Pal Singh*, (1917) P. W. R. No. 35 of 1917.

[7] *Nga Ba Thin*, (1922) 1 B. L. J. 70; *Kachria*, (1921) 18 N. L. R. 101.

[8] *Gulab*, (1925) 2 L. C. 14, 7 L. L. J. 479.

[9] *Chuha*, (1913) P. R. No. 18 of 1913.

[10] *Mato Ho*, (1920) 1 P. L. T. 282.

[11] Reg. III of 1901, ss. 11 (3) (*d*) and 12 (2).

[12] Act XIII of 1898, s. 4 (3) (*b*) and Sch. II.

[13] [illegible] Chandavarkar, J., in *Umi Kom* [illegible] of [illegible] 1 Rang. 751.

accused when passing sentence. Where a young girl of fifteen years killed her step-son because her husband was ill-treating her, the Court sentenced her to transportation for life.[1]

Punishment for murder by life convict.

303. Whoever, being under sentence of transportation for life,[1] commits murder, shall be punished with death.

COMMENT.

This section makes capital sentence compulsory in the case of a convict who commits murder while undergoing a sentence of transportation. Thus, where a person under sentence of transportation for life on a conviction for murder is found guilty of murder on a subsequent and different charge, the only sentence that can be passed on him according to this section is that of death.[2]

1. **'Being under sentence of transportation for life.'**—These words indicate that the sentence of transportation must have been passed on the accused. It is immaterial whether he was already transported or not.

Punishment for culpable homicide not amounting to murder.

304. Whoever commits culpable homicide not amounting to murder, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

COMMENT.

This section "creates no offence, but provides the punishment for culpable homicide not [illegible]

[illegible] cases in which the crim[illegible] to murder, that is to say, where there is kr[illegible] sult, but intention to cause death or bodily [illegible]."[3] If the act of the accused falls within either of the clauses 1, 2 and 3 of s. 300 but is covered by any of the five exceptions, it will be punishable under the first part. If the act comes under cl. 4 of s. 300 but is covered by any of the exceptions it will be punishable under the second part.[4]

Where the finding of the Sessions Judge was that "the accused must have known that he was likely to cause death" and the conviction was under s. 302 for an offence falling under s. 300 (4), it was held that, on the Court's finding, the accused was guilty of an offence under the second part of this section, and not under s. 302.[5]

[1] *Daulan*, (1924) 26 P. L. R. 550.

[2] *Doorjodhun Shamonto*, (1873) 19 W. R. (Cr.) 45.

[3] Per Straight, J., in *Idu Beg*, (1881) 3 All. 776, 778; *Attra*, (1891) P. R. No 9 of 1891; *Masti*, (1910) P. L. R. No 87 of 1911.

[4] *Barkatulla*, (1887) P. R. No. 32 of 1887.

[5] *Nga Po Saw*, (1923) 2 B. L. J. 99.

As to whipping in Upper Burma for this offence, see the Burma Laws Act,[1] s. 4 (*b*) and Sch. II.

See the Punjab Frontier Crimes Regulation, 1901[2] as to enquiry by a council of elders in a Punjab Frontier District. See also the Frontier Crimes Regulation,[3] and the Criminal Tribes Act.[4]

PRACTICE.

Evidence.—Prove (1) the death of the person in question.

(2) That such death was caused by the act of the accused.

(3) That the accused intended by such act to cause death ; or

That he intended by such act to cause such bodily injury as was likely to cause death ; or

that he knew that such act of his would be likely to cause death.

"The most important consideration upon a trial for this offence is the intention or knowledge with which the act which caused death, was done. The intention to cause death or the knowledge that death will probably be caused, is essential and is that to which the law principally looks. And it is of the utmost importance that those who may be entrusted with judicial powers should clearly understand that no conviction ought to take place, unless such intention or knowledge can from the evidence be concluded to have really existed.

"The existence of a particular evil motive such as hatred, avarice, jealousy, etc., is not necessary. It is no part of the definition of culpable homicide that the act which causes death should be a malicious act. Malice is not made a necessary ingredient. Whatever may be the motive which incites the action, and whether or not any motive whatsoever be discoverable, the question for investigation is this :—Did the accused person intend to cause death, or a bodily injury likely to end in death ; or did he know that it was a probable result of his act ? If such was his purpose and design, or such his knowledge,—and none of the General Exceptions of this Code are applicable,—the act is an offence within this definition, although there is no apparent motive for it. If this intention or knowledge is clearly shewn, it is needless to enquire into the motives. It must not, however, be forgotten that under certain circumstances the existence of a motive may become an important element in a chain of presumptive evidence, as tending to shew the intention of the accused person.

"It may be asked how can the existence of the requisite intention or knowledge be proved, seeing that these are internal and invisible acts of the mind ? They can be ascertained only from external and visible acts. Observation and experience enables us to judge of the connection between men's conduct and their intentions. We know that a sane man does not usually commit certain acts heedlessly or unintentionally—and generally we have no difficulty in inferring from his conduct what was his real intention upon any given occasion."[5]

Where a man receives only one blow on the head and dies, and there is no evidence to show which of the two persons attacking him gave that blow, neither of the two will be convicted under this section but both of them can be convicted of an offence under s. 325.[6]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Calcutta Circular.—(*a*) Sessions Judges, in all cases in which they may convict of culpable homicide not amounting to murder, shall invariably mention in their

[1] Act XIII of 1898.
[2] Reg. III of 1901, s. 12.
[3] *Ibid.* s. 6.
[4] Act II of 1897, s. 6.
[5] M. & M. 230, 231.
[6] *Agra*, (1914) P.R. No. 37 of 1914, P.W.R. (Cr.) No. 69 of 1914; P. L. R. No. 219 of 1915; *Jhandu*, (1924) 6 L. L. J. 268; *Datta Ram*, (1924) 6 L. L. J. 317; *Dalip Singh*, (1924) 7 L. L. J. 44.

remarks on the trial, the circumstances under which the culpable homicide was held not to amount to "murder."

(*b*) Sessions Judges shall invariably record their opinion whether the act by which death was caused was done with the intention of causing death, or of causing such bodily injury as was likely to cause death, or with the knowledge that it was likely to cause death, but without any intention to cause death, or to cause such bodily injury as was likely to cause death. And, in cases tried by a jury, they should be careful to obtain a specific verdict on these points.[1]

Patna Circular.—(*a*) Sessions Judges, in all cases in which they may convict of culpable homicide not amounting to murder, shall invariably mention in their remarks on the trial, the circumstances under which the culpable homicide was held not to amount to "murder."

(*b*) Sessions Judges shall invariably record their opinion whether the act by which the death was caused was done with the intention of causing death, or of causing such bodily injury as was likely to cause death, or with the knowledge that it was likely to cause death, but without any intention to cause death, or to cause such bodily injury as was likely to cause death.

And, in case tried by jury, they should be careful to obtain a specific verdict on these points.[2]

The Central Provinces Circular.—In view of the distinctive penal provisions contained in s. 304 of the Penal Code, Sessions Judges and Magistrates specially empowered will, in all cases in which they may convict the accused of culpable homicide not amounting to murder, invariably record their opinion whether the act by which the death was caused was done with the intention of causing death or of causing such bodily injury as was likely to cause death; or with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as was likely to cause death.[3]

Venue.—See ills (*a*) and (*d*) to s 179, Criminal Procedure Code

Committal.—Where death has resulted from a violent attack, the Magistrate must commit the accused to the Court of Session on a charge of culpable homicide not amounting to murder [4]

Charge to the Jury.—In his charge to the jury, the Judge should draw a distinction between the two classes of culpable homicide mentioned in this section, and direct them to find specially under which, if either, the prisoner is guilty.[5] Where the Judge omitted to require the jury to do this, the High Court held that the conviction was for the lighter description of the offence.[6] In a trial on a capital charge the jury should be directed in the event of finding that the accused culpably caused the injuries which resulted in death to find with what intention he did so. If they find that his intention was to cause only such bodily injury as was likely to cause death, they should find the accused guilty of culpable homicide not amounting to murder. The general [illegible]

[illegible]

accused.[7]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed culpable homicide not amounting to murder, causing the death of——, and thereby committed

[1] C. H. C. R. & O., Vol. I, c. i., s., 74, p. 28.
[2] Pat. Hc Cr C. para. 42 (*a*),(*b*), pp 18, 19
[3] C. P. Cr. C. No. 1, p. 1.
[4] *Gopinath Shaha*, (1877) 1 C. L. R. 141; (1881) 1 Weir 288.
[5] *Kalichurn Dass*, (1871) 15 W. R. (Cr.) 17, 6 Beng L.R. App. 86; *Ladlya*, (1890) Cr. R. No. 62 of 1890, Unrep. Cr. C. 530; *Posha Hari*, (1895) Cr. R. No. 4 of 1895, Unrep. Cr. C. 735.
[6] *Ameer Khan*, (1869) 12 W. R. (Cr.) 35.
[7] *Kya Nyun*, (1913) 8 L. B. R. 125.

an offence punishable under s. 304 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

And I hereby direct that you be tried by the said Court on the said charge.[1]

Punishment where death is caused from provocation.—The Bombay High Court has observed that no higher provocation can be given than that of finding a man's wife in actual intercourse with a paramour, and death caused under such circumstances must be visited with a very light sentence. It, therefore, passed a sentence of six months' rigorous imprisonment where death was the result of provocation of this sort.[2] Similarly, the former Chief Court of the Punjab sentenced the accused to one year's imprisonment where he caught the deceased in the act of adultery with his married sister and struck him one blow on the head with a stick which killed him by fracturing his skull.[3]

The Penal Code of some countries provides specially for the reduction or even the entire remission of punishment for the slaying of an adulterer taken in the act. The Indian Penal Code, like that of most other countries, makes adultery punishable as a crime. However the matter may be regarded from a moral point of view, the law forbids the husband to take vengeance with his own hands, and, if he chooses to avenge his injury himself, he does so at his peril. At the same time the amount of punishment to be imposed is discretionary, so that while it is made sufficiently severe to deter the injured husband from resort to excess in violence, it may not be made so severe as to encourage adulterers with the hope of immunity from immediate chastisement.[4]

Where the accused was found to have murdered his wife under a mistaken impression that she was unchaste, the High Court set aside the punishment of death passed upon him and sentenced him to transportation for life.[5] Where there was a violent altercation between a husband and wife and the husband threw a stone which killed the wife, the Court altered the sentence of death to one of transportation for life.[6]

Punishment where right of defence exceeded.—Where, in an affray respecting land, one party were the aggressors, and the other side (had the affair [illegible] not ended fatally) would have been in the legal exercise of the right of defence [illegible] of property and would have been entitled to the benefit of s. 104, it was held th[illegible] at one year's rigorous imprisonment was sufficient.[7]

Causing death by negligence.

304-A. Whoever causes the death of any person by doing any rash or negligent act[1] not amounting to culpable homicide[2] shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section deals with homicide by negligence.

Object.—The Code as it originally stood contained no adequate provision for the punishment of what English law called manslaughter by negligence. In the draft Code there was a section which punished this offence, but by some accident it had been omitted from the Code when it was passed into law. The present section inserted by Act XXVII of 1870, s. 12, supplied the omission.

[1] Criminal Procedure Code, Sch. V, 28 (6).

[2] *Asha Gopal*, (1897) Unrep. Cr. C. 932, Cr. R. No. 42 of 1897.

[3] *Fazal Dad*, (1904) P. R. No. 4 of 1904.

[4] *Nga Lun Mya*, (1894) 1 U. B. R. (1892-1896) 213.

[5] *Dina Bandhu Moitra*, (1903) 8 C. W. N. 218.

[6] *Nowaroo*, (1866) P. R. No. 105 of 1866.

[7] *Shunker Sing*, (1864) 1 West 34; *Fuzza Meeah*, (1866) 6 W. R. (Cr.) 89.

Scope.—The provisions of this section seem to apply to cases where there is no intention to cause [illegible] would cause death.[1] I [illegible]

This section does r [illegible] commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed still the wilful offence does not take the character of rashness; because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under s. 336, 337, 338 or 304-A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged, with regard to the knowledge [illegible] this section has no application.[3]

This section does not apply to cases where the death has arisen, not from the negligent or rash mode of doing the act, but from some result supervening upon the act which could not have been anticipated.[4]

1. **'Rash or negligent act.'**—A rash act is primarily an overhasty act, and is thus opposed to a deliberate act, but it also includes an act which, though it may be said to be deliberate, is yet done without due deliberation and caution.[5]

Negligence is the breach of a duty caused by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do.[6]

"*Criminal rashness* is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause [illegible] that reasonable and proper care to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."[7]

"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (*luxuria*). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection. It is manifest that personal injury, consciously and intentionally [illegible]

[1] *Sukaroo Kobiraj*, (1887) 14 Cal. 566, 569; *Nashkir*, (1912) P. L. R. No. 259 of 1913.

[2] *Kelabdi Mundul*, (1879) 4 Cal. 764, 766; *Pitu Bewa*, (1912) 39 Cal. 855; *Hasan*, (1900) 2 Bom. L. R. 613; *Ittlingapa Shivapa*, (1912) 14 Bom. L. R. 887, 1 Bom. Cr. C. 153, *O'Brien*, (1880) 2 All. 766; *Randhir Singh*, (1881) 3 All. 597; *Idu Beg*, (1881) 3 All. 776; *Saifulla*, (1882) P. R. No. 15 of 1882.

[3] *Damodaran*, (1888) 12 Mad. 56; *Mehr Ilahi*, (1911) P. W. R. (Cr.) No. 26 of 1911.

[4] *Heera Jeeta*, (1901) 3 Bom. L. R. 394.

[5] *Nga Myat Thin*, (1898) P. J. L. R. 429.

[6] *Blyth* v. *Birmingham Waterworks Co.*, (1856) 11 Ex. 781, 784.

[7] Per Straight, J., in *Idu Beg*, sup., pp. 779, 780; *Smith*, (1925) 30 C. W. N. 46.

producers of death. To say that because, *in the opinion of the operator*, the sufferer could have borne a little more without death *following, the act amounts* merely to rashness because he has carried the experiment too far, results from an obvious and dangerous *misconception*... *It is* clear, however, that if the words, '*not amounting to culpable homicide*,' are a part of the definition, the offence defined by this *section consists of* the rash or negligent act not falling under that category, as *much as of its fulfilling* the positive requirement of being the cause of death."[1]

"Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the *jury feel that he is guilty of culpable* negligence, and ought to be punished. Suppose a man performed a surgical operation, whether from losing his head, or [illegible] *reason*, omitted to do something he ought to [illegible] *not have* done, in such a case there would [illegible] *the kind of* forgetfulness which is common to everybody, or as there was slight *want of skill*, any injury which resulted might furnish a ground for claiming civil *damages*, but it would be wrong to proceed against a man criminally in respect of *such injury*. But if a surgeon was engaged in attending a woman during her confinement, and went to the engagem[illegible] drunkenness neglected his duty, and the woman's life [illegible] be culpable negligence of a grave kind. [illegible] surgeon, but it is given to everyone to keep sober when such a duty has to be performed."[2]

To render a person liable for neglect of duty there must be such a degree of culpability as to amount to gross negligence on his part. It is not every little trip or mistake that will make him so liable.[3] The distinction between the negligence which is sufficient ground for a civil action and the higher degree which is necessary in criminal proceedings is sharply insisted on in several cases.[4]

Death must be caused from rash or negligent act.—"Death should have been the direct result of a rash and negligent act of the accused and that act must have been the proximate and efficient cause without the intervention of another's negligence. It must have been the *causa causans*; it is not enough that it may have been the *causa sine qua non*."[5] Where a person using a road was accidentally killed in consequence of it being out of repair through neglect of trustees, appointed for the purpose of repairing the roads, to contract for repairing it, it was held that they were not chargeable with manslaughter.[6] If the driver of a carriage be racing with another carriage, and from being unable to pull up his horses in time the first-mentioned carriage is upset, and a person thrown off it and killed, this is manslaughter in the driver of that carriage.[7]

[illegible] **able homicide.**'—"Section 304-A is directed at [illegible] 299 and 300, and obviously contemplates those [illegible] nor knowledge...enters. For the rash or negligent act which is declared to be a crime is one 'not amounting to culpable homicide,' and it must therefore be taken that intentionally or knowingly inflicted violence, directly and wilfully caused, is excluded. Section 304-A does not say every unjustifiable or inexcusable act [illegible] mentioned shall be punishable under the provisions of [illegible] and in terms limits itself to those rash or negligent [illegible] fall short of culpable homicide of either descriptic[illegible] offences of

[1] *Nidamarti Nagabhushanam*, (1872) 7 M. H. C. 119, 120.

[2] Per Stephen, J., in *Doherty*, (1887) 16 Cox 306, 309.

[3] *Finney*, (1874) 12 Cox 625.

[4] *Noakes*, (1866) 4 F. & F 920.

[5] Per Jenkins, C. J., in *Omkar Ramprutap*, (1902) 4 Bom. L. R. 679, 682; *Ledger*, (1862) 2 F. &.F. 857.

[6] *Thomas Pocock*, (1851) 5 Cox 172.

[7] *Richard Timmins*, (1836) 7 C. & P. 499

this kind would come within the category of manslaughter, but the authors of our Penal Code appear to have thought it more convenient to give them a separate *status* in a section to themselves, with a narrower range of punishment proportioned to their culpability. It appears to me impossible to hold that cases of direct violence, wilfully inflicted, can be regarded as either rash or negligent acts. There may be in the act an absence of intention to kill, to cause such bodily injury as is likely to cause death, or of knowledge that death will be the most probable result, or even of intention to cause grievous hurt, or of knowledge that grievous hurt is likely to be caused. But the inference seems irresistible that hurt at the very least must be presumed to have been intended, or to have been known to be likely to be caused. If such intention or knowledge is present, it is a misapplication of terms to say that the act itself, which is the real test of the criminality, amounts to no more than rashness or negligence"[1] The accused, while engaged in a verbal wrangle with his wife, struck her a blow on the left side with great force, the result of which was that she vomited and bled from the nose, and within little more than an hour died. Upon the *post-mortem* examination it was found that her "spleen was badly ruptured, almost torn across, and the death was caused by its rupture." There were no signs of disease of the spleen, though it was a little enlarged. The Sessions Judge convicted him under this section, but the High Court altered the conviction to one under s. 325 on the ground that the blow was wilfully and consciously given to the deceased by the accused and the consequences that resulted from it could not change a wilful and conscious act into a rash or negligent one and it was found that the accused neither intended to kill nor to cause bodily injury likely to cause death and that he had not the knowledge that death would be the probable result.[2]

Death caused by persons practising surgery or medicine.—Where a person practising medicine or surgery, whether licensed or unlicensed, is guilty of gross negligence, or criminal inattention, in the course of his employment, and in consequence of such negligence or inattention death ensues, it is manslaughter, but if there is no gross negligence it is not.[3]

Where a person acting as a medical man, whether licensed or unlicensed, administers to a patient a poisonous medicine without any intent of doing any bodily harm but with an intent to prevent or cure a disease and it kills the patient, he is guilty of an offence under this section [4]

Contributory negligence.—The doctrine of contributory negligence does not apply to criminal liability where the death of a person is caused partly by the negligence of the accused and partly by his own negligence.

If the accused is charged with contributing to the death of the deceased by his negligence, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death.[5]

CASES.

Rash or negligent act.—Where a railway official, after being instructed to move some trucks down an incline uncoupled and singly, disobeyed the instruction and lost control over them, and a cooly in trying to stop the trucks fell under the wheels and was killed [5]; where an engine-driver failed to sound his whistle

[1] Per Straight, J., in *Idu Beg*, (1881) 3 All. 776, 778,779.

[2] *Ibid.*

[3] *Long*, (1831) 4 C. & P. 383, 423; *Joseph Senior*, (1832) 1 Mood. Cr. C. 346; *Simpson*, (1829) 1 Lewin 172; *Spiller*, (1832) 5 C. & P. 333; [illegible]

[4] *DeSouza*, (1920) 42 All. 272; *Mahla*, (1924) 1 L. C. 393.

[5] Per Pollock, C. B., in *Swindall*, (1846) 2 C. & K. 230, 232, referred to in (1871) 6 M. H. C. App. 31; *Dant*, (1865) 10 Cox 102; [illegible]

before starting the engine, and the engine having been put in motion caused a boy, who was painting a wagon on the line, injury, which resulted in this death [1]; where the accused while out shooting with the deceased in a jungle separate from him, seeing something move in the jungle but without waiting to see what it was, fired and shot the deceased [2]; where the accused cut out the piles of a person with an ordinary knife and, from the profuse bleeding, the person died [3]; where the prisoner struck at a man carrying a child and the blow fell on the child and killed it [4]; where the prisoner received poison from her paramour to administer it to her husband as a charm and administered it with the result that death ensued, but she did not know that the substance given to her was noxious until she had seen its effects [5]; where the accused administered to her husband a deadly poison (arsenious oxide) believing it to be a love potion in order to stimulate his affection for her, and the husband died from the effects of the poison [6]; where the accused received a powder from an enemy of her relative, took no precaution to ascertain whether it was noxious, and mixed it with food believing that by doing so she would become rich, but four of the persons who ate the food died [7]; where the lessee of a ferry allowed an unsound boat to be used, and in consequence of its unsoundness, the boat sank while crossing the river and some of the persons in it were drowned [8]; where the accused being absorbed in an attempt to witness the preparations for a festival drove his cart on one side of the road regardless of the persons standing on that part of the road, and in so doing drove over and killed a child [9]; where the accused and the deceased were standing on the parapet of a deep well, and an altercation having arisen between them, the accused struck the deceased on the head with a club and the deceased lost his balance, fell into the well, and was drowned [10]; where the accused sent two boxes containing fireworks to a railway company falsely declaring them to contain iron locks, with the result that in loading one of the boxes exploded killing one cooly, injuring another, and damaging the railway wagon in which it was being placed [11]; it was held in all those cases that the acts of the accused were either rash or negligent. The accused had been in charge of a police-station, the vicinity of which had been much troubled by thieves. On one occasion a thief had fired at the accused. It having been reported to the accused that three thieves were prowling about, he, with two other men, went out to patrol. They saw a man crouching under a tree, and thinking he must be a thief, the accused fired at him, and killed him. The man proved to be a cooly. It was held that the accused was guilty of a most rash act.[12]

Where, by the bullet fired by the one or the other of two accused persons who were practising at target shooting at a place near which was a public road which the accused would have noticed if they had used the least circumspection, a man

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[2] *Nga Pon Gyi*, (1885) S. J. L. B. 308.

[3] *Sukaroo Kobiraj*, (1887) 14 Cal. 566; but see *Baboolun Hijrah*, (1866) 5 W. R. (Cr.) 7 and *Gonesh Dooley*, (1879) 5 Cal. 351.

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[5] *Mussammat Bahian*, (1887) P. R. No 60 of 1887; *Khema*, (1869) P. R. No. 8 of 1869; *Musst. Sultan*, (1884) P. R. No. 35 of 1884. Under similar circumstances the Bombay High Court acquitted the accused of the offence of murder: *Nagaiya Bhimappa*, (1902) 4 Bom. L. R. 425; but in this case the question whether the act of the accused did not come under s. 304-A was not considered

[6] *Ramaya Channappa*, (1915) 17 Bom. L. R. 217, 3 Bom. Cr. C. 38. See *Emp.* v. *Chanchal*, Crim. Appeal No. 249 of 1916, decided on 10th August 1916, in which a woman who administered to her husband *dhatura* as a love philtre which made him ill was acquitted of a charge under s. 328 as it was not administered with a malicious desire of injuring her husband.

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was wounded resulting in his death, it was held that both the accused were guilty of an offence under this section, and that in such a case the one whose bullet struck the deceased and caused death could not be held to be the only principal offender under it, and the other whose shot did not strike the deceased, his abettor under s. 114.[1] This case follows an English case the facts of which are similar. A, B and C went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practising firing with it. B placed a board, which was handed to him by A, in the presence of C, in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired by one, though it was not proved by which one of them, killed a boy on a tree in a garden near the field, at a spot 393 yards distant from the firing point. A, B and C were all found guilty by the jury of manslaughter. It was held by the Court that A, B and C had been guilty of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter.[2] Where an Assistant Station Master on duty at a station gave the "line clear" on his own responsibility on a foggy night knowing that another train was standing at a particular point and the train which was allowed to pass came into collision with the standing train, it was held that the granting of "line clear," under the circumstances was in itself a rash and negligent act which rendered him amenable to punishment.[3] An unqualified person who was in charge of a dispensary had to make up a quantity of quinine mixture for cases of fever He went to a cupboard where non-poisonous medicines were supposed to be kept and took therefrom a bottle with an outside wrapper marked 'poison.' This wrapper he tore off and threw away. The bottle itself was labelled 'strychnine hydrochloride', but, without regarding this, and apparently because there was a resemblance between this bottle and another in which quinine hydrochloride was kept, he made up the entire contents of the bottle as if it had been quinine. The result was that seven patients died It was held that he was guilty under this section.[4] The accused, a girl of seventeen who happened to be carrying her infant daughter tied on her back, having been exasperated at an altercation which she had with her husband, attempted to commit suicide by jumping into a well. She was found alive in the well next day but her child was drowned. The trial Judge convicted her of an attempt to commit suicide and also of the murder of her infant child, under ss. 309 and 302. It was held that the offence which she had committed was not murder, but causing death by negligent omission, *i.e.*, omission to put the child down before jumping into the well.[5]

Acts not rash or negligent, but done intentionally or designedly.—Where the accused gave the deceased a push which caused him to fall, and in such fall he broke his toe, and on the fifth day died of tetanus, this section was held not to apply. The High Court remarked that it was simply a case of using criminal force.[6] Where the accused threw his stick at the deceased with such force that it hit the deceased on the head with the point, and made a punctured wound which caused the death of the deceased, it was held that he had not committed an offence under this section, because the injury was intentionally caused to the deceased. He was, therefore, held guilty of causing hurt.[7] Where there was medical evidence to show that milk had been administered to a child in such quantities as to kill it, but there was no evidence to show that the milk was administered by the orders of the mother, or that she knew the quantity that was

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being administered, it was held that there was no evidence for a conviction under this section.[1] The accused was watching his field one dark night. Hearing a noise in the field he shouted, whereupon a thief ran out of it whom he followed and struck with a stick. The thief fell down, and the accused caught him and took him to the Zemindar's house. The thief became insensible there, and subsequently died from the effects of the blows which the accused had given him. It was held that he could not be convicted of an offence under this section.[2]

The accused's wife, eight or nine years of age, was brought by her father to his house for the purpose of being left there. At night the accused and his wife went inside the house; the fathers of both remaining outside in the verandah. After midnight the girl left the house with the intention of going home to her father's house, got into a canoe, which sank, and left her in the water, from which she was rescued by the accused's father, and brought back to the house by the accused. The accused, having pulled her into the house, kicked her on the back with his bare foot, from which kick the girl fell down and died almost immediately. On the medical evidence it appeared that she was quite healthy, and that she had died from rupture of the anterior coat of her stomach caused by external violence. The Sessions Court convicted the accused under this section. But the High Court set aside the conviction and convicted him of culpable homicide, observing: "To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such a character that no reasonable man could be ignorant of the likelihood of its causing death."[3]

Where the accused administered a love potion or drug which was found to be aconite, to her husband, mother-in-law and brother-in-law, thinking that it was some charm to procure their love as they were mal-treating her because she was carrying on an intrigue with another neighbour, and her husband and mother-in-law died, though the brother-in-law ultimately recovered, it was held that she was guilty of the offence under this section as she administered the drug without due care and caution or any inquiry as to what it really was.[4] Where the accused kicked a person on his stomach and struck him with a piece of stone on his head and back and that person died ten days after receiving the injuries, it was held that the section was not applicable to a case where injuries were inflicted neither rashly nor negligently but intentionally and designedly.[5]

Too remote consequences.—B, an Assistant Station Master at a station G, had, in anticipation of receiving a line clear and caution message, and against rules written out in the prescribed form book a conditional message to the effect that on the arrival at G of a down train then due from a station S, the line would be clear for a certain up train at G to start for S. The guard of the latter train thereafter, without the knowledge of B and also against rules, entered the Station Master's room in his absence, tore this imperfect certificate from out of the book and without reading it, as he ought to have done, signed and passed it on to the driver, and gave the signal for the train to start, but without taking the permission of the Station Master as the rules required. The driver also, without examining the certificate, started the train and a collision took place in which several persons including the driver were killed. B and the guard were both convicted under this section. It was held that B was not liable; the consequences were too remote to have been caused by B's writing out the certificate in disobedience of the rule.[6]

English cases.—**Gross negligence**—Where the defendant came to town in a chaise, and before he got out of it, he fired his pistols, which by accident killed

[1] *Musumat Pembor*, (1873) 5 N. W. P. 38.
[2] *Bhikam*, (1881) 1 A. W. N. 103.
[3] *Kelabdi Mundal*, (1879) 4 Cal. 764, 767.
[4] *Pika Bewa*, (1912) 39 Cal. 855.
[5] *Sallingapa Shivapa*, (1912) 14 Bom. L. R. 887, 1 Bom. Cr. C. 183.
[6] *Shankar Balkrishna*, (1904) 32 Cal. 73, 8 C. W. N. 645.

a woman[1]; where a workman threw down a piece of timber crying aloud 'stand clear' and was heard by all labourers but one on whom it fell and killed him[2]; where a man turned out a horse known to be vicious on a common across which were public footpaths and he kicked a child who died[3]; where the accused being employed to drive a cart sat in the inside instead of attending at the horse's head and that cart went over a child who was gathering up flowers on the road[4]; where [illegible] dangerous medicines of which he was ignorant[5]; [illegible]

where a lad, as a frolic, took the trap-stick out of the front part of a cart, in consequence of which it was upset, and the cartman was killed[7], it was held that the accused were guilty of gross negligence

No gross negligence.—The accused was an attendant at a lunatic asylum. Being in charge of a lunatic, who was bathing, he turned on hot water through mistake into the bath, and thereby scalded him to death. It was found that the lunatic was a man capable of getting out by himself and of understanding what was said to him and that he was told to get out. It was held that he was not guilty of gross negligence.[8] The negligent act which causes death should be that of the party charged. Where it was the duty of the accused to attend a steam-engine but he had stopped it and gone away, and, during his absence, a person came to the spot, and put [illegible] to stop it again, and a person was [illegible] was held that the death was not t[illegible] negligence of the accused, however gross, will not render him responsible for a death which his diligence would not have averted[10] The prisoner was indicted for the manslaughter of a passenger in a train of which he was in charge as guard The prisoner had directed the train to be separated on an incline, whereby a portion of the train ran backwards and collided with another train, causing the death of many of the passengers. It was held that in order to convict the prisoner he must be found guilty 'of gross negligence' or 'reckless negligent conduct' and that mere intellectual defect or mistake of judgment, without wilful disobedience, as to a traffic regulation, would not create criminal liability.[11]

On an indictment for the murder of an aged and infirm woman, by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines, and other necessaries, and not allowing her the enjoyment of open air, in breach of an alleged duty, Patterson, J., in his charge to the jury, said: "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter."[12]

Where it was the duty [illegible] a mine to cause the mine to be properly ventila[illegible] put up where necessary, and by reason of this [illegible] by an explosion of fire damp, it was held that the accused was guilty of manslaughter by negligence.[13]

PRACTICE.

Evidence.—Prove (1) the death of the person in question.

(2) That the accused caused such death.

[1] *Burton*, (1721) 1 Str. 481; *Hardie*, 10 Rennels, 647.

[2] *Hull*, (1664) Kelyng 40.

[3] *David Dant*, (1865) L. & C. 567.

[4] *Knight*, (1828) 1 Lewin 168.

[5] *Markuss*, (1864) 4 F. & F. 356.

[6] *John Jones*, (1874) 12 Cox 628.

[7] *James Sullivan*, (1836) 7 C. & P. 641.

[8] *Finney*, (1874) 12 Cox 625

[9] *Hilton*, (1838) 2 Lewin 214.

[10] *Dalloway*, (1847) 2 Cox 273.

[11] *Ellis*, (1889) 16 Cox 710.

[12] *Simon Morrott*, (1838) 8 C. & P. 425, 433.

[13] *Haines*, (1847) 2 C. & K. 368

being administered, it was held that there was no evidence for a conviction under this section.[1] The accused was watching his field one dark night. Hearing a noise in the field he shouted, whereupon a thief ran out of it whom he followed and struck with a stick. The thief fell down, and the accused caught him and took him to the Zemindar's house. The thief became insensible there, and subsequently died from the effects of the blows which the accused had given him. It was held that he could not be convicted of an offence under this section.[2]

The accused's wife, eight or nine years of age, was brought by her father to his house for the purpose of being left there. At night the accused and his wife went inside the house; the fathers of both remaining outside in the verandah. After midnight the girl left the house with the intention of going home to her father's house, got into a canoe, which sank, and left her in the water, from which she was rescued by the accused's father, and brought back to the house by the accused. The accused, having pulled her into the house, kicked her on the back with his bare foot, from which kick the girl fell down and died almost immediately. On the medical evidence it appeared that she was quite healthy, and that she had died from rupture of the anterior coat of her stomach caused by external violence. The Sessions Court convicted the accused under this section. But the High Court set aside the conviction and convicted him of culpable homicide, observing: "To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such a character that no reasonable man could be ignorant of the likelihood of its causing death."[3]

Where the accused administered a love potion or drug which was found to be aconite, to her husband, mother-in-law and brother-in-law, thinking that it was some charm to procure their love as they were mal-treating her because she was carrying on an intrigue with another neighbour, and her husband and mother-in-law died, though the brother-in-law ultimately recovered, it was held that she was guilty of the offence under this section as she administered the drug without due care and caution or any inquiry as to what it really was.[4] Where the accused kicked a person on his stomach and struck him with a piece of stone on his head and back and that person died ten days after receiving the injuries, it was held that the section was not applicable to a case where injuries were inflicted neither rashly nor negligently but intentionally and designedly.[5]

Too remote consequences.—B, an Assistant Station Master at a station G, had, in anticipation of receiving a line clear and caution message, and against rules written out in the prescribed form book a conditional message to the effect that on the arrival at G of a down train then due from a station S, the line would be clear for a certain up train at G to start for S. The guard of the latter train thereafter, without the knowledge of B and also against rules, entered the Station Master's room in his absence, tore this imperfect certificate from out of the book and without reading it, as he ought to have done, signed and passed it on to the driver, and gave the signal for the train to start, but without taking the permission of the Station Master as the rules required. The driver also, without examining the certificate, started the train and a collision took place in which several persons including the driver were killed. B and the guard were both convicted under this section. It was held that B was not liable; the consequences were too remote to have been caused by B's writing out the certificate in disobedience of the rule.[6]

English cases.—Gross negligence.—Where the defendant came to town in a chaise, and before he got out of it, he fired his pistols, which by accident killed

[1] *Musumat Pember*, (1873) 5 N. W. P. 38.
[2] *Bhikam*, (1881) 1 A. W. N. 103.
[3] *Ketabdi Mundul*, (1879) 4 Cal. 764, 767.
[4] *Puka Bewa*, (1912) 39 Cal. 855.
[5] *Istlingapa Shirupa*, (1912) 14 Bom. L. R. 887, 1 Bom. Cr. C. 183.
[6] *Shankar Balkrishna*, (1904) 32 Cal. 73, 8 C. W. N. 645.

a woman[1]; where a workman threw down a piece of timber crying aloud 'stand clear' and was heard by all labourers but one on whom it fell and killed him[2]; where a man turned out a horse known to be vicious on a common across which were public footpaths and he kicked a child who died[3]; where the accused being employed to drive a cart sat in the inside instead of attending at the horse's head and that cart went over a child who was gathering up flowers on the road[4]; where [illegible] prescribed dangerous medicines of which he was ignorant[5];

[illegible]

where a lad, as a frolic, took the trap-stick out of the front part of a cart, in consequence of which it was upset, and the cartman was killed[7], it was held that the accused were guilty of gross negligence.

No gross negligence.—The accused was an attendant at a lunatic asylum. Being in charge of a lunatic, who was bathing, he turned on hot water through mistake into the bath, and thereby scalded him to death It was found that the lunatic was a man capable of getting out by himself and of understanding what was said to him and that he was told to get out. It was held that he was not guilty of gross negligence.[8] The negligent act which causes death should be that of the party charged. Where it was the duty of the accused to attend a steam-engine but he had stopped it and gone away, and, during his absence, a person came to the spot, and put it in motion and, being unskilled, was not able to stop it again, and a person was killed in consequence of its being in motion, it was held that the death was not the consequence of the prisoner's act.[9] The negligence of the accused, however gross, will not render him responsible for a death which his diligence would not have averted[10] The prisoner was indicted for the manslaughter of a passenger in a train of which he was in charge as guard. The prisoner had directed the train to be separated on an incline, whereby a portion of the train ran backwards and collided with another train, causing the death of many of the passengers It was held that in order to convict the prisoner he must be found guilty 'of gross negligence' or 'reckless negligent conduct' and that mere intellectual defect or mistake of judgment without wilful disobedience, as to a traffic regulation, would not create criminal liability.[11]

On an indictment for the murder of an aged and infirm woman, by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines, and other necessaries, and not allowing her the enjoyment of open air, in breach of an alleged duty, Patterson, J., in his charge to the jury, said: "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter."[12]

Where it was the duty of the accused as ground bailiff of a mine to cause the mine to be properly ventilated by causing air headings to be put up where necessary, and by reason of this omission another person was killed by an explosion of fire damp, it was held that the accused was guilty of manslaughter by negligence.[13]

PRACTICE.

Evidence—Prove (1) the death of the person in question.
(2) That the accused caused such death.

[1] *Burton*, (1721) 1 Str. 481, *Hardie*, 10 Rennels, 647.
[2] *Hull*, (1664) Kelyng 40.
[3] *David Dant*, (1865) L. & C. 567.
[4] *Knight*, (1828) 1 Lewin 168.
[5] *Marluss*, (1866) 4 F. & F. 356.
[6] *John Jones*, (1874) 12 Cox 628.
[7] *James Sullivan*, (1836) 7 C. & P. 641.
[8] *Finney*, (1874) 12 Cox 625.
[9] *Hilton*, (1838) 2 Lewin 214
[10] *Dalloway*, (1847) 2 Cox 273.
[11] *Elliot*, (1889) 16 Cox 710.
[12] *Simon Morrott*, (1838) 8 C. & P. 423, 433.
[13] *Haines*, (1847) 2 C. & K. 368

(3) That such act of the accused was rash or negligent, although it did not amount to culpable homicide.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session. Presidency Magistrate or Magistrate of the first class.

The Central Provinces Circular.—Section 304-A of the Penal Code is not to be applied to cases in which there is voluntary commission of an offence against the person. The Courts should be guided by the following explanation taken from the judgment of the Madras High Court in the case of *Nidamarti Nagabhusanam*, 7 Madras High Court Reports 119, of the terms 'rashness' and 'negligence' as used in that section :—* * * *

It may be added that in cases in which there has been an intention to cause bodily injury, and the offence does not amount to culpable homicide the person by whom death has been caused should be punished for causing either hurt or grievous hurt, according as his intention and the nature of the injuries inflicted bring the case within the definition of one or the other offence.[1]

Direction to jury.—Where an accused was charged with culpable homicide and the evidence showed that the deceased had an enlarged spleen, and that his death was caused by rupture of the spleen occasioned by blows inflicted by the accused on the body of the deceased, it was held that it was not sufficient, in order to find the accused guilty of a rash act under s. 304-A, that the jury should be satisfied only of the prevalence of the disease of enlargement of the spleen in the district, and infer therefrom criminal rashness in beating the deceased; but that they should also be sa[illegible] accused was aware of the prevalence of such disease in the district. [illegible] and in striking a person afflicted with that disease.[2]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

[illegible] about the——day of——; at——, caused the death of——[illegible] amounting to homicide, to wit——, and thereby [illegible] of the Indian Penal Code and within my cognizance.

And I hereby direct that you be [illegible] said charge.

Abetment of suicide of child or insane person.

305. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide shall be punished with death or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

COMMENT.

Object.—This and the following provisions have been inserted because the ordinary law of abetment is inapplicable. They apply when suicide is in fact committed.

'Suicide' is the self-destruction by a person.

The Commissioners observe : "It seems to us that the rule would fail to be applied under these clauses chiefly in such a case as this, where a person legally bound to take care of the person of another has by an illegal omission of his duty intentionally given him the opportunity, or permitted him to obtain the means of killing himself. It would apply also, we conceive, in the case of a person seeing

[1] C. P. Cr. C. No. 2, ss. 1, 3, p. 1

[2] *Nafaralla*, (1879) 4 Cal. 815.

another preparing to destroy himself, say by hanging, and allowing him to accomplish his purpose without any attempt to prevent him if as, may be excepted, the law of procedure makes it a common duty incumbent upon all men to assist in preventing offences about to be committed in their presence. The intention here would be inferable from the circumstances. In the former case collateral proof of the intention would be requisite. But we apprehend that it is *active* aid which is principally intended in these clauses, and to which the higher penalties are meant to be applied."[1]

PRACTICE.

Evidence.—Prove (1) the commission of suicide by a person

(2) That the person who committed suicide was under eighteen years of age or was insane, or delirious, or an idiot, or intoxicated

(3) That the accused abetted the commission of such suicide.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, abetted the commission of suicide by AB, a person in a state of intoxication, (*specify the state*) and thereby committed an offence punishable under s. 305 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Abetment of suicide.

306. If any person commits suicide, whoever abets[1] the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Abetment of suicide is punishable under this section and attempt to suicide under s. 309.

Abetment of suicide is confined to the case of persons who aid and abet the commission of suicide by the hand of the person himself who commits the *suicide*. When another person, at the request of, or with the consent of, the suicider, has killed that person, he is guilty of homicide by consent, which is one of the forms of culpable homicide.[2]

1. '**Abets.**'—See s. 108, *supra*.

CASES.

Suttee.—Three accused persons instigated a boy to light the pile of a *suttee* while another induced the woman to return to the pile after she had once retired from it, and she was immolated. The three persons were convicted of abetting culpable homicide, and the boy and other person of abetting suicide.[3] Where, in the presence of the accused, a woman prepared to commit suicide, and they followed her to the pyre, and stood by her, her step-sons crying "*Ram Ram*," and one of the accused admitted that he told the woman to say "*Ram Ram*," and she would become *suttee*, it was held that those facts were sufficient to prove the active connivance of the accused, and to justify the inference that they had engaged with her in a conspiracy for the commission of the *suttee*.[4]

One R having died, his widow declared her intention to be a *suttee*. The accused sent word to the police, but before their arrival they took the body to the

[1] First Report, ss. 322, 323.
[2] *Sakebloll Reetkoll*, (1863) 1 R. J. P. J. 174.
[3] *Ibid.*
[4] *Mohit Pandey*, (1871) 3 N. W. P. 316.

cremating place. The evidence was that the deceased having shown certain miracles they were overawed by her threats to curse them and did what she ordered them to do. They prepared the funeral pyre, placed her husband's body over it, but did not use any force to prevent her from sitting on the pyre and supplied her with *ghee* which she poured over the pyre and herself. It was held that the accused were guilty of abetment of suicide.[1]

PRACTICE.

Evidence.—Prove (1) the commission of suicide by a person.
(2) That the accused abetted the commision thereof (*vide* s. 107).

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the——day of——, at——, one AB committed suicide, and that you abetted its commission by——(*specify the act*), and thereby committed an offence punishable under s. 306 of the Indian Penal Code and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Attempt to murder.

307. Whoever does any act with such intention or knowledge[1] and under such circumstances,[2] that if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned.

Attempts by life-convicts.

When any person offending under this section is under sentence of transportation for life, he may, if hurt[3] is caused, be punished with death.

ILLUSTRATIONS.

(*a*) A shoots at Z with intention to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(*b*) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(*c*) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(*d*) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping ; A has not yet committed the offence in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

COMMENT.

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.[2]

[1] *Ram Dial*, (1913) 36 All. 26.

[2] Stephen's Digest of Crim. Law, Art. 43.

The authors of the Code say :—" These clauses appear to us absolutely necessary to the completeness of the Code. We have provided, under the head of bodily hurt, for cases in which hurt is inflicted in an attempt to murder ; under the head of assault, for assaults committed in attempting to murder ; under the head of criminal trespass, for some criminal trespass committed in order to murder. But there will still remain many atrocious and deliberate attempts to murder which are not trespasses, which are not assaults and which cause no hurt. A, for example, digs a pit in his garden, and conceals the mouth of it, intending that Z may fall in and perish there. Here A has committed no trespass, for the ground is his own, and no assault, for he has applied no force to Z. He may not have caused bodily hurt, for Z may have received a timely caution, or may not have gone near the pit ; but A's crime is evidently one which ought to be punished as severely as if he had laid hands on Z with the intention of cutting his throat

" Again, A sets poisoned food before Z. Here A may have committed no trespass, for the food may be his own ; and if so, he violates no right of property by mixing arsenic with it. He commits no assault, for he means the taking of the food to be Z's voluntary act. If Z does not swallow enough of the poisoned food to disorder him, A causes no bodily hurt ; yet it is plain that A has been guilty of a crime of a most atrocious description.

" Similar attempts may be made to commit voluntary culpable homicide in any of the three mitigated forms. A, for example, is excited to violent passion by Z, and fires a pistol intending to kill Z. If the shot proves fatal, A will be guilty of manslaughter ; and he surely ought not to be exempted from all punishment if the ball only grazes the intended victim.

" It is to meet cases of this description that clauses 308 and 309 [these sections] are intended."[1]

Scope.—The intention or knowledge which is necessary to (constitute murder may exist, combined with an act which falls short of the complete commission) of that offence. The murderer may do an act towards the commission of the murder, but may involuntarily fail or be intercepted or prevented from consummating the crime. This and the following section seem to apply to attempts to murder, in which there has been not merely a commencement of an execution of the purpose, but something little short of a complete execution, the consummation being hindered by circumstances independent of the will of the author. The act or omission, [illegible] f carry- [illegible] injury [illegible] circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds.[3]

If a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself. If he did all that he could do, and completed the only remaining proximate act in his power, he cannot escape criminal responsibility because the consequences which he expected to ensue were prevented from ensuing.[4]

See notes on s. 511, *infra*, where there is a full discussion as to what constitutes an attempt.

[1] Note M, pp. 150, 151.

[2] M. & M. 214 ; *Rawal Arab*, (1898) Unrep. Cr. C. 964 ; *Mangavalli Ranganayalamma*, (1889) 1 Weir 328.

[3] *Kyaw We*, (1908) 4 L. B. R. 311, F. B., overruling *Nga Shée Nwe*, (1869) S. J. L. B. 460.

[4] *Siddha*, (1891) 14 All. 38 ; *Abdul Rahaman*, (1908) 9 C. L. J. 432.

cremating place. The evidence was that the deceased having shown certain miracles they were overawed by her threats to curse them and did what she ordered them to do. They prepared the funeral pyre, placed her husband's body over it, but did not use any force to prevent her from sitting on the pyre and supplied her with *ghee* which she poured over the pyre and herself. It was held that the accused were guilty of abetment of suicide.[1]

PRACTICE.

Evidence.—Prove (1) the commission of suicide by a *person*.
(2) That the accused abetted the commision thereof (*vide* s. 107).

Procedure.—*Cognizable*—*Warrant*—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the——day of——, at——, one AB committed suicide, and that you abetted its commission by——(*specify the act*), and thereby committed an offence punishable under s. 306 of the Indian Penal Code and within the cognizance of the Court of Session (or High Court).

And I hereby direct that you be tried by the said Court on the said charge.

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307. Whoever does any act with such intention or knowledge[1] and under such circumstances,[2] that if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine: and, if hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned.

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The authors of the Code say :—" These clauses appear to us absolutely necessary to the completeness of the Code. We have provided, under the head of bodily hurt, for cases in which hurt is inflicted in an attempt to murder ; under the head of assault, for assaults committed in attempting to murder ; under the head of criminal trespass, for some criminal trespass committed in order to murder. But there will still remain many atrocious and deliberate attempts to murder which are not trespasses, which are not assaults, and which cause no hurt. A, for example, digs a pit in his garden, and conceals the mouth of it, intending that Z may fall in and perish there. Here A has committed no trespass, for the ground is his own, and no assault, for he has applied no force to Z. He may not have caused bodily hurt, for Z may have received a timely caution, or may not have gone near the pit ; but A's crime is evidently one which ought to be punished as severely as if he had laid hands on Z with the intention of cutting his throat.

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" Similar attempts may be made to commit voluntary culpable homicide in any of the three mitigated forms. A, for example, is excited to violent passion by Z, and fires a pistol intending to kill Z. If the shot proves fatal, A will be guilty of manslaughter ; and he surely ought not to be exempted from all punishment if the ball only grazes the intended victim

" It is to meet cases of this description that clauses 308 and 309 [these sections] are intended."[1]

Scope.—The intention or knowledge which is necessary to (constitute murder may exist, combined with an act which falls short of the complete commission) of that offence. The murderer may do an act towards the commission of the murder, but may involuntarily fail or be intercepted or prevented from consummating the crime. This and the following section seem to apply to attempts to murder, in which there has been not merely a commencement of an execution of the purpose, but something little short of a complete execution, the consummation being hindered by circumstances independent of the will of the author. The act or omission, although it does not cause death, is carried to such a length as, at the time of carrying it to that length, the offender considers sufficient to cause death.[2]

To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of the injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds.[3]

If a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself. If he did all that he could do, and completed the only remaining proximate act in his power, he cannot escape criminal responsibility because the consequences which he expected to ensue were prevented from ensuing.[4]

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[1] Note M, pp. 150, 151

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[3] *Kyaw We*, (1908) 4 L. B. R. 311, F. B., overruling *Nga Shwe Nwe*, (1869) S. J. L. B. 466.

[4] *Niddha*, (1891) 14 All. 38 ; *Abdul Rahaman*, (1908) 9 C. L. J. 432.

1. **'With such intention or knowledge.'**—The intention or knowledge must be such as is necessary to constitute murder. Without this there can be no attempt to murder.

2. **'Under such circumstances.'**—"It is necessary...that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things; and if the act complained of is not of that description, a prisoner cannot be convicted of an attempt to murder under this section. The illustrations given bear out this view."[1] The only act which can fall within its purview is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events. Where a person struck his wife on her neck with an axe causing an incised wound, it was held that he was guilty of causing hurt by a dangerous weapon (s. 321) and not of attempt to murder. The Court observed: "Although a hatchet is a dangerous weapon, a blow with it is not, in our opinion, an act ordinarily capable of causing death in the natural and ordinary course of events. On the contrary, we should say that whether a blow with a hatchet is or is not capable of causing such a result must depend upon the particular nature of the blow inflicted. It seems to us, therefore, that this is a case where the accused's criminal liability must be limited to the act which he in fact did, and cannot be extended so as to embrace the consequences of another act which he might have done but did not do."[2] Where the acts committed by the accused consisted only in running after the complainant with an axe in his hand and raising it to the shoulder when about four steps from the complainant, but before there was time to do anything further in pursuance of his purpose, the axe was snatched out of the accused's hand; it was held that the accused was not guilty of an attempt to commit murder as neither of his acts could *per se* have caused death, but that he was guilty of an attempt to cause grevious hurt.[3]

The Allahabad High Court has held that the words 'under such circumstances' indicate that the act must be done in such a way and with such ingredients that, if succeeded, and death was caused by it, the legal result would be murder according to ss. 299 and 300.[4]

When the accused pointed an uncapped gun at his superior officer (believing the gun to be capped) with the intention of murdering him, but his rifle was pushed up, and he was prevented from the pulling the trigger, it was held that he was guilty not under this section but under s. 511.[5] In this case Westropp, J., said: "That may be an attempt under s. 511 which does not come within s. 307;" and "s. 307 was not intended to exhaust all attempts to commit murder which should be punishable under the Code." But the Allahabad High Court has laid down that s. 511 does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307.[6] In this case the accused pointed a loaded pistol at a person to shoot him and pulled the trigger. The cap exploded but the charge did not go off. He was convicted under this section. It was held that a person was criminally responsible for an attempt to commit murder when, with the intention or knowledge requisite to its commission, he had done the last proximate act necessary to constitute the completed offence, and when the completion of the offence was only prevented by some cause independent of his volition. Straight, J., observed: "Now it appears to me that the attempts which are limited by s. 511 are attempts to commit offences, which by the Code itself are punishable either with 'transportation or imprisonment.' It cannot properly be said that the offence of murder is punishable with either of those things. In my opinion, if murder, as

[1] Per Couch, C. J., in *Francis Cassidy*, (1867) 4 B. H. C. (Cr. C.) 17, 21; *Jiwan Das*, (1904) P. R. No. 30 of 1904.

[2] *Martu Vithoba Prabhu*, (1913) 15 Bom L. R. 991, 993, 2 Bom. Cr. C. 159.

[3] *Jiwan Das*, sup.

[4] Per Straight, J., in *Niddha*, (1891) 14 All. 38.

[5] *Francis Cassidy*, sup., pp. 24, 25.

[6] *Niddha*, sup.

mentioned in ss. 299 and 300, was intended to be included, the Legislature would before the word transportation have inserted the word 'death.' But, again, the section goes on and says that, certain things being done, the person who does those acts shall, 'where no express provision is made for the punishment of such attempt,' be punished in a particular way. As I have pointed out, by s. 307,.... there is express provision made in the Code itself for the punishment of an attempt to murder. It seems therefore to me that when the framers of s. 511 drew it up in the terms that they have drawn it up, they especially meant to exclude those attempts to commit offences which in the various preceding sections of the Code were specifically and deliberately provided for with punishments enacted in the sections themselves. I have therefore for these reasons come to the conclusion that s. 307 is exhaustive and that no Court has any right to resort to the provisions of ss 299 and 300 read with section 511 for the purpose of convicting a person of the offence of attempted murder, which, according to the view of the Court, does not come within the provision of s. 307." Mayne, (4th Edn., p 532) in his Criminal Law, thus criticises these remarks: "Upon this part of the judgment it may be remarked, as to the first reason, that murder is punishable with transportation as well as death. This is the case as regards every offence punishable with death, except in the single instance of murder by a person under transportation for life, which under s. 303 is only punishable, and in fact can only be punished, with death. Cases of murder therefore do come within the letter of s. 511. It seems obvious too that those words in s. 511 are not intended to exclude the very few cases where the penalty of death is added to that of transportation, but to exclude the numerous cases which are only punishable with fine. Further, that part of the learned judge's reasoning would not apply to s. 308, which is in *pari materia* with s. 307, and worded in the same way, and can hardly admit of different treatment. As to the second reason, it is of course clear that any attempt, coming under s. 511, which is specifically provided for elsewhere, must be dealt with under the express provision. For instance, an attempt to wage war against the King must be dealt with under s. 121 It is also quite clear that any attempt to commit culpable homicide which falls under s. 307 or 308, must be dealt with under them and not under s. 511. What the Bombay case decided was, that an act done towards the commission of an attempt to murder, which was not an act by which murder could be effected, came under s. 511 because it did not come within s. 307. That being so, it fell within the wording of s. 511, as being a case 'where no express provision is made by this Code for the punishment of *such* attempt.' According to Mr. Justice Straight, such a case would go wholly unpunished.

"The same judgment appears to express doubt as to the propriety of the Bombay ruling that the act done in that case, *viz*, trying to discharge an uncapped rifle, supposed to be capped, did not come within s. 307. 'If he did all that he could do, and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because his own act, volition, and purpose having been given effect to in their full effect, a fact unknown to him, and at variance with his own belief, intervened to prevent the consequence of that act, which he expected to ensue, ensuing.' This is well illustrated by *Ananda Bhau.*[1] There the accused intending to kill his victim gave large dozes of opium in milk but unknown to him, the intended victim was a confirmed opium-eater and thus he escaped serious harm. But it may be submitted that the question is, not whether the accused would escape criminal responsibility—it was decided that he was liable under s. 511,—but whether he would be criminally responsible under the very special words of s. 307. If that section only applies where the prisoner has done an act, which if carried to its utmost possible limits, without any interference from without, could cause death, and if his act could not have caused death, then his belief that it could have caused death is outside the question. Suppose, for instance, that *Cassidy* had put his rifle all ready loaded and capped

[1] (1905) 7 Bom. L. R. 985.

for the purpose of committing the murder, and that in the excitement of the moment he had snatched up a comrade's rifle, which was unloaded, and the lock of which had been taken to pieces for repairs; that he had levelled it at his officer and pulled the trigger; it is plain that he had intended to do an act with such an intention that if by that act he had caused death he would have been guilty of murder; but that is not enough. The section requires that he should have done the act. He intended to discharge his own loaded rifle. He presented and tried to discharge a weapon which was as harmless as a broomstick."

The Rangoon High Court has held in a case in which the accused presented a gun at the complainant and pulled the trigger, no report or discharge resulting, that, in the absence of evidence to show that the gun was loaded, the accused's act amounted to no more than presenting an unloaded gun at the complainant and pulling the trigger and that he was guilty under s. 352 and not this section.[1]

The Court of Criminal Appeal in England has laid down that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt, but would none the less be an attempt. In this case the accused was proved to have bought cyanide of potassium on 22nd December 1909. On 9th January, his mother was found dead in a sitting posture on a sofa in her house There was a round table standing 2 ft. from the sofa, on the further side of which was a wine-glass three-parts filled with a liquid made up of a drink called nectar, which was afterwards shown to contain two grains of cyanide of potassium. There were also on the table a nectar bottle, two lumps of sugar, and a spoon. There was no evidence to show that she had taken any of this liquid, and the result of the *post-mortem* and of the analysis of the contents of the wine-glass was to show she had not died from poisoning by cyanide of potassium, but that death was most probably caused by syncope or heart failure, due to fright or some external cause, and, further, that the quantity of cyanide of potassium in the wine-glass was, even if she had taken the whole, insufficient to cause her death. The accused did not live in the house, but he said he had purchased the poison for case-hardening a chisel and had placed it in a cupboard in the room where the mother was found dead, and that he thought it possible she might have taken it from there. No traces of the poison, however, were found after her death either in the cupboard or in the house. There was a good deal of evidence showing that the accused had a motive for killing his mother, *viz.*, to obtain her money. It was held that the evidence was sufficient to warrant the jury in drawing the inference that the accused had put the cyanide of potassium in the wine-glass with intent to murder his mother. It was urged on behalf of the accused that the act of which the accused was guilty, viz., the putting the poison in the wine-glass, was a completed act and could not be and was not intended by the accused to have the effect of killing her at once It could not kill unless it were followed by other acts which he might never have done. But the Court decided that the accused was guilty of attempt to murder.[2] Under illustration *(d)* to this section if a person places poisoned food on another's table intending to kill him he is guilty of attempting to murder. But looking to the wording of this section the poisoned food should have been capable of causing death if it is eaten. In *White's case* it was found that two grains of cyanide of potassium were insufficient to cause death. It seems, therefore, doubtful whether this section would apply in similar circumstances.

3. **'Hurt.'**—See s. 319, *infra*.

Amendment.—Attempts by life convicts.— This clause was provided by s. 11 of Act XXVII of 1870, because a person attempting to murder might, if hurt was caused, be transported for life or imprisoned for ten years, but where the offender

[1] *Nga Wail*, (1923) 1 Rang 209. [2] *White*, (1910) 22 Cox 325.

was already transported for life, the law, by a strange oversight, actually awarded no penalty.

CASES.

Death resulting not from the act of the accused but through other causes.—Where a child wrapped in a quilt was abandoned in a thicket close to a house and footpath, and was found very shortly after its exposure, the child having died; not from exposure but from the ignorance of the person who found it and who gave it no food[1]; and where a man struck another on the head with a stick, and believing him to be dead set fire to the hut with a view to remove all evidence of the crime, and the Civil Surgeon deposed that the blow only stunned the deceased, and the death was really caused by the injuries from the burning when the accused set fire to the hut,[2] it was held that the offence of attempt to murder was committed.

Mutual infliction of injury.—Two accused in the course of a fight inflicted on each other injuries so serious that their dying depositions had to be taken in both cases. There was no eye-witness to the occurrence; and the evidence in each trial consisted of that of the complainant, the corroborative evidence of the wounds on the complainant and the admission of the accused that he was himself wounded in the occurrence. In separate trials, each was convicted of an offence under this section. It was held that as either of the accused would be entitled, in the event of the other dying of the wounds, to the benefit of a reasonable doubt and to plead that the case came within exception 4 to s. 300, neither accused could be legally convicted under this section[3]

Poison.—Where the accused intentionally put arsenic into her husband's food in order to kill him and the husband died sometime afterwards from inflammation of the brain, and there was no evidence that the poison was even a secondary cause of the deceased's death[4], and where the accused asked a doctor to supply her with medicine for the pupose of poisoning her son-in-law[5]; it was held that an attempt to murder had not been committed. Where a woman administered *dhatura* to three members of her family, who did not die, it was held that an attempt to murder was committed as she must be presumed to have known that the administration of *dhatura* was likely [illegible] tered it with that intention.[6] [illegible] to commit robbery, and one [illegible] another taken seriously ill, it was held that in respect of the former the offence committed was that of grievous hurt and in respect of the latter the offence fell under s. 328.[7]

Poison intended for one shared by others.—Where sweetmeat containing arsenic sent to A with the intention of causing her death were also shared by B and C, and none of them died, it was held that the accused was guilty of an attempt to murder not only A but also B and C.[8]

Attempt to cause death by suffocation.—The accused enticed into her house a boy aged nine years, used violence to him and removed several jewels from his person and, being unable to remove his anklets and ear-rings, tied his wrists and neck with a rope, put a cloth in his mouth, took him into a room and placed him sitting [illegible]

[1] *Khodabux Fakeer*, (1868) 10 W. R. (Cr.) 52.
[2] *Khandu valad Bhavani*, (1890) 15 Bom. 194.
[3] *Nga Po Theik* and *Nga Po E*, (1924) 2 Rang. 558.
[4] *Venkatasami*, (1882) Weir, 3rd Edn., 187.
[5] *Musst. Bakhtawar*, (1882) P. R. No. 21 of 1882.
[6] *Tulsha*, (1897) 20 All. 113.
[7] *Bhagwan Din*, (1908) 28 A. W. N. 213
[8] *Ladha Singh*, (1920) 3 U. P. L. R. (L.) 12.

to the omission of the accused to watch the jar and the room, got out in the morning and ran home. It was held that the accused was rightly convicted under this section.[1]

Attempt to discharge a loaded fire-arm.—B drew a loaded pistol from his pocket for the purpose of murdering S, but before he had time to do anything further in pursuance of his purpose the pistol was snatched out of his hand and he was at once arrested. It was held that he had attempted to shoot.[2] On the trial of an indictment under 24 & 25 Vic., c. 100, s. 18, which enacts that whosoever shall unlawfully and maliciously, "by drawing a trigger or in any other manner," attempt to discharge any kind of loaded arms at any person with intent to do grievous bodily harm, shall be guilty of felony, it was proved that the prisoner drew from his pocket a loaded revolver and pointed it towards his mother. His wrists were seized by bystanders as he was raising the pistol, and after a struggle it was taken from him. During the struggle his finger and thumb were seen fumbling about the revolver, which cocked automatically when the trigger was pulled. It was held that there was evidence upon which the prisoner could properly be convicted of an attempt to discharge the revolver within the meaning of the statute.[3] During an interview between the prisoner and the prosecutor, the prisoner drew a loaded revolver from his coat pocket. The prosecutor immediately seized the prisoner and prevented him from raising his arm; a struggle ensued, in the course of which the prisoner nearly succeeded in getting his arm free, but after a few minutes the prosecutor wrested the revolver from him and he was taken into custody. During the struggle the prisoner several times said to the prosecutor, "you've got to die." It was held that the prisoner had attempted to discharge the revolver.[4]

At a public meeting held in Calcutta a student pointed a five-chambered loaded revolver at Sir Andrew Fraser, Lieutenant-Governor of Bengal, and pulled the trigger twice, but owing to the damaged condition of the percussion cap the revolver did not go off. He was prosecuted and convicted under this section.[5] Where a young man of twenty-five and accustomed to shooting was found to have fired at a person at a distance only of some six paces, the cartridge containing shot of about No. 6 size, it was held that he must have known that his act was likely to cause death. If the person shot at had died, the accused would undoubtedly have been guilty of murder. The fact that the back of the chair on which the victim was seated intercepted a number of bullets and thus avoided a fatal result was held not to reduce the offence from one under this section to one under s. 324.[6]

Where two persons fire at another and one only actually hits and kills him, the other is not guilty of murder under ss. 302 and 34, but of attempt to murder.[7]

PRACTICE.

Evidence.—Prove (1) that the death of a human being was attempted.

(2) That such death was attempted to be caused by, or in consequence of, the act of the accused.

(3) That such act was done with the intention of causing death; or

That it was done with the intention of causing such bodily injury as (*a*) the accused knew to be likely to cause death; or (*b*) was sufficient in the ordinary course of nature to cause death; or

That the accused attempted to cause such death by doing an act known to him to be so imminently dangerous that it must in all probability cause (*a*) death, or (*b*) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

[1] *Mangavalli Ranganayakamma*, (1889) 1 Weir 328.
[2] *Brown*, (1883) 10 Q. B. D. 381.
[3] *Duckworth*, [1892] 2 Q. B. 83.
[4] *Linneker*, [1906] 2 K. B. 99.
[5] *J. Roy Chowdhury*, Unreported case, 1908, Criminal Sessions, Calcutta, decided on the 9th November 1908.
[6] *Abdul Rahiman*, (1908) 9 C. L. J. 432.
[7] *Nirmal Kanta Roy*, (1914) 41 Cal. 1071.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

The Court can convict the accused persons of offences under this section read with s. 34 or 114, although they are charged only with offences under this section and ss. 148 and 149.[1]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, with such intention (*or* knowledge), and under such circumstances, that if by that act you had caused the death of AB, you would have been guilty of murder [and that you caused hurt to the said AB by the said act] and thereby committed an offence punishable under s 307 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by th[illegible]

Punishment.—The Frontier Crimes Regulat[illegible]nd 12 (2); the Burma Laws Act, 1898, s. 4 (3) ([illegible]ct, 1897, s 6, apply to offences under this section.

Mental incapacity.—In awarding punishment the fact that the accused had contracted the habit of taking morphia and was a very fickle-minded person was taken into consideration although there was no indication of a plainly marked mental aberration.[2]

Attempt to commit culpable homicide.

308. Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

ILLUSTRATION.

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

COMMENT.

The wording of this section is the same as that of the preceding one except that it deals with an attempt to commit culpable homicide The punishment provided is therefore not so severe.

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.[3]

PRACTICE.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

[1] *Ranchhod Sarang,* (1924) 26 Bom. L. R. 24 of 1912.
954, 7 Bom. Cr. C. 197.
[2] *Alexander Ruffee,* (1912) P. W. R. No 50.
[3] Stephen's Digest of Criminal Law, Art.

That you, on or about the——day of——, at——, did an act, to wit——, with such intention (or knowledge), and under such circumstances, that if by that act you had caused the death of AB, you would have been guilty of culpable homicide not amounting to murder [and that you caused hurt to the said AB by the said act] and thereby committed an offence punishable under s. 308 of the Indian Penal Code, and within the [illegible]

And I hereby direct : [illegible]

Punishment.—The Frontier Crimes Regulation, 1901, ss. 11 (3) (*d*) and 12 (2), and the Criminal Tribes Act, 1897, s. 6, apply to offences under this section.

Attempt to commit suicide.

309. Whoever attempts to commit suicide[1] and does any act towards the commission of such offence,[2] shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.

COMMENT.

This is the only instance in which an attempt to commit an offence is punishable but actual commission cannot be punished.

1. 'Commit suicide.'—To 'commit suicide' is for a person voluntarily to do an act (or, as it is submitted, to refrain from taking bodily sustenance), for the purpose of destroying his own life, being conscious of that probable consequence, and having, at the time, 'sufficient mind to will the destruction of life.'[1]

2. 'Any act towards the commission of such offence.'—Such act must be in the course of the attempt.

Where a woman with the intention of committing suicide by throwing herself in a well, actually ran towards it where she was seized by a person, it was held that she was not guilty of attempt to commit suicide, because she might have changed her mind, and she [illegible] which might be regarded as the commencement [illegible] of oleander roots with the intention to poison [illegible] constitute this offence.[3] In both these cases the acts amounted merely to preparation to commit suicide. The Court has always to consider when the preparation has ended and attempt commenced. A person who emasculated himself was held to have committed no offence under this section, the act not being ordinarily likely to cause death.[4] Where the accused jumped into a well to avoid and escape from the police; and when rescued he came out of the well of his own accord, it was held that in the absence of evidence that he jumped into the well to commit suicide he could not be convicted of an offence under this section.[5] Where a woman who was in advanced stage of pregnancy threw herself into a well being driven mad by pains of prolonged labour and in consequence of that the child was born dead, it was held that she could not be held guilty of attempting to voluntarily cause miscarriage but of attempting to commit suicide.[6]

Means of committing suicide.—In India, of the various methods of committing [illegible] in England, [illegible] and lastly drowning. In India, men resort to hanging and drowning as a means of self-destruction in about equal numbers, while six out of seven women who commit suicide prefer the water. In England, four times as many males as females destroy them-

[1] *Clift* v. *Schwabe*, (1846) 3 C. B. 437.
[2] *Ramaiha*, (1884) 8 Mad. 5.
[3] *Tayee*, (1883) Unrep. Cr. C. 188.
[4] *Madho Singh*, (1878) P. R. No. 22 of 1878.
[5] Dwarka Poonja, (1912) 14 Bom. L. R. 148, 1 Bom. Cr. C. 87.
[6] *Musammat Mulia*, (1919) 17 A. L. J. R. 478.

selves by hanging and the same proportion by cut throat, while the number of males and females who commit suicide by drowning and poison is about equal. The number of sucides by lethal weapons is exceedingly small compared with that which exists in England The most common causes of suicide in India are jealousy, family discord, destitution and physical suffering. Jealousy, with all the bitter feelings it engenders, is the cause of a large number of female suicides.[1]

Attempts to commit suicide are of three classes—

(1) Persons who are driven to attempt to commit suicide by real intense [illegible]al. Every instance of this kind should be treated [illegible]

[illegible]ted in a moment of passion, with little or no reflection, and no very definite motive, punishment, though not severe, should be inflicted.

(3) Where the suicide partakes of the nature of poison, severe punishment may be inflicted.

Amendment.—The words "or with fine, or with both" were substituted for the words, "and shall also be liable to fine" by Act VIII of 1882, s. 7.[2]

English law.—If two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will be guilty of the murder of the one who died.[3]

PRACTICE.

Evidence.—Prove (1) that the act of the accused amounted to an attempt.

(2) That the attempt was complete by doing an act towards the commission of suicide.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of, ——at——, attempted to commit suicide and did an act, to wit——, towards the commission of it, and you thereby committed an offence under s. 309 of the Indian Penal Code, and within my cognizance (*or* within the cognizance of the Court of Session, *or* High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—This section requires the Court to pass a substantive sentence of imprisonment. A sentence of fine and of imprisonment in default of payment is an illegal sentence[4] But sentences should not be passed in cases of attempt to commit suicide, where the accused suffers from a bodily affection which is likely to cause him acute mental depression.[5]

310. Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.

Thug.

COMMENT.

This and the following section incorporate the provisions of the Thugee Act, 1836.

[1] Chevers' Medical Jurisprudence, 658.

[2] *Chanviova bom Shidram*, (1863) 1 B. H. C. 4, is therefore overruled.

[3] *Benjamin Alison*, (1838) 8 C. & P. 418; *Dyson*, (1823) R. & R. 523; *Jessop*, (1877) 16 Cox 204.

[4] Weir, 3rd Edn., 192.

[5] *Appulsaumy*, (1904) 2 L. B. R. 209.

311. Whoever is a thug shall be punished with transportation for life, and shall also be liable to fine.

Punishment.

COMMENT.

Gangs of persons habitually associated for the purpose of inveigling and murdering travellers or others in order to take their property, etc., are called thugs. Thugs are robbers and dacoits, but robbers and dacoits are not Thugs. Thugs committed robbery or dacoity or kidnapping always accompanied with murder. Killing of the victim was the essential thing. Thugs have practically disappeared from the land, but the harrowing tales of their doings are extremely shocking. No lighter punishment could have terrorised them.

Under s. 310 anyone who habitually associates with others for the purpose of committing robbery, etc., is a Thug. Actual commission of any act is not necessary.

The provisions of the Thugee Act with a slight alteration are incorporated in s. 310 and this section.

PRACTICE.

Evidence.—Prove (1) that the accused was associated with other person or persons.

(2) That he was so associated after the passing of this Code.

(3) That such persons, including the accused, were associated for the purpose of committing robbery, or child-stealing, by means of, or accompanied with, murder.

(4) That such persons were habitually associated for that purpose.[1]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, were a Thug, and that you thereby committed an offence punishable under s. 311 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—The Criminal Tribes Act, 1897, s. 6, applies to offences under this section.

Of the Causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the Concealment of Births.

312. Whoever voluntarily causes a woman with child to miscarry[1] shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman,[2] be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child,[3] shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Causing miscarriage.

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.

[1] *Pira*, (1881) P. R. No. 28 of 1881.

COMMENT.

This section deals with the causing of miscarriage with the consent of the woman, while the next section deals with the causing of miscarriage without the consent.

The authors of the Code observe: "With respect to the law on the subject of abortion, we think it necessary to say only that we entertain strong apprehensions that this or any other law on that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated, often leaves a stain on the honour of families. The power of bringing a false accusation of [illegible] unprincipled men. [illegible] few convictions, but [illegible] harvest of profit to t[illegible] *the Code of procedure to lay down rules which may prevent such an abuse. Should* we not be able to do so, we are inclined to think that it would be our duty to advise his Lordship in Council rather to suffer abortion, where the mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions which would occasion more suffering to the innocent than to the guilty."[1] This offence is the [illegible]

I. [illegible] good faith for the purpose of saving the life of the woman.

1. **'Whoever voluntarily causes a woman with child to miscarry.'**—The offender may be the woman herself or any other person.

'Voluntarily.'—See s. 39, *supra*.

'With child' means pregnant, and it is not necessary to show that 'quickening,' that is, perception by the mother of the movements of the fœtus has taken place or that the embryo has assumed a fœtal form, the stage to which pregnancy has advanced and the form which the ovum or embryo may have assumed are immaterial. Where a woman was acquitted on a charge of causing herself to miscarry, on the ground that she had only been pregnant for one month and that there was nothing which could be called fœtus or child, it was held that the acquittal was bad in law.[2]

2. **'Such miscarriage be not caused in good faith for the purpose of saving the life of the woman.'**—Miscarriage is the premature expulsion of the child or fœtus from the mother's womb at any period of pregnancy before the term of gestation is completed. Where a child was full-grown a conviction under this section was set aside and one under s 511 for attempt to bring about miscarriage was maintained.[3] The offence defined in this section can only be committed when the woman is in fact pregnant.[4] For although there may be a guilty intention and attempt to commit it on the person of a woman believed to be, but who really is, not pregnant, the offence, as here defined, seems to require that the woman should be with child. If it appear that the woman was not with child at all, the prisoner must be acquitted.[5]

'Good faith.'—See s. 2, *supra*.

3. **'Quick with child.'**—Quickening is the name applied to peculiar sensations experienced by a woman about the fourth or fifth month of pregnancy. The symptoms are popularly ascribed to the first perception of the movements of the fœtus. But quickening is not a constant, uniform, and well-marked distinction

[1] Note M, p. 151.
[2] *Ademma*, (1886) 9 Mad. 369.
[3] *Arunja Bewa*, (1873) 19 W. R. (Cr.) 32.
[4] *Kabul Pattur*, (1871) 15 W. R. (Cr.) 4.
[5] *James Scudder*, (1828) 3 C. & P. 605.

of the pregnant state.[1] "'Quick with child' is having conceived; 'with quick child' is when the child has quickened."[2]

It has been held under an English statute that the expression 'quick with child' means when the woman has felt the child move within her.[3]

PRACTICE.

Evidence.—Prove (1) that the woman was with child: or (if under the second clause) that she was quick with child.

(2) That the accused did some act likely to cause a miscarriage.

(3) That he did so voluntarily.

(4) That such woman did miscarry in consequence.

(5) That such miscarriage was not caused in good faith in order to save the woman's life.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, voluntarily caused (*name of the woman*) then being with child to miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said——, and thereby committed an offence punishable under s. 312 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—In awarding punishment where a woman has caused herself to miscarry, it should not be forgotten that "the high caste young widow, who, to hide her shame, should, at the risk of life, cause herself to miscarry does not, under the peculiar circumstances in which she is placed by the institutions of society, commit an offence in any respect of like criminality with the seducer of a young girl, or married woman, who to cover her crime should cause such woman to miscarry."[4]

Causing miscarriage without woman's consent.

313. Whoever commits the offence defined in the last preceding section without the consent[1] of the woman, whether the woman is quick with child[2] or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

When the consent of the woman is not taken the offence comes under this section. When the consent is taken then s. 312 applies. Again, under this section the person procuring the abortion is alone punished: under s. 312 such person as well as the woman who causes herself to miscarry are both punished.

1. **'Consent.'**—See s. 90, *supra*.

2. **'Quick with child.'**—See s. 312, *supra*.

PRACTICE.

Evidence.—Prove the same points as required in s. 312; and further it must be established that the woman did not consent to such abortion.

[1] M. & M. 278.

[2] Per Gurney, J., in *Anne Wycherley*, (1828) 8 C. & P. 262, 264.

[3] *Anon.*, (1811) 3 Camp. 76. This case was decided under s. 1 of 43 Geo. III., c. 58, which is now repealed.

[4] Ist Rep., s. 349.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at—, you voluntarily caused AB (the woman who miscarried) then being with child to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said AB, and thereby committed an offence punishable under s. 313 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Death caused by act done with intent to cause miscarriage.

314. Whoever, with intent to cause the miscarriage of a woman which child,[1] does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ;

If fact done without woman's consent.

and if the act is done without the consent[2] of the woman, shall be punished either with transportation for life, or with the punishment abovementioned.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

COMMENT

This section provides for the case where death has occurred in causing miscarriage. Under it it is immaterial whether the woman was pregnant or not and whether the act done was or was not intended or known to cause her death.

This species of homicide may be committed involuntarily, that is, in the language of the Code, by a person who does not intend to cause (or think it likely that he will cause) death by the act which he does If A, intending only to cause miscarriage to Z, involuntarily does an act which causes her death, he is liable to punishment under this section. And he is thus liable whether he acts with caution in order to prevent risk to Z's life, or whether he acts rashly or negligently. Even if he takes such precautions that there is no reasonable probability that Z's death will be caused, and if the medicine is rendered deadly by some accident which no human sagacity could foresee or by some peculiarity in Z's constitution, such as there was no ground whatever to expect, A will be liable to punishment under this section for causing death by an act done with intent to cause miscarriage.[1]

1. **'Intent to cause miscarriage of a woman with child.'**—Even though the woman is not pregnant, yet if the death is caused by administering a drug under the belief that she was so, the offence will probably come under this section. Where a husband procured sul[illegible] it for the purpose of pr[illegible] although in reality she [illegible] was guilty of manslaughter.[2]

Where a poisonous drug was administered to a woman to procure miscarriage, and it was not proved that the accused knew that the drug was likely to cause death, it was held that they had committed an offence under this section.[3] The prisoner, at the request of a pregnant woman, who wished to procure abortion,

[1] M. & M. 280. See *Whitchurch*, (1890) 24 Q. B. D. 420.
[2] *William Gaylor*, (1857) D. & B. 288. [3] *Kalachand Gope*, (1868) 10 W. R. (Cr.) 59.

of the pregnant state.[1] "'Quick with child' is having conceived; 'with quick child' is when the child has *quickened*."[2]

It has been held under an English statute that the expression 'quick with child' means when the woman has felt the child move within her.[3]

PRACTICE.

Evidence.—Prove (1) that the woman was with child; or (if under the second clause) that she was quick with child.

(2) That the accused did some act likely to cause a *miscarriage*.

(3) That he did so voluntarily.

(4) That such woman did miscarry in consequence.

(5) That such miscarriage was not caused in good faith in order to save the woman's life.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, voluntarily caused (*name* [illegible]

the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—In awarding punishment where a woman has caused herself to miscarry, it should not be forgotten that "the high caste young widow, who, to hide her shame, should, at the risk of life, cause herself to miscarry does not, under the peculiar circumstances in which she is placed by the institutions of society, commit an offence in any respect of like criminality with the seducer of a young girl, or married woman, who to cover her crime should cause such woman to miscarry."[4]

Causing miscarriage without woman's consent.

313. Whoever commits the offence defined in the last preceding section without the consent[1] of the woman, whether the woman is quick with child[2] or not, shall be punis[illegible] [illegible]ation for life, or with imprisonm[illegible] for a term which may extend to ten years, [illegible] fine.

COMMENT.

When the consent of the woman is not taken the offence comes under this [illegible] Again, under this section [illegible] under s. 312 such person as well as the woman who causes herself to miscarry [illegible] both punished.

1. **'Consent.'**—See s. 90, *supra*.

2. **'Quick with child.'**—See s. 312, *supra*.

PRACTICE.

Evidence.—Prove the same points as required in s. 312; and further it must be established that the woman did not consent to such abortion.

[1] M. & M. 278.

[2] Per Gurney, J., in *Anne Wycherley*, (1838) 8 C. & P. 262, 264.

[3] *Anon.*, (1811) 3 Camp. 76. This case was decided under s. 1 of 43 Geo. III., c. 58, which is now repealed.

[4] 1st Rep., s. 349.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at—, you voluntarily caused AB (the woman who miscarried) then being with child to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said AB, and thereby committed an offence punishable under s. 313 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Death caused by act done with intent to cause miscarriage.

314. Whoever, with intent to cause the miscarriage of a woman which child,[1] does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

If fact done without woman's consent.

and if the act is done without the consent[2] of the woman, shall be punished either with transportation for life, or with the punishment abovementioned.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

COMMENT.

This section provides for the case where death has occurred in causing miscarriage Under it it is immaterial whether the woman was pregnant or not and whether the act done was or was not intended or known to cause her death.

This species of homicide may be committed involuntarily, that is, in the language of the Code, by a person who does not intend to cause (or think it likely that he will cause) death by the act which he does. If A, intending only to cause miscarriage to Z, involuntarily does an act which causes her death, he is liable to punishment under this section. And he is thus liable whether he acts with caution in order to prevent risk to Z's life, or whether he acts rashly or negligently. Even if he takes such precautions that there is no reasonable probability that Z's death will be caused, and if the medicine is rendered deadly by some accident which no human sagacity could foresee or by some peculiarity in Z's constitution, such as there was no ground whatever to expect, A will be liable to punishment under this section for causing death by an act done with intent to cause miscarriage.[1]

1. **'Intent to cause miscarriage of a woman with child.'**—Even though the woman is not pregnant, yet if the death is caused by administering a drug under the belief that she was so, the offence will probably come under this section. Where a husband procured [illegible] it for the purpose of [illegible] although in reality [illegible] was guilty of manslaughter.[2]

Where a poisonous drug was administered to a woman to procure miscarriage, and it was not proved that the accused knew that the drug was likely to cause death, it was held that they had committed an offence under this section.[3] The prisoner, at the request of a pregnant woman, who wished to procure abortion,

[1] M. & M. 280. See *Whitchurch*, (1890) 24 Q. B. D. 420.
[2] *William Gaylor*, (1857) D. & B. 288. [3] *Kalachand Gope*, (1868) 10 W. R. (Cr.) 59.

of the pregnant state.[1] "'Quick with child' is having conceived; 'with quick child' is when the child has quickened."[2]

It has been held under an English statute that the expression 'quick with child' means when the woman has felt the child move within her.[3]

PRACTICE.

Evidence.—Prove (1) that the woman was with child: or (if under the second clause) that she was quick with child.

(2) That the accused did some act likely to cause a miscarriage.

(3) That he did so voluntarily.

(4) That such woman did miscarry in consequence.

(5) That such miscarriage was not caused in good faith in order to save the woman's life.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——,voluntarily caused (*name of the woman*) then being with child to miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said——, and thereby committed an offence punishable under s. 312 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—In awarding punishment where a woman has caused herself to miscarry, it should not be forgotten that "the high caste young widow, who, to hide her shame, should, at the risk of life, cause herself to miscarry does not, under the peculiar circumstances in which she is placed by the institutions of society, commit an offence in any respect of like criminality with the seducer of a young girl, or married woman, who to cover her crime should cause such woman to miscarry."[4]

Causing miscarriage without woman's consent.

313. Whoever commits the offence defined in the last preceding section without the consent[1] of the woman, whether the woman is quick with child[2] or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

When the consent of the woman is not taken the offence comes under this section. When the consent is taken then s. 312 applies. Again, under this section the person procuring the abortion is alone punished: under s. 312 such person as well as the woman who causes herself to miscarry are both punished.

1. **'Consent.'**—See s. 90, *supra*.

2. **'Quick with child.'**—See s. 312, *supra*.

PRACTICE.

Evidence.—Prove the same points as required in s. 312; and further it must be established that the woman did not consent to such abortion.

[1] M. & M. 278.

[2] Per Gurney, J., in *Anne Wycherley*, (1838) 8 C. & P. 262, 264.

[3] *Anon.*, (1811) 3 Camp. 76. This case was decided under s. 1 of 43 Geo. III., c. 58, which is now repealed.

[4] 1st Rep., s. 349.

murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it the less a murder.

PRACTICE.

Evidence.—Prove (1) that the woman was with child.

(2) That the accused did an act, before the child was born, calculated to prevent the child from being born alive, or to cause it to die after its birth.

(3) That such act was done by the accused with that intention.

(4) That such act was done, not in good faith, for the purpose of saving the mother's life.

(5) That the child was born dead, or died after its birth.

(6) That such death was caused by the abovementioned act of the accused.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—The charge should describe the act by which the accused intended to prevent the child being born alive, and should also state that the act was not caused in good faith for the purpose of saving the mother.[1]

Form.—I (*name and office of Magistrate, etc,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, to XY before the birth of her child, with the intention of thereby preventing that child from being born alive (*or* causing it to die after its birth), and by that act did prevent that child from being born alive (*or* caused it to die after its birth) and the said act was not done in good faith for the purpose of saving the life of the mother, and thereby committed an offence punishable under s. 315 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Causing death of quick unborn child by act amounting to culpable homicide.

316. Whoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick[1] unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

ILLUSTRATION.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

COMMENT.

This section punishes offences against children in the womb [illegible]

[illegible]

[illegible] culpable homicide, if the sufferer were a living person, will, if done to a quick unborn child, whose death is caused by it, constitute the offence here punished. If a person strikes a pregnant woman and thereby causes the death of her quick unborn child, he will be guilty of the offences here defined, if the blow was intended by him to

[1] (1865) 3 W. R. (Cr. L.) 5.

obtained for her a poisonous *drug*. He knew the purpose for which she wanted it, and though he gave it to her for that purpose, he was unwilling that she should use it, and he did not administer it to her, or cause her to take it. She, however, took it for the purpose assigned, and died in consequence. It was *held* that the prisoner was not liable to be convicted on an indictment charging him with the *murder of the woman.*[1]

2. 'Consent.'—The consent of the woman *freely* and intelligently given is allowed to mitigate the offence. If A kills Z by administering abortives to her with the knowledge that those abortives are likely to cause her death, he is guilty of culpable homicide, which will be culpable homicide, by *consent*, if Z agreed to run the risk, and murder, if Z did not so agree.

As to the definition of 'consent' see s. 90, supra.

PRACTICE.

Evidence.—Prove (1) that the woman was with child.

(2) That the accused did an act to cause miscarriage.

(3) That he did so with that intention.

(4) That such act caused the death of the woman.

(5) (If the case comes under the second clause) that such act was done by the accused without the consent of the woman.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, with intent to cause the miscarriage of (*name of the woman*) did a certain act, to wit——, which caused the death of the said——, and thereby committed an offence punishable under s. 314 of the Indian Penal Code and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Act done with intent to prevent child being born alive or to cause it to die after birth.

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith[1] for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

COMMENT.

The offence which this section punishes is the injury to the child's life.

Any act done with the intention here mentioned which results in the destruction of the child's life, whether before or after its birth, is made punishable.

1. 'Good faith.'—See s. 52, *supra*.

English law.—If a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world; the person who by his misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of

[1] *Fretwell*, (1862) 31 L. J. (M. C.) 145. *See William Gaylor*, (1857) D. & B. 288

murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it the less a murder.

PRACTICE.

Evidence.—Prove (1) that the woman was with child.

(2) That the accused did an act, before the child was born, calculated to prevent the child from being born alive, or to cause it to die after its birth.

(3) That such act was done by the accused with that intention.

(4) That such act was done, not in good faith, for the purpose of saving the mother's life.

(5) That the child was born dead, or died after its birth.

(6) That such death was caused by the abovementioned act of the accused.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—The charge should describe the act by which the accused intended to prevent the child being born alive, and should also state that the act was not caused in good faith for the purpose of saving the mother.[1]

Form.—I (*name and office of Magistrate, etc,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, to XY before the birth of her child, with the intention of thereby preventing that child from being born alive (*or* causing it to die after its birth), and by that act did prevent that child from being born alive (*or* caused it to die after its birth) and the said act was not done in good faith for the purpose of saving the life of the mother, and thereby committed an offence punishable under s. 315 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Causing death of quick unborn child by act amounting to culpable homicide.

316. Whoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick[1] unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

ILLUSTRATION.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

COMMENT.

This section punishes offences against children in the womb where the pregnancy has advanced beyond the stage of quickening, and where the death is caused after the quickening and before the birth of the child. Any act or omission of such a nature and done under such circumstances [illegible] pable homicide, if the sufferer were a living child, whose death is caused by it, constitute [illegible] strikes a pregnant woman and thereby causes the death of her quick unborn child, he will be guilty of the offences here defined, if the blow was intended by him to

[1] (1865) 3 W. R. (Cr. L.) 5.

cause the woman's death or was one which he knew or had reason to believe to be likely to cause it.[1]

1. *'Quick.'*—See s. 312, *supra*.

PRACTICE.

Evidence.—Prove (1) that the woman was *quick with child*.

(2) That the accused did an act to cause the death of such child.

(3) *That the circumstances* under which such act was *done, were such as to* make the accused guilty of culpable homicide, if death had been caused. (See s. 300).

(4) That such act did cause the death of the quick unborn child.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, did an act, to wit——, *under circumstances*, to wit——, that if you thereby caused death, you will be guilty of culpable homicide, and did by such act cause the death of a quick unborn child of XY, and you thereby committed an offence punishable under s. 316 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Exposure and abandonment of child under twelve years, by parent or person having care of it.

317. Whoever, being the father or mother[1] of a child under the age of twelve years,[2] or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child,[3] shall be punished with imprisonment of either description for a term which may extend *to seven years, or with fine, or with both.*

Explanation[4].—This section is not intended to prevent the *trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.*[5]

COMMENT.

Object.—This section is intended to prevent the abandonment or desertion by a parent of his or her children of tender years, in such a manner, that the children, not being able to take care of themselves, may run the risk of dying or being injured. It does not apply when children are left under the care of others.[2]

S[illegible] child is *exposed and no death supervenes;* if, h[illegible] be under s. 304.[3] The offence is com[illegible] ger or risk of danger *arises to the* child's life.

Ingredients.—The section has three essentials—

1. The person coming within its purview must be father or mother or must have the care of the child.
2. Such child must be under the age of twelve years.
3. The child must have been exposed or left in any place with the intention of wholly abandoning it.

[1] M. & M. 282.

[2] *Fehani Hariani*, (1871) 16 W. R. (Cr.) 12; *Mussumat Khairo*, (1872) P. R. No. 33 of 1872; *Mussammat Bhuran*, (1877) P. R. No. 5 of 1878; *Mussammat Bhagan*, (1878) P. R. No. 4 of 1879.

[3] *Banni*, (1879) 2 All. 349.

1. **'Whoever being the father or mother . . or having the care of such child.'**—Both are equally bound by ties of duty, and this equally whether the child be born in wedlock or be illegitimate. An infant requiring nurture, or a child of tender years, will ordinarily be in the immediate charge of the mother, the father's duty being that of providing for both the mother and the offspring. The person who has the immediate care of the child is the person contemplated. A parent who is absent, but who has provided duly for the maintenance and protection of his child, would not be criminally answerable for its abandonment by the person in whose charge he had left it. The offence consists in the desertion of the child by a person who is bound by nature to support and protect it, or who has taken on himself that duty, whether by adopting the child, or by way of contract with the parent, or in some other way.[1] Any person receiving an infant from its mother on the understanding that the mother never desired or wished to have it back again, must be regarded as a person having the care of it. The mother of a newly born child, with a view to dispose of it, gave it to her sister who carried it by a train and left it in a compartment. The child was found wrapped up and a bottle of milk was left by its side. It was held that the mother was guilty under this section and s. 109, and her sister under this section only.[2]

2. **'Age of twelve years.'**—Twelve years is fixed as the period under which a child cannot be abandoned.

3. **'Expose or leave such child in any place with the intention of wholly abandoning such child.'**—The word 'expose' means to physically put outside, so that such putting outside involves some physical risk to the person put out. Having reference to a child, it would mean putting it somewhere where it could not receive the protection necessary for its tender age, as, for instance, putting it outside the house, whereby it would be exposed to the risk of climate, wild beasts, and the like. The exposure contemplated by the Code is one by which danger to life may immediately ensue.[3] But the Madras High Court has held that it is not necessary that the exposure and abandonment must be under such circumstances as to endanger the life or the health of the child The only intention required to complete the offence is an intention of wholly abondoning the child.[4]

'Leave.'—As this word comes in immediate juxtaposition with the word 'expose' the word 'leaving' means leaving in a sense *ejusdem generis* as the exposure, and indicates an offence only slightly distinguishable from exposing. It cannot mean leaving in the large sense of abandonment, but must be construed in strict connection with the word 'exposure.' The narrower construction of the words 'expose or leave' is much strengthened by the insertion of those striking words 'in any place.'[5] "In order to make the 'leaving' of a child an offence under s. 317 . . . the child must be left *without protection*. I think this is clear in the first place because the word 'leave' being coupled in that section with the word 'expose,' must on the principle '*noscitur ex sociis*' be considered as to some extent taking its colour from the word 'expose,' and must be construed as meaning leave under circumstances more or less resembling those of an exposure. I think this is clear further from the intention which is expressly required by the section to constitute the offence. There must be an intention wholly to *abandon* the child: now I think an intention wholly to abandon the child means something more than an intention to go away from it and never to return to it. The phrase 'to abandon a child' in its ordinary acceptance means something more than merely to go away from it. In fact it seems to me that here again the idea of leaving *without protection* comes in."[6]

[1] M. & M. 284.

[2] *Cripps*, (1916) 18 Bom. L. R. 934, 3 Bom. Cr. C. 217.

[3] *Mirchia*, (1890) 18 All. 364, 366.

[4] *Baya Sunkulamma*, (1890) 1 Weir 331.

[5] *Mirchia*, sup.

[6] Per Fitzpatrick, J., in *Mussammat Bhuran*, (1877) P. R. No. 5 of 1878.

'With the intention of wholly abandoning the child.'—The gist of the offence is the exposure or leaving with intention to wholly abandon, and the manner of exposing or leaving and the consequences likely to ensue are not essential ingredients, though they may be taken into consideration in passing the sentence.[1] The legislature looks to the intention of the accused rather than to the consequences of the act done. Where a woman abandoned her newly-born child by leaving it in a place which was quite close to a village and near a public road, and the child was soon discovered, it was held that she was guilty of this offence.[2] A woman, mother of an illegitimate child, six months old, left it in charge of a blind woman saying she would soon return. She went away to another village and did not return; and apparently she never intended to return. It was held that she could not be convicted under this section.[3] The accused, a married woman, eloped leaving her child, one and a half months old, in the house of her husband. It was held that this was not a "leaving with the intention of wholly abandoning the child."[4]

A, the mother of a child five weeks old, and B put the child into a hamper, wrapped up in a shawl and packed with shavings and cotton wool, and A, with the connivance of B, took the hamper to a railway station, paid for its carriage, and told the clerk to send it to G. She said nothing as to the contents of the hamper, which was delivered to the father of the child at G. The child died three weeks afterwards from causes not attributable to the conduct of A and B. It was held that they were guilty of abandoning and exposing the child.[5] A woman who was living apart from her husband, and who had the actual custody of the child, brought the child, and left it at the father's door, telling him she had done so. He knowingly allowed it to remain from about 7 P.M. till 1 A.M., when it was removed by a constable, the child being then cold and stiff. It was held that though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered.[6]

4. Explanation.—The explanation indicates "with much clearness the scope and purview of the section and the nature of the evil against which it sought to provide. That explanation provides for the case of injuries actually ensuing that the guilty person shall be punished for the injury so inflicted according to the circumstances under which the injury is done, *i.e.*, for murder or culpable homicide, as the case may be."[7] Though the death of the child may not ensue the offence may amount to an attempt punishable under s. 307. See ill. (*b*) to that section.

5. 'If the child die in consequence of the exposure.'—This expression means 'dies from cold or other result of exposure.' Hence, where a new-born child was exposed, and it died after, but not, except remotely, on account of its exposure, the mother was acquitted of murder and convicted under this section.[8] Where a woman deserted her illegitimate child of ten days old, but under circumstances in which it could and, as a matter of fact, did, obtain food, and the child died after four days from natural causes, it was held that the mother could not be convicted under this section.[9]

PRACTICE.

Evidence.—Prove (1) that the child is under twelve years of age.

[1] *Antakke*, (1901) 24 Mad. 662; *Mussi. Nankee*, (1866) P. R. No. 23 of 1866; *Mussammat Ram Das*, (1870) P. R. No. 18 of 1870; *Mussumat Khairo*, (1872) P. R. No. 33 of 1872; *Mussammat Bhagan*, (1878) P. R. No. 4 of 1879.

[2] *Kundan*, (1903) 23 A. W. N. 43

[3] *Mirchia*, (1896) 18 All. 364.

[4] *Mussammat Bhuran*, (1877) P. R. No. 5 of 1878; *Mussammat Bhagan*, Sup.

[5] *Folkingham*, (1876) L. R. 1 C. C. R. 222.

[6] *White*, (1871) L. R. 1 C. C. R. 311.

[7] Per Blair, J., in *Mirchia*, sup., p. 366.

[8] *Khodabux Fakeer*, (1868) 10 W. R. (Cr.) 52.

[9] *Jeoni*, (1893) 13 A. W. N. 100.

(2) That the accused is the father or mother, or person having the care of that child.

(3) That he exposed or left such child in the place in question.

(4) That he so exposed or left the child with the intention of wholly abandoning it.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, being the father (*or* mother *or* having the care) of a certain child under the age of twelve years, to wit——; of the age of——years, did expose or leave the said child in a certain place, to wit——, with the intention of wholly abandoning the said child, and thereby committed an offence punishable under s. 317 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Concealment of birth by secret disposal of dead body.

318. Whoever, by secretly burying or otherwise disposing of the dead body of a child,[1] whether such child die before or after or during its birth,[2] intentionally conceals or endeavours to conceal the birth [3] of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section deals with the secret burial of a child. If it is a fœtus only then ss. 312 and 511 of the Code will apply.

The facility with which the life of an infant at its birth is extinguished, and the temptation to take it away in cases of bastard children, justify such a provision.

Bentham says that this offence ought to be punished by branding it with disgrace. It is commonly the fear of shame which is its cause ; it needs a greater shame to repress it.

[illegible] ld.

3. Intention to conceal the birth of such child by such secret burying or disposal.

1. **'Secret burying or otherwise disposing of the dead body of a child.'**—This includes every possible mode of disposing of the body. It is sufficient if the body is temporarily concealed with the intention of removing it elsewhere when opportunity offered.[1]

This section refers to the disposal of a dead body secretly and does not meet the case of a person depositing a child alive in any place which is punishable under the last section. There must be a secret disposition of the body and an offence under this section is not committed if the body is left in a public place.[2] Leaving the dead body of a child in two boxes, but not locked or fastened, one being placed inside the other in a bed room, but in such a position as to attract the attention of those who daily resorted to the room was held to be not a secret disposition of the body.[3] It was held similarly where the dead body of a child

[1] *Mt. Sulkdchi*, (1900) 13 C. P. L. R. 188 [2] *Jane George*, (1868) 11 Cox 41.
[3] *Abbas Bi*, [1911] 2 M. W. N. 379.

was placed on a dung heap quite close to a public road.[1] But where a woman threw a child down a privy[2]; and where a woman placed a living child in a place of concealment, and on subsequently re-visiting that place found the child dead and left it there[3] it was held that this offence was committed.

It should be distinctly proved that the child was dead at the time of disposal. Where a woman, delivered of a child born alive, endeavoured to conceal the birth thereof, by depositing the child while alive in a corner of a field, leaving the infant to die from exposure, which it did, and the dead body was afterwards found in the corner, it was held that she could not be convicted of secretly "disposing of the dead body of a child."[4]

No endeavour to conceal the birth of a child.—Where a woman having been delivered of a dead child left it at the place of birth which was in the compound of her house and told no one about it, she was held to be not guilty of this offence.[5] The accused, being pregnant with an illegitimate child, went to the village jungle for purposes of nature and there, in the presence of another woman, gave birth to a child which died immediately. The dead body was left on the spot where the birth took place and was there discovered two or three days afterwards. It was held that the mere leaving of the body where the birth took place did not constitute an offence under this section as it did not amount to a secret disposal.[6]

A woman was delivered of a child, whose dead body was found at her father's house in a bed among the feathers. There was no evidence to show who placed it there, but it being proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the Court directed an acquittal on a charge of endeavouring to conceal the birth.[7]

'Child.'—Under this section it is sufficient to show that a 'child' was born and that it was sufficiently developed to have lived if born alive.[8]

Concealment of the birth of a fœtus four months old is no offence[9]; but if the fœtus is six[10] or seven[11] months old its concealment is an offence. "This offence cannot be committed unless the child had arrived at the stage of maturity at the time of birth, that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity, and if she had miscarried at a time when the fœtus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probability is that the child would not be born alive."[12] But in a later case it has been laid down that the word 'child' is not to be limited to a child likely to live or likely to die, but that as soon as the fœtus had the outward appearance of a child it is sufficient. A fœtus not bigger than a man's finger, but having the shape of a child was, therefore, held to be 'a child.'[13]

2. ***'Whether such child die before or after its birth.'***—The offence under this section is in respect of concealment of birth by a secret disposal of the dead body of a child. It is, therefore, not material when such child died.

[1] *Musammat Bakhtawari*, (1913) P. W. R. (Cr.) No. 26 of 1913.
[2] *Elizabeth Cornwall*, (1817) R. & R. 336; *Ann Coxhead*, (1845) 1 C. & K. 623.
[3] *Hughes*, (1850) 4 Cox 447.
[4] *Jane May*, (1867) 10 Cox 448.
[5] *Amina*, (1892) Unrep. Cr. C. 607.
[6] *Mt. Saraswati*, (1905) 1 N. L. R. 89; *Mt. Piara*, (1883) 5 C. P. L. R. (Cr.) 29, where it was held to the contrary, dissented from.
[7] *Sarah Higley*, (1830) 4 C. & P. 366.
[8] *Radha Lom Rangu*, (1899) 1 Bom. L. R. 165; *Mi Pyo Nyo*, (1905) U. B. R. (P. C.) 27.
[9] (1869) 4 M. H. C. App. 63.
[10] *Kasai*, (1894) Cr. R. No. 55 of 1894. Unrep. Cr. C. 727; *Hewitt*, (1856) 4 F. & F. 1101.
[11] *Sunna*, (1884) 1 Weir 334.
[12] Per Erle, J., in *Berriman*, (1854) 6 Cox 388; *Mt. Bilase*, (1887) 2 C. P. L. R. 153
[13] *Colmer*, (1864) 9 Cox 506.

3. **'Intentionally conceals, or endeavours to conceal, the birth.'**—The offence becomes complete when the birth, *i.e.*, the delivery of a child dead or living is concealed by any means.[1] The endeavour to conceal the birth of a child by a secret disposition of the body must be by putting it into some place where it is not likely to be found. Placing it in an open box in the prisoner's bed-room, and afterwards, on enquiry by the medical man, informing him that the child was in the box where it was found, was held to be not a secret disposition.[2] The evidence of a secret disposition consists in the situation in which the body is placed.[3] If any concealment or disposition of the dead body of a child is made, it does not matter whether it be final or temporary.[4] Where, therefore, a woman placed the dead body of a child between a bed and a mattress,[5] or placed it upon her bed and covered it over with a petticoat,[6] it was held that this offence was not committed. If the mother causes the body of her child to be secretly buried with a view to conceal the birth, the offence is complete even though she may have previously allowed the birth to be known to some other persons.[7]

Abetment.—Where the accused gave her new-born illegitimate dead child to a woman with instructions to dispose of it secretly, and the latter carried out the instructions by throwing it into a river, it was held that the accused was not guilty of the substantive offence under this section, though the facts more appropriately came under the definition of abetment.[8]

PRACTICE.

Evidence.—Prove (1) the birth of the child.

(2) That the child died either before, during, or after, its birth.

(3) That the accused buried or otherwise disposed of the dead body.

The accused should have done some act of disposal of the body after the child was dead.[9] The dead body must be found, and identified as that of the child of which she is alleged to have been delivered.[10]

(4) That such burial or disposal of the body was secretly done.

(5) That the accused thereby intentionally concealed, or endeavoured to conceal, the birth of such child.

Mere proof that a woman was delivered of a child and allowed two others to take away its body is insufficient to sustain an indictment against her for concealment of birth.[11]

Pr[illegible]
by C[illegible]

of th[illegible]er but must be convicted under

[illegible] hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, by secretly burying (*if any*

[1] *Lalbu*, (1898) Cr. R. No. 15 of 1898, Unrep. Cr. C. 961; *Mi Pyo Nyo*, (1905) U. B. R. (P. C.) 27.

[2] *Sleep*, (1864) 9 Cox 559

[3] *Elizabeth Brown*, (1870) L. R. 1 C. C. R. 244.

[4] *Farnham*, (1845) 1 Cox 349.

[5] *Sarah Goldthorpe*, (1841) Car. & M. 335; 2 Moody 244, *Jane Perry*, (1855) 6 Cox 531.

[6] *Rosenberg*, (1906) 70 J. P. 201.

[7] *Frances Douglas*, (1836) 1 Moody Cr. C. 480.

[8] *Bays*, (1895) Cr. R. No. 40 of 1895, Unrep Cr. C. 775.

[9] *Harriett Turner*, (1839) 8 C. & P. 755

[10] *Mary Williams*, (1871) 11 Cox 684.

[11] *Emma Bate*, (1871) 11 Cox 686.

[12] *Subbalakshmi Ammal*, (1900) 1 Weir 334.

section and s. 321.[1] Where the accused beat and kicked the deceased whereby the deceased's spleen, which was in a diseased condition, was ruptured and he died,[2] where the accused kicked a punkha-puller who had an enlarged spleen which was not known to the accused, and death ensued,[3] where the accused caused the death of another person by throwing a piece of brick at him which struck him in the region of the spleen and ruptured it, the spleen being diseased,[4] it was held that as the accused had not the intention to cause death, or to cause such bodily injury as was likely to cause death, the offence committed was that of voluntarily causing hurt.

Hair-pulling.—Pulling a woman by the hair is held to be this offence.[5]

Grievous hurt.

320. The following kinds of hurt only are designated as "grievous":—

First.—Emasculation.[1]

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration[2] of the head or face.

Seventhly.—Fracture or dislocation[3] of a bone or tooth.

Eighthly.—Any hurt which endangers life[4] or which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits[5].

COMMENT.

The authors of the Code observe: "We have found it very difficult to draw a line between those bodily hurts which are serious and those which are slight. To draw such a line with perfect accuracy is, indeed, absolutely impossible; but it is far better that such a line should be drawn, though rudely, than that offences some of which approach in enormity to murder, while others are little more than frolics which a good-natured man would hardly resent, should be classed together.

"We have, therefore, designated certain kinds of hurt as *grievous*. We have given this name to emasculation, etc., etc.,..to the fracture and to the dislocation of bones. Thus far we proceed on sure ground. But a more difficult task remains. Some hurts which are not, like those kinds of hurt which we have just mentioned, distinguished by a broad and obvious line from slight hurts, may nevertheless be most serious. A wound, for example, which neither emasculates the sufferer, nor blinds him, nor destroys his hearing, nor deprives him of a member or a joint, nor permanently deprives him of the use of a member or a joint, nor disfigures his countenance, nor breaks his bones, nor dislocates them, may yet cause intense pain, prolonged disease, lasting injury to the constitution. It is evidently desirable that the law should make a distinction between such a wound, and a scratch which is healed with a little sticking plaster. A beating, again, which does not maim the sufferer or break his bones, may be so cruel as to bring him to the point of death. Such a beating, it is clear, ought not to be

[1] *Bysagoo Noshyo*, (1867) 8 W. R. (Cr.) 29; *Punchanun Tantee*, (1866) 5 W. R. (Cr.) 97; *Phimni Ramudu*, (1881) Weir, 3rd Edn., 162; *Nga Kyin*, (1893) 1 U. B. R. (1892—1896), 217.

[2] *Bawaji*, (1872) Unrep. Cr. C. 63, C. R. of 1872.

[3] *Fox*, (1879) 2 All. 522; *Ramdayal*, (1891) 5 C. P. L. R. 69.

[4] *Randhir Singh*, (1881) 3 All. 597.

[5] (1883) Weir, 3rd Edn., 196.

confounded with a bruise, which requires only to be bathed with vinegar, and of which the traces disappear in a day."[1]

This section enumerates eight kinds of hurt as grievous. The term "maim" in the English criminal law will include 'hurt.'

To make out the offence of voluntarily causing grievous hurt, there must be some specific hurt, voluntarily inflicted, and coming within some of the eight kinds enumerated in this section.[2]

1. **'Emasculation.'**—The term 'emasculation' means the depriving of a person of masculine vigour, castration. Injury to the scrotum would render a man impotent A person emasculating himself cannot be convicted under this section or under s. 309.[3] A person causing grievous hurt upon his own self does not come within the purview of this section.

2. **'Disfigure.'**—The word 'disfigure' in this section, means to do a man some external injury which detracts from his personal appearance, but does not weaken him as the cutting off of a man's nose or ears[4] Where a girl's cheeks were branded with a red-hot iron, which left scars of a permanent character, it was held that the disfigurement contemplated by this section was caused.[5]

3. **'Fracture or dislocation of a bone'**—The fracture or dislocation of a bone is considered grievous because it causes great pain and suffering to the injured person. The bone fractured may be rejoined or the bone dislocated may be re-set, and this is immaterial so far as the offence is concerned.

Where the accused threw his wife from a window about six feet high, but the fall was broken by a weather board fixed just below it and resulted in the fracture of the knee pan and in several small wounds, it was held that the offence committed was grievous hurt.[6] Where the result of a joint attack by several persons on one party was fracture of the arm of the party assaulted, the offence committed was held to be grievous hurt and not assault.[7]

4. **'Any hurt which endangers life'**—These words cannot apply to cases in which life was not merely endangered but actually taken away.[8]

5. **'Causes the sufferer to be during the space of twenty days, in severe bodily pain, etc.'**—The authors of the Code say: "After long consideration we have determined to give the name grievous bodily hurt to all hurt which causes the sufferer to be in pain, diseased or unable to pursue his ordinary avocations, during the space of twenty days...It appears to us that the length of time during which a sufferer is in pain, diseased or incapacitated from pursuing his ordinary avocations, though, a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised. It is a criterion which may, we think, with propriety be employed not merely in cases where violence has been used, but in cases where hurt has been caused without any assault, as by the administration of drugs, the setting of traps, the digging of pit-falls, the placing of ropes across a road...In apportioning the punishment, we take into consideration both the extent of the hurt and the intention of the offender."[9]

The Commissioners observe: "We cannot but think that there is reason in the exceptions taken to estimating the severity of a hurt by the time during which the sufferer is unable to follow his ordinary pursuits, as a rule which will operate unequally. The man who lives by daily labour suffers far more by being kept from his work for twenty days, than he who has independent means, and whose ordinary pursuits may be intermitted for that time without causing him any material privation. Again an injury to the right hand may in the case of a clerk keep

[1] Note M, pp 151, 152
[2] *Budri Roy*, (1875) 23 W. R. (Cr.) 65.
[3] *Madho Singh*, (1878) P. R. No. 22 of 1878.
[4] 1st Rep. s. 373.
[5] *Anta bin Dadoba*, (1863) 1 B. H. C. 101.
[6] *Jiva*, (1891) Unrep. Cr. C. 558.
[7] *Ramtohul Sing*, (1866) 5 W. R. (Cr.) 12.
[8] *Marimuthu*, [1923] M. W. N. 796, 18 L. W. 183.
[9] Note M, pp. 152, 153.

him from his work for twenty days, which if it happened to the left hand would be of no consequence. An injury to the foot may prevent one man from following his business, in which walking is necessary, which if it happened to another man in a sedentary employment would not interrupt him at all. The proposed criterion is therefore unsatisfactory, but some criterion is necessary and it will be difficult to devise a better."[1] The mere fact that a man has been in hospital for twenty days is not sufficient, it must be proved that during that time he was unable to follow his ordinary pursuits.[2] An injured man may be quite capable of following his ordinary pursuits long before twenty days are over, and yet for the sake of permanent recovery or greater ease or comfort be willing to remain as a convalescent in a hospital, especially if he is fed at the public expense.[3] A disability for twenty days constitutes grievous hurt; if it continues for fifteen days, then the offence is hurt.[4]

Where a man was so much injured that he had to go to hospital, but left it perfectly cured on the twentieth day, it was held that that day would count as one of the twenty days during which he was unable to follow his ordinary pursuits.[5] Where the accused caused hurt to a woman, who remained in a hospital only for seventeen days, out of which she was in danger for three days, it was held that he had caused grievous hurt.[6]

Acts neither intended nor likely to cause death may amount to grievous hurt even though death is caused.—Where there is no intention to cause death or no knowledge that death is likely to be caused from the harm inflicted, and death is caused, the accused would be guilty of hurt or grievous hurt according to the seriousness of the injury, but not of culpable homicide. Where a man receives only one blow on the head and dies, and there is no evidence to show which of the two persons attacking him gave that blow, neither of the two can be convicted under s. 304 but both of them can be convicted of an offence under s. 325.[7] Three men armed with sticks attacked an unarmed man and inflicted injuries which resulted shortly afterwards in his death. The accused intended to give a thrashing to the deceased but did not intend to cause death or to cause such bodily injury as they knew was likely to cause death, it was held that they were guilty of an offence under s. 326.[8] The accused who was beaten by the deceased on the previous day came across the deceased by chance and gave him a blow on the back of the head with a hocky stick which he had in his hand at the time and ran away. The blow did not fell the deceased. It was held that the offence committed by the accused was grievous hurt because it would not be safe to hold that he intended to do more than cause grievous hurt[9].

For further cases on the point see pp 690, 691.

Diseased spleen.—Where the accused pulling the deceased out of a cot, kicked him, and struck him on the side or on the ribs with a stick, whereby the deceased, whose spleen was diseased, died, it was held that he had committed the offence of voluntarily causing grievous hurt.[10]

Blow aimed at one person falling upon another.—The accused struck a woman, carrying an infant in her arms, violently over her head and shoulders. One of the blows fell on the child's head, causing death. It was held that the

[1] First Rep., s. 374.
[2] *Vasta Chela*, (1894) 19 Bom. 247; *Nga Ya Baw*, (1902) 1 L. B. R. 221.
[3] *Vasta Chela*, sup.
[4] *Bishnooram Surma*, (1864) 1 W. R. (Cr.) 9.
[5] *Sheikh Bahadur*, (1862) 2nd Mad. Sess.
[6] *Bassoo Rannah*, (1865) 2 W. R. (Cr.) 29.
[7] *Agra*, (1914) P. R. No. 37 of 1914; *Jakana*, (1916) P. L. R. No. 109 of 1916; *Datta Nana Pawar*, (1917) 19 Bom. L. R. 902, 4 Bom. Cr. C. 157; *Jhandu*, (1924) 6 L. L. J 268; *Datta Ram*, (1924) 1 L. C. 297, 6 L. L. J. 317; *Dalip Singh*, (1924) 7 L. L. J. 44.
[8] *Ramza*, (1922) 6 L. L. J. 533.
[9] *Ghulam Jilani*, (1925) 2 L. C. 37, 26 P. L. R. 430.
[10] *O'Brien*, (1810) 2 All. 766; *Idu Beg*, (1881) 3 All. 776; *Mahabir*, (1921) 19 A. L. J. R. 295.

accused committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt.[1]

In the course of an affray severe injuries were inflicted and suffered by both sides. On the side of the complainants there was a girl of tender years who was sitting very close to her father and she received a severe blow on the head which subsequently resulted in her death. It was held that the accused were guilty of causing grievous hurt.[2]

In the course of an altercation between the accused and the complainant on a dark night, the former aimed a blow with his stick at the head of the latter. To ward off the blow, the complainant's wife, who had a child on her arm, intervened. The blow missed its aim, but fell on the head of the child causing severe injuries, from the effects of which it died. The accused was convicted of causing grievous hurt. It was held that, inasmuch as the blow, if it had reached the complainant, would have caused simple hurt, the accused was guilty of simple hurt only.[3]

Death caused in the course of mutual stone-throwing is grievous hurt.—As the result of a longstanding enmity and after a fresh altercation, two parties encountered and hurled stones at each other. A member of one of the parties was struck by a stone of considerable weight and thrown with a good deal of violence, which ruptured his liver and immediately caused his death. As he fell down and lay on the ground, the accused, a man from the other party, caused a serious wound in his leg with a sword. It was held that the accused was not guilty of murder, as there could be no intention to kill, for the stone-throwing by his party was resorted to by way of defence to a similar act by the other party and [illegible] inflicting grievous hurt.[4]

Presence of a person properly armed along with the accused.—D was killed by one blow on his head with a sharp weapon It was found that the accused B and M with others armed with *gandasas* had invaded the compound where D was sleeping, that they immediately assaulted D and that M struck him in the head and killed him. The intention of the accused was to insult and disgrace one Mussammat K. *M was held guilty under s. 302; but as both the accused had armed* [illegible] P [illegible] the [illegible] He [illegible] with s 109.[5]

321. Whoever does any act with intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt."

Voluntarily causing hurt.

322. Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

Voluntarily causing grievous hurt.

[1] *Sahar Rai*, (1878) 3 Cal. 623.
[2] *Kurt*, (1918) 16 A. L. J. R. 615.
[3] *Chatur Nathe*, (1919) 21 Bom. L. R. 1101, 5 Bom. Cr. C. 152.
[4] *Dattu Nana Pawar*, (1917) 19 Bom. L. R. 902, 4 Bom. Cr. C. 157.
[5] *Bahal Singh*, (1919) P. R. No. 24 of 1919.

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt, and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

ILLUSTRATION.

A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

COMMENT.

The Law Commissioners observe: The Judge "is not to trouble himself with seeking for direct proof of what the offender thought was likely to happen, but is to infer it from the nature of his act, taking him to have intended grievous hurt [illegible] contemplated grievous hurt as likely to occur, when he did [illegible] hurt, and the more certainly dra[illegible] revious enmity against the par[illegible] hing more than simple hurt con[illegible] hen although grievous hurt may unexpectedly [illegible] to convict the offender of simple hurt only...judging that grievous hurt [illegible] ; for according to Clause 317 (this section) a person ca[illegible] only when the result and the intention correspond, [illegible] suffe[illegible] intended to cause grievous hurt, though [illegible] of a [illegible] construction. A Magistrate dealing with [illegible] must consider and decide not only whether grievous hurt [illegible], has been caused whether the accused intended or knew himself to be likely to cause grievous hurt. If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under s. 325.[2]

Punishment for voluntarily causing hurt.

323. Whoever, except in the case provided for by section 334, voluntarily causes hurt,[1] shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one housand ru[illegible] with both.

MEN[illegible]

This is a general s[illegible] e punis[illegible] luntarily causing hurt. Sections 324, 327, 328, 3[illegible] l with [illegible] nce done under certain aggravated circumstance[illegible], 336 [illegible] vide [illegible] nishment when there are certain mi[illegible] tanc[illegible]

1. [illegible] ntarily cause[illegible] 321 [illegible] g [illegible] ion.

[illegible] complaina[illegible] the [illegible] f [illegible] Court of t[illegible] held that [illegible] his [illegible] came to a[illegible] lainant's d[illegible] t [illegible] not survi[illegible] represent[illegible] as [illegible] ourt

[1] F[illegible] 1917;
[2] N[illegible] . B. R.

has dissented from this view and has laid down that criminal proceedings once legally instituted, whether upon a complaint or otherwise, do not terminate or abate merely by reason of the death of the complainant or the person injured. Section 89 of the Probate and Administration Act has no application to a criminal prosecution and there is nothing in the Criminal Procedure Code in support of the proposition that the death of the person injured or of the complainant, of itself causes the proceedings to abate. It is a mistake to speak of an offence as a purely personal one.[1] The Madras and Allahabad High Courts have also held that a criminal prosecution does not abate by reason of the death of the person injured.[2]

PRACTICE.

Evidence.—Prove (1) that the accused by his act caused bodily pain, disease, or infirmity to the complainant.

(2) That he did such act intentionally or with a knowledge that it would cause the hurt, etc.

The intent to cause hurt may be presumed from the nature of the hurt caused and the circumstances under which it was caused.[3]

(3) That such hurt, etc., was caused without provocation.

[illegible]

Autrefois acquit.—A person tried and acquitted on a charge of using criminal force under s. 352 (which includes the offence of battery) cannot be tried, in respect of the same criminal matter, on a charge of hurt.[5]

Private defence.—In cases of hurt, the question should be considered as to who was the aggressor, and whether the offence was committed in the exercise of the right of private defence.[6]

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

A conviction under s. 160 on a prosecution initiated by the police would be no bar to a subsequent trial under this section on a complaint laid by the party injured.[7]

Committal.—Where death is caused, Magistrates should be careful not to take [illegible] murder or culpable [illegible] clear that there is [illegible]

Punishment.—The act for which an accused person must be punished is the hurt which he intended to cause, or might be reasonably held likely to cause, by the act done, and not an unfortunate and entirely unforeseen result of that act.[9] Where different persons are injured, grievous hurt being caused in one case and simple hurt in others, it is competent for the Court to impose separate and accumulative sentences.[10]

Direction to Magistrates.—The Punjab Rule.—It has come to notice that Magistrates are apt to confound ss. 352 and 323 of the Indian Penal Code, and to issue process and convict under the former section in cases in which the complaint

[1] *Hazara Singh*, (1920) 2 Lah. 27.

[2] *Muhammad Ibrahim* v. *Shaik Davood*, (1920) 44 Mad. 417; *Musa*, (1924) 22 A.L.J.R. 520.

[3] *Nga Ba Gyaw*, (1911) 1 U. B. R. 105.

[4] *Dani*, (1920) 3 U. P. L. R. (L.) 11.

[5] *Kaptan* v. *G. M. Smith*, (1871) 16 W. R. (Cr.) 3.

[6] *Sohun*, (1865) 2 W. R. (Cr.) 59.

[7] *Ram Sukh*, (1924) 47 All. 284.

[8] (1869) 12 W. R. (Cr. Cr.) 7.

[9] *Kelly*, (1897) P. R. No. 11 of 1897.

[10] *Bateshar*, (1915) 37 All. 628.

is laid under s. 323, and the evidence for the prosecution establishes the fact of violence having been actually used.[1]

In some cases this is possibly done purposely, because charges under s. 352 are triable as summons cases, whereas a charge under s. 323 must be tried as a warrant case. The procedure in the former class of cases is, no doubt, easier to the Magistrate; but it is less favourable to the accused, for in warrant cases the Magistrate is bound to call upon the accused for his defence, unless he discharges him (see ss. 253 to 256 of the Code of Criminal Procedure), while in a summons case the accused is primarily responsible for the production of his evidence on the day fixed for hearing (s. 244).

It is accordingly pointed out that s. 352 of the Indian Penal Code does not apply to cases where the offender uses criminal force which actually causes hurt to the person against whom it is displayed, and that such cases fall under s. 323 of the Indian Penal Code.[2]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, voluntarily caused hurt to AB, and thereby committed an offence punishable under s. 323 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Voluntarily causing hurt by dangerous weapons or means.

324. Whoever, except in the case provided for by section 334, voluntarily[1] causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument, which, used as a weapon[2] of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison[3] or any corrosive substance,[4] or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal,[5] shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

Object.—The object of the section is to make simple hurt more grave and liable to a more severe punishment where it has the "differentia" of one of the modes of infliction described in the section.[3]

The authors of the Code say: "Bodily hurt may be inflicted by means the use of which generally indicates great malignity. A blow with the fist may cause as much pain, and produce as lasting injury, as laceration with a knife, or branding with a hot iron. But it will scarcely be disputed that, in the vast majority of cases, the offender who has used a knife or a hot iron for the purpose of wreaking his hatred is a far worse and more dangerous member of society than he who has only used his fist. It appears to us that many hurts which would not, according to our classification, be designated as grievous, ought yet, on account of the mode in which they are inflicted, to be punished more severely than many grievous hurts."[4]

1. **'Voluntarily.'**—See s. 39, *supra*.

2. **'Weapon.'**—It is not necessary that the manner of use of the weapon must be such as is likely to cause death. Such an element would compose a crime

[1] P. C. C. R. & O., Vol. II, No. 32, p. 201.
[2] *Ibid*, p. 202.
[3] (1872) 7 M. H. C. App. 11.
[4] Note M, pp. 153, 154.

of a wholly different character.[1] It is merely the nature of instrument that should be taken into consideration.[2] Where the accused fired a pistol into a group of persons among whom was A, without aiming at A or anyone in particular, but intending generally to do grievous bodily harm, and wounded A, it was held that he had committed this offence.[3]

3. **'Poison.'**—Poison is that which when administered is injurious to health or life.[4] If the thing administered is a recognized poison, the offence may be committed, though the quantity given is so small as to be incapable of doing harm.[5] A person who administers that which is a poison is guilty, although by ignorance or mistake he happens to administer it in a form which renders it innocuous. Where, therefore, the accused, with intent to kill, administered to a child nine weeks old two poisonous berries but the child did not die because the poisonous property of berries resided in the kernal which was enclosed in a pod so hard that it could not be digested by a child of that age, it was held that he was guilty of the offence of administering poison with intent to kill.[6] Under the Code this will amount to attempt to murder.

4. **'Corrosive substance.'**—The term "corrosive substance" means any substance which irritates the system, *e.g.*, sulphuric acid, corrosive sublimate, etc.

5. **'Animal.'**—See s. 47, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused caused by his act bodily pain, disease, or infirmity to the complainant.

(2) That he did such act intentionally or with a knowledge that it would cause the hurt, etc.

(3) That it was unprovoked.

(4) That the accused caused it by means of an instrument for shooting, stabbing or cutting; or by an instrument, used as a weapon likely to cause death; or by means of fire, etc.; or by means of any poison, etc.; or by means of any substance which it is deleterious to the human body to inhale, etc., or by means of any animal.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Alternative charges.—Where the prisoners were charged under s 148 of the Indian Penal Code of rioting armed with deadly weapons, and also under s. 324 of voluntarily causing hurt by dangerous weapons, it was held that they should have been sentenced only under one or other of these sections, the charges being, properly speaking, only alternative charges.[7]

Punishment: Lower Burma Rule.—Deterrent sentences must be passed in cases in which hurt is caused by a knife or other deadly weapon.[8]

See the Frontier Crimes Regulation,[9] ss. 6, 11 (3) (*d*) and 12 (2); and the Criminal Tribes Act[10], s. 64.

[1] (1872) 7 M. H. C. App. 11.
[2] *Nga Po Thit*, (1899) 1 U. B R. (1897-1901) 311.
[3] *Fretwell*, (1864) 9 Cox 471.
[4] Per Lord Coleridge, C. J., in *Cramp*, (1880) 5 Q B. D. 307, 309.
[5] Per Field J. in *Ibid*, pp. 309, 310.
[6]
[7]
[8]
[9] Reg. III of 1901.
[10] Act II of 1897.

(*d*) That such grievous hurt was caused by means of an instrument for shooting, etc., or by means of any instrument which, used as a weapon of offence, is likely to cause death; or by means of fire, etc., or by means of any poison, etc., or by means of any substance which it is deleterious to the human body to inhale, etc., or by means of any animal.

Procedure.—Cognizable—Summons—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge under ss. 326 and 149, but conviction under s. 326 alone.—A full bench of the Madras High Court has held, differing from the Calcutta High Court, that when a charge has been framed under ss. 326 and 149, a conviction under s. 326 is not necessarily bad. Whether the conviction is bad or not depends upon whether the accused has or has not been materially prejudiced by the form of the charge.[1]

Evidence of a medical man is necessary.—In all cases of voluntarily causing grievous hurt the evidence of the medical officer who examined and attended on the person to whom the hurt was caused should, if obtainable without unreasonable expense or delay, invariably be taken.[2]

Committal and punishment.—The accused was tried by a Presidency Magistrate on a charge of voluntarily causing grievous hurt by cutting off with a penknife the whole of the soft part of her nose and a portion of her upper lip, and sentenced to rigorous imprisonment for two years. The High Court, quashing the conviction and sentence, held that the offence of which the prisoner was convicted being one punishable with transportation for life, or rigorous imprisonment for ten years, the Magistrate ought to have committed the accused for trial to the High Court. The case was afterwards committed to the Court of Session and the accused was sentenced to eight years' rigorous imprisonment.[3] The amount of punishment for cutting off a wife's nose for intriguing with another man depends on the time of the commission of the grievous hurt, whether at the instant, or long after the husband found himself dishonoured.[4] See the Burma Laws Act, 1898, s. 1.

Lower Burma Rule.—The attention of Magistrates is called to the necessity of passing really deterrent sentences in cases in which hurt is caused by a knife or other deadly weapon. The use of knives on the slightest provocation, and often without any provocation at all, is far too frequent in this province. The most likely method of suppressing this dangerous practice is to make the punishment severe and certain. Many cases of this kind have come to the notice of the Judges in which inadequate sentences have been passed.[5]

Where an accused is sent up for trial under s. 326, Indian Penal Code, for causing grievous hurt with a deadly weapon, a reference should always be made to the District Magistrate, in order that he may, if he thinks fit, try the case in exercise of his special powers. Many cases of this kind are hardly distinguishable from attempts to murder, punishable under s. 307 of the Penal Code, and Magistrates, other than the District Magistrate, can rarely impose a sufficiently severe sentence in these cases.[6]

Charge.—See the remarks under the heading 'Charge' in s. 324, *supra*.

Voluntarily causing hurt to extort property, or to constrain to an illegal act.

327. Whoever voluntarily[1] causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer,[2] any property or valuable security,[3] or of constraining[4] the sufferer or any person interested in such sufferer to do anything which is illegal[5] or which may facilitate

[1] *Theethumalai Goundar*, (1924) 47 Mad. 746, F. B.
[2] *Nga Chet*, (1884) S. J. L. B 292.
[3] *Abdul Rahiman*, (1891) 16 Bom. 580
[4] *Sulamat Russooa*, (1865) 4 W. R. (Cr.) 17.
[5] L. B. C. M., Vol. I, s. 327, p. 89.
[6] *Ibid*, s. 323, p. 89.

the commission of an offence,[6] shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

of extorting, or compelling, against the sufferer's consent, the delivery of property, notwithstanding that the offender may have a valid claim or title to such property.

1. **'Voluntarily.'**—See s. 39, *supra*.

2. **'Person interested in the sufferer.'**—Any tie of blood relationship, marriage service, or even friendship, seems sufficient. The Court must ascertain for what purpose the suffering was caused, whether it was directed wholly at the sufferer or at another through him.[1]

3. **'Valuable security.'**—See s. 30, *supra*.

4. **'Constraining.'**—This word seems to have been inserted with a view to make this section applicable to all cases where, if 'extortion' could not be proved, a compelling or constraining against the sufferer's consent would equally be an offence.

5. **'Illegal.'**—See s. 44, *supra*.

6. **'Offence.'**—The word 'offence' here denotes a thing punishable under this Code or under any special or local law (s. 40).

PRACTICE.

Evidence.—Prove (1) that the accused caused hurt.[2]

(2) That the accused caused such hurt in order to extort from the sufferer, or person interested in him, some property or valuable security; or

That the accused caused such hurt in order to constrain the sufferer, or a person interested in him, to do something illegal, or to facilitate the commission of an offence.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session—Presidency Magistrate or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, voluntarily caused hurt to AB for the purpose of extorting from the said AB [*or* from a certain person interested in the said AB], to wit——, a certain property, to wit——, and thereby committed an offence punishable under s 327 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—See the Criminal Tribes Act (II of 1897), s. 6, and the Burma Laws Act, 1898, s. 4.

Causing hurt by means of poison, etc., with intent to commit an offence.

328. Whoever administers to or causes to be taken by[1] any person[2] any poison or any stupefying, intoxicating or unwholesome drug, or other thing[3] with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence[4] or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description

[1] M. & M. 294.

[2] *Vide* s. 323, sup.

for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section is merely an extension of the provisions of s. 324. Under s. 324 actual causing of hurt is essential.

The offence under this section is complete even if no hurt is caused to the person to whom the poison or any other stupefying, intoxicating, or unwholesome drug is administered.

1. **'Administers to or causes to be taken by.'**—The word 'administers' and the expression 'causes to be taken' are used to include every possible case of taking an unwholesome drug. Mere procuring or supplying a poisonous drug at the instigation of a person who wishes to take it does not amount to the offence of administering it.[1] At the same time to constitute administering, it is not necessary that the poison should be delivered by the hand of the party.[2] If a servant put poison into a coffee-pot which contains coffee, and, when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her breakfast, and the mistress drinks the poisoned coffee, this will amount to 'administering' poison.

Putting poison in a place where it is likely to be found and taken is an attempt to administer. Where the accused purchased some "salts of sorrel" and put it in the complainant's sugar basin, mixing it with sugar, and the complainant subsequently put some of the mixture into his tea, but on tasting it discovered that there was something wrong, and on investigation poison was discovered, it was held that this constituted an attempt to administer posion.[3]

One E being pregnant applied to the accused to get her something to procure miscarriage, and that the accused procured a drug and gave it to the deceased. The drug was taken by E but not in the presence of the accused, and it procured miscarriage. It was held that the accused was guilty of administering and causing to be taken certain poison with intent to procure miscarriage.[4]

Where a deleterious drug is administered, an offence is committed under this section although life is not endangered.[5] Thus, where a man administered the juice of some leaves to some villagers by way of ordeal and some of them showed symptoms of poison[6]; and where the accused administered powder of *dhatura* to a woman and robbed her of her jewellery while she was senseless,[7] this offence was held to have been committed. Where, for the purpose of facilitating robbery, *dhatura* was administered by two persons to certain travellers, in consequence of which one of the travellers died and others were made seriously ill, it was held that, in respect of the traveller who died, the offence committed was that punishable under s. 325, and, in respect of the travellers who did not die, the offence committed was that under this section.[8] But in a subsequent case the same Court, where *dhatura* was administered with the object of facilitating robbery in such quantity that the person to whom it was given died in the course of a few hours, convicted the accused of murder under s. 302.[9]

As *dhatura* can both be and is in practice frequently used by robbers without fatal results, it is necessary to show against a person accused of a purpose to commit robbery with murder something more than that he proposed to administer, or did on a particular occasion administer, *dhatura* in order to effect his purpose of robbery: though it may not be absolutely necessary to show that on any occasion culpable homicide amounting to murder was in fact committed.[10]

[1] *Francis Fretwell*, (1862) L. & C. 161, 31 L. J. (M. C.) 145.
[2] *Hannah Harley*, (1830) 4 C. & P. 369.
[3] *Dale*, (1852) 6 Cox 14.
[4] *Harriet Wilson*, (1859) D. & B. 127; *Mary Farrow*, (1857) D. & B. 164.
[5] *Joygopal*, (1865) 4 W. R. (Cr.) 4.
[6] *Dasi Pitchigadu*, (1883) 1 Weir 335.
[7] *Nanjundappa*, Weir, 3rd Edn., 107.
[8] *Bhagwan Din*, (1908) 30 All. 568.
[9] *Gutali*, (1908) 31 All. 148.
[10] *Pira*, (1881) P. R. No. 28 of 1881.

Where the accused administered a drug to a female to excite her sexual passion and desire, in order that he may have sexual connection with her, it was held that he had administered an unwholesome drug.[1]

2. **'Any person.'**—It is not necessary that the hurt should be caused to any particular person intended, or that the person injured or likely to be injured should have been previously known. Where the accused mixed milk bush juice in his toddy pots, knowing that if drunk by a person it would cause injury, with the intention of detecting an unknown thief who was always in the habit of stealing his toddy, and the toddy was drunk by some soldiers, who purchased it from an unknown vendor, it was held that he was guilty under this section.[2]

3. **'Or other thing.'**—These words must be referred to the preceding words and be taken to mean "unwholesome or other thing" and not other thing simply.[3]

4. **'With intent to cause hurt...or to facilitate the commission of an offence.'**—The word 'offence' here denotes a thing punishable under this Code or under any special or local law (s. 40). If the poison or unwholesome drug is administered not with the intention of causing hurt or to commit an offence, the accused cannot be convicted under this section. Accused, a boy of sixteen years of age, having [illegible] to cause hurt to any person, but, as a result of the administration of the drug, the girl was thrown into a delirium for some time with the possible risk of falling into a coma. It was held that the offence did not fall within this section but the accused must be deemed to have had knowledge that the administering of the drug was likely to cause hurt within the meaning of s. 319.[4]

PRACTICE.

Evidence.—Prove (1) that the substance in question is a poison, or any stupefying, intoxicating, or unwholesome drug, etc.

(2) That the accused administered or caused the complainant to take such substance

(3) That he did as above with intent to cause hurt or knowing it to be likely that he would thereby cause hurt; or that the accused intended to commit or facilitate the commission of an offence.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Oudh rule.—Sessions Judges and Magistrates will, however, bear in mind that a sentence of transportation for life cannot be inflicted under s. 328, Indian Penal Code, even on a second or third conviction, because s. 75 does not apply to offences punishable under Chapter XVI, Indian Penal Code, in which s. 328 is placed. If, however, the offender not only causes, or attempts to cause, hurt by poisoning, in order to commit theft but afterwards commits theft on his victim, thus completing the offence of robbery, he may be dealt with under Chapter XVII, ss. 392 and 394; and in that case may be transported for life under ss. 392, 75, s. 394, or ss. 394, 75, Indian Penal Code, if he be convicted by the Court of Session, not by the Deputy Commissioner.[5]

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, administered to (*or caused to be taken by*) AB a certain poison (*or a certain stupefying, intoxicating or*

[1] *Wilkins*, (1861) 31 L. J. (M. C.) 72, 9 Cox 20.

[2] *Dhanu Daji*, (1868) 5 B. H. C. (Cr. C.) 59

[3] *Jotee Ghorees*, (1864) 1 W. R. (Cr.) 7

[4] *Anis Beg*, (1923) 46 All. 77.

[5] O. C. D., s. 64.

unwholesome drug), to wit——, with intent to cause, (*or* knowing it to be likely that you will thereby cause) hurt to the said AB (*or* with intent to commit or facilitate the commission of the offence of——upon the *said* AB), *and thereby* committed an offence punishable under s. 328 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

And I hereby *direct that you be tried by the said Court* on the said charge.

Punishment—See the Criminal Tribes Act, 1897, s. 6; the Frontier Crimes Regulation, 1901, ss. 11 (3) (*d*) and 12 (2).

Voluntarily causing grievous hurt to extort property or to constrain to an illegal act.

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

See Comment on s. 327, *supra*. *This section is similar to that section*, the only difference being that the hurt caused under it is grievous.

PRACTICE.

Evidence.—Prove (1) that the accused caused grievous hurt.[1]

(2) That the accused caused such *grievous hurt in order to extort* from the sufferer, or a person interested in him, some property or valuable security; or

That the accused caused such grievous hurt in order to constrain the sufferer, or a person interested in him, to do something illegal, or to facilitate the commission of an offence.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—The charge should be in the same form as that under s. 327, except that the expression 'grievous hurt' should be substituted for 'hurt.'

Voluntarily causing hurt to extort confession, or to compel restoration of property.

330. Whoever voluntarily[1] causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer[2] any confession or any information which may lead to the detection of an offence[3] or misconduct, or for the purpose of constraining[4] the sufferer or any person interested in the sufferer to restore or cause the restoration of any property or valuable security[5] or to satisfy any claim or demand,[6] or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

ILLUSTRATIONS.

(*a*) A, a police-officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

[1] *Vide* s. 325, *sup.*

(*b*) A, a police-officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(*c*) A, a revenue-officer, tortures Z in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(*d*) A, a zamindar, tortures a raiyat in order to compel him to pay his rent. A is guilty of an offence under this section.

COMMENT:

The offence which this section intends to describe is that of inducing a person by hurt to make a statement, or a confession, having reference to an offence or misconduct; and whether that offence or misconduct has been committed is wholly immaterial.[1] The principal object of this section is to prevent torture by the police. But the section covers every kind of torture for whatever purpose it may be intended.

The information sought for may be required for the advancement of justice—nay more, it may be such information as cannot be withheld without offending against public justice—the property, the extortion of which is sought, may be property which the sufferer has borrowed from the offender and which he illegally refuses to give back—the claim or demand may be a just claim—but the law will not tolerate the employment of such means as are here made punishable, even when for an honest end.[2]

1. **'Voluntarily.'**—See s. 39, *supra*.

2. **'Person interested in the sufferer.'**—See s. 327, *supra*.

3. **'Offence.'**—It must be proved that the hurt to the complainant was caused with intent to extort a confession of some offence or misconduct punishable under the Code. The accused seized three women, took them to the house of [illegible] by pouring hot oil over them, and other- [illegible] en subsequently threw herself down a [illegible] was prevalent in the village and that the accused believing that these women practised witchcraft, tortured them for the purpose of extorting a confession that they were witches. It was held that the accused could not legally be convicted under this section, but they were guilty of hurt.[3]

Police torture.—Where the accused, a constable, during an enquiry into a theft case, violently beat the deceased, who died about nine days afterwards from the effects of the beating, it was held that he was guilty under this section.[4] Under similar circumstances when death resulted from injuries which were of the nature of grievous hurt the accused was convicted under the following section.[5]

The word 'offence' here denotes a thing punishable under this Code, or under any special or local law (s. 40).

4. **'Constraining.'**—See s. 327, *supra*.

5. **'Valuable security.'**—See s. 30, *supra*.

6. **'Demand.'**—Under this section the 'demand' must be one with respect to property. Hence, where the accused, in order to constrain his wife to return to his house, caused hurt to her, s. 324, and not this section, was held to apply.[6]

Abetment.—Where the accused stood by and acquiesced in an assault on a prisoner committed by another police-man for the purpose of extorting a confession, it was held that he had committed abetment of the offence under this section.[7]

[1] *Nim Chand Mookerjee*, (1873) 20 W. R. (Cr.) 41.

[2] M. & M. 297.

[3] *Baboo Moondu*, (1870) 13 W. R. (Cr.) 23.

[4] *Meeah Mahomed*, (1866) P. R. No. 86 of 1866. See *Mehter Ali*, (1885) 11 Cal. 530.

[5] *Miran Baksh*, (1916) P. W. R. No. 12 of 1917.

[6] *Ella Boyan*, (1887) 11 Mad. 257; *Maula Bakhsh*, (1923) 5 L. L. J. 375.

[7] *Latifkhan*, (1895) 20 Bom. 394.

PRACTICE.

Evidence.—Prove (1) *that the accused caused hurt.*[1]

(2) *That the accused caused such hurt in order to extort from the sufferer, or a person interested in him, a confession, or some information.*[2]

(3) *That such confession or information was required, as possibly leading to the detection of an offence, or of some misconduct.*

Or prove—

(1) As above.

(2) That the accused caused such hurt in order to constrain the sufferer, or a person interested in him, to restore or to cause the restoration of some property, or valuable security, etc.

There must be immediate connection between the assault and the restoration of property. The intention of the person causing the assault must be proved to be to obtain from the person assaulted a confession of the restoration of property.[3]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, voluntarily caused hurt to AB for the purpose of extorting from the said AB (*or* from a certain person interested in the said AB, to wit——) a certain confession (*or* information) to wit——, which might lead to the detection of the offence of——(*specify the person in respect of whom, and the place where, the offence was committed*), and thereby committed an offence punishable under s. 330 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

331. [illegible] hurt, for the purpose [illegible] or any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing grievous hurt to extort confession or to compel restoration of property.

COMMENT.

[illegible] to the preced-

PRACTICE.

Evidence.—Prove the same points as required for s. 330, showing that the hurt caused was grievous hurt.[4]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

[1] *Vide* s. 323, *sup.*
[2] *Baboo Moondu,* (1870) 13 W. R. (Cr.) 23.
[3] *Satya Deva Swami,* (1918) 5 P. L. W. 169.
[4] *Vide* s. 325, *sup.*

Charge.—See section 330. In the charge as given under that section substitute 'grievous hurt' for 'hurt.'

Voluntarily causing hurt to deter public servant from his duty.

332. Whoever voluntarily[1] causes hurt to any person being a public servant[2] in the discharge of his duty as such public servant,[3] or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The protection given by this section is not confined to public servants, but will also extend to persons acting in good faith under their directions. The public servant must be acting in the discharge of his duty as such public servant. If he was acting for his own private work no offence would be committed.[1]

This section resembles s. 353. Under it there is causing of hurt to the public servant: under s. 353 there is assault or criminal force for the same purpose.

1. 'Voluntarily.'—See s. 39, *supra*.

2. 'Public servant.'—See s. 21, *supra*.

3. **'In the discharge of his duty as such public servant.'**—This expression means in the discharge of a duty imposed by law on such public servant in the particular case, and does not cover an act done by him in good faith under colour of his office.[2] "A warrant," for example, "is handed to a Police officer for the arrest of a particular person. That warrant on the face of it does not direct him to break open premises, for instance, in order to effect the arrest, and yet it may be necessary for the officer in discharge of his duty in arresting the accused under the warrant to break into the accused's house, or to do some other act without the doing of which the warrant could not be executed. Such acts would be properly described as done or attempted to be done by the Police officer in the lawful discharge of his duty. If it was unnecessary to do such an act and it was done, the act would not be done by the Police officer in the lawful discharge of his duty, and therefore would not be covered by the concluding portion of s. 332."[3]

A warrant was issued by a Magistrate for the arrest of D under s. 114 of the Criminal Procedure Code. The warrant was sent to a *thana* to be executed. It was there, after being copied into a book kept for that purpose at the *thana*, made over to a particular constable for execution. When the constable to whom the warrant had been made over had left the *thana*, it was discovered that D was in a village other than that in which he had been supposed to be. Thereupon the officer temporarily in charge of the *thana* made a copy from the book at the *thana*: endorsed on the back the names of one N and some other constables, and having signed the endorsement sent N and the others out with this paper to arrest D. N and his companions arrested D; but, as they were returning with him in custody, some of D's friends, aided by D himself, attacked them, rescued D, and caused hurt to the police. It was held that the police-officers concerned in arresting D under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of this section so as to render the accused liable to conviction

[1] *Hardit Singh*, (1911) P. L. R. No. 161 of 1911.

[2] *Dalip*, (1896) 18 All. 246; *Madho*, (1917) 40 All. 22.

[3] *Per Edge, C. J.*, in *Dalip*, *ibid.*

under it; but inasmuch as they were acting in good faith under colour of their office, s. 99 applied, and D and his associates might properly be convicted under ss. 147 and 323.[1] An Excise Inspector, in searching the house of a person, under the suspicion that he would find cocaine there, committed many irregularities. He had no warrant authorising him to make the search, he had brought only one search witness and he had directed a constable to scale the outer wall of the house. The accused assaulted and beat him. It was held that the Inspector and the constables were not acting in the discharge of their duties as public servants and the accused were not guilty of an offence under this section, but were guilty of an offence punishable under s. 323.[2] Where a person is arrested for an offence not really under a warrant, the mere fact that a warrant had been issued for his arrest, which warrant had been executed against other persons who have since been convicted, can hardly be put forward as a justification for the arrest.[3] Where an order issued by a Magistrate ceased to have effect, a constable in carrying out the order could not be said to have been acting in the discharge of a duty imposed by law on him, and no conviction could take place under this section.[4] If hurt is caused the accused may be convicted under s. 323.

A police constable investigating a charge of burglary under s. 457 is empowered, under s. 54 of the Criminal Procedure Code, to arrest, without an order from a Magistrate or his superior officer, persons against whom a reasonable suspicion of having been concerned in the burglary exists, and if any of such persons resists the wish of the constable by force he is guilty of an offence under this section, if he causes hurt; or under s. 353, if an assault is simply committed and he is not protected under s. 99. But in the case of a scuffle merely a small fine is quite sufficient to meet the ends of justice.[5] A police-officer authorized to investigate a charge of theft has a right to make a search, which is incidental to his right to investigate. In conducting the search, however if he ignores the provisions of s. 103 of the Criminal Procedure Code and the accused offer resistance they are guilty of an offence under this section for the officer so resisted would not be at the time acting in the discharge of his duty.[6]

Blow with an umbrella amounts to 'hurt.'—Where a blow was struck by the accused with an umbrella to a public servant this offence was held to have been committed.[7]

PRACTICE.

Evidence.—Prove (1) that the accused caused hurt.[8]

(2) That the person so hurt was a public servant.

(3) That such public servant was then discharging his duty as such.[9]

Or prove.

(1) and (2) as above, and further.

(3) That the accused did so, with intent to prevent or deter such public servant or any other public servant, from discharging his duty[10]; or

That he did so in consequence of something done, or attempted to be done, by such public servant, in the lawful discharge of his duty.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

[1] *Dalip*, (1896) 18 All. 246. *Nand Kishore*, (1891) 12 A. W. N. 1, though not expressly overruled by this case, yet it is considered to have laid down bad law.

[2] *Mukhtar Ahmad*, (1915) 37 All. 353.

[3] *Abdool Karim*, (1905) 4 C. L. J. 92. See *Chunder Coomar Sen*, (1869) 3 C. W. N. 605.

[4] *Madho*, (1917) 40 All. 28

[5] *Yusuf*, (1910) P. R. No. 18 of 1910. See *Mahomed Yakoob*, (1910) 7 M. L. T. 386.

[6] *Nirmal Singh*, (1910) 17 A. L. J. R. 1047.

[7] *Sheo Gholam Lalla*, (1875) 24 W. R. (Cr.) 67.

[8] *Vide* s. 323, sup.

[9] *Sampat*, (1917) 15 A. L. J. R. 565.

[10] *Kishen Lal*, (1924) 22 A. L. J. R. 501.

That you, on or about the——day of——, at——, voluntarily caused hurt to one AB, a public servant, in the discharge of his duties as such public servant, and thereby committed an offence punishable under s. 332 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—See the Criminal Tribes Act (II of 1897), s. 6.

Voluntarily causing grievous hurt to deter public servant from his duty.

333. Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section provides for the aggravated form of the offence dealt with in the last. The hurt caused under it must be grievous.

See Comment on the preceding section.

Public servant must be acting in the discharge of his legal duties.—Two village watchmen arrested one F on suspicion that he was in possession of stolen property. While he was being taken to the police station he was rescued from the custody of the watchmen by certain persons. It was held that the watchmen were not members of the police force, and had no authority to arrest F on mere suspicion inasmuch as the statute whereunder they had been appointed was repealed, and that F could not be convicted under this section because it was necessary to make out that F and the actual rescuers were acting in pursuance of a common intention within the meaning of s. 34.[1]

PRACTICE.

Evidence.—Prove the same points as for s. 332, showing that the hurt caused was grievous hurt.[2]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—See s. 332.

Punishment.—See the Criminal Tribes Act (II of 1897), s. 6; the Burma Laws Act (1898), s. 4.

Voluntarily causing hurt on provocation.

334. Whoever voluntarily causes hurt on grave and sudden provocation,[1] if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

[1] *Jafar*, (1916) 14 A. L. J. R. 789.

[2] *Vide* s. 325, *sup.*

COMMENT.

This section serves as a proviso to ss. 323 and 324.

Causing hurt on grave and sudden provocation to the person giving the provocation is chargeable as an offence under this section, and not under s. 324.[1]

1. 'Grave and sudden provocation.'—See Comment on s. 300, exception 1.

PRACTICE.

Evidence.—Prove (1) that the accused caused bodily pain, disease, or infirmity.

(2) That it was caused when he was under grave and sudden provocation.

(3) That he neither intended nor knew it to be likely to cause it to any person other than the person who gave the provocation.

Onus.—The burden of proving sudden provocation, and that the accused neither intended nor knew that he was likely to cause hurt to any person other than the person giving the provocation, would lie on the accused.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

Voluntarily causing grievous hurt on provocation.

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation,[2] if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.—The last two sections are subject to the same provisos as exception 1, section 300.

COMMENT.

This section serves as a proviso to ss. 325 and 326.

1. 'Grave and sudden provocation.'—See Comment on s. 300, exception 1, p. 629. The provocation and its effects must be sudden as well as grave; and the deprivation of the power of self-control must continue in order to benefit a man who kills another under circumstances of grave provocation.[2] If the particular act of which the accused is found guilty is one which imports deliberate design, the plea of grave and sudden provocation has not the same effect as in the case of a man who in sudden and provoked anger strikes a blow, however serious that blow may be. Thus, where the accused cut the nose of his wife with deliberate design, the High Court enhanced the sentence to two years' rigorous imprisonment though there was grave provocation.[3]

'Sudden provocation.'—A person who, by a single blow with a deadly weapon, killed another, entering at dead of night into a dark room where he and his wife were sleeping separately, for the purpose of having criminal intercourse with her, was held guilty of causing grievous hurt on a grave and sudden provocation.[4]

Not sudden provocation.—A husband, suspecting his wife of infidelity, hid himself so as to see her with her paramour, and, having seen an improper act being committed, he came out and caused grievous hurt to the wife. It was held that

[1] *Bhola Chula*, (1863) 1 B. H. C. 17.
[2] *Bechoo Sooot*, (1873) 19 W. R. (Cr.) 35.
[3] *Bhagwan Chhagan*, (1914) 17 Bom. L. R. 68, 3 Bom. Cr. C. 1.
[4] *Chullundee Poramanick*, (1865) 3 W. R. (Cr.) 55.

assuming the provocation to be 'grave' it was not 'sudden' within the meaning of this section.[1]

Amendment.—The word 'voluntarily' was inserted by Act VIII of 1882, s. 8. As to the meaning of this word see s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused caused bodily pain, disease, or infirmity.

(2) That he did so with the intention or knowledge of causing grievous hurt.

(3) That it was caused when he was under grave and sudden provocation.

(4) That he neither intended nor knew it to be likely to cause it to any person other than the person who gave the provocation.

Onus.—The onus of proving sudden provocation, etc., would as in s. 334, lie on the accused.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the ——day of——, at——, voluntarily caused grievous hurt to XY on grave and sudden provocation given to you by the said XY [(*or if the person hurt is another*) say on grave and sudden provocation given to you by AB and not intending to (*or knowing it to be likely that you would thereby*) cause hurt to XY] and thereby committed an offence punishable under s. 335 of the Indian Penal Code and within my cognizance (or the cognizance of the Court of Session or the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Act endangering life or personal safety of others.

336. Whoever does any act[1] so rashly or negligently as to endanger human life or the personal safety of others shall be punished with imprisonment of either description for a term which may extend to three months or with fine which may extend to two hundred and fifty rupees or with both.

COMMENT.

Rash and negligent acts, which endanger human life or the personal safety of others, are punishable under this section even though no harm follows. They are additionally punishable under ss. 337 and 338 if they cause hurt or grievous hurt.

Many specific acts of rashness or negligence likely to endanger life or to cause hurt or injury are made punishable by Chapter XIV.

Object.—The provisions of s. 336 are intended to meet cases where acts which are in themselves lawful are done so rashly or negligently as to endanger human life or the personal safety of others.

The offence punishable by this and the following two sections is the doing of an act so rashly or negligenly as to put in peril the lives and safety of others, but without an intention of causing hurt or any knowledge that hurt is likely to be thereby caused.

1. **Act.**—See s. 52, *supra*.

In order to determine whether an act was done rashly or negligently, no distinction ought to be drawn between the act itself and the instrument with which it is

[1] *Ramzani*, (1889) 9 A. W. N. 9.

COMMENT.

This section serves as a proviso to ss. 323 and 324.

Causing hurt on grave and sudden provocation to the person giving the provocation is chargeable as an offence under this section, and not under s. 324.[1]

1. **'Grave and sudden provocation.'**—See Comment on s. 300, exception 1.

PRACTICE.

Evidence.—Prove (1) that the accused caused bodily pain, disease, or infirmity.
(2) That it was caused when he was under grave and sudden provocation.
(3) That he neither intended nor knew it to be likely to cause it to any person other than the person who gave the provocation.

Onus.—The burden of proving sudden provocation, and that the accused neither intended nor knew that he was likely to cause hurt to any person other than the person giving the provocation, would lie on the accused.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

Voluntarily causing grievous hurt on provocation.

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation,[1] if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.—The last two sections are subject to the same provisos as exception 1, section 300.

COMMENT.

This section serves as a proviso to ss. 325 and 326.

1. **'Grave and sudden provocation.'**—See Comment on s. 300, exception [illegible] and its effects must be sudden as well as grave; and [illegible] *continue in* order to benefit a [illegible] grave provocation.[2] If the particular act of which the [illegible] *one which imports deliberate de-* [illegible] provocation has not *the same* effect as in the [illegible] *provoked anger strikes a blow*, however serious [illegible] the accused cut the nose of his wife with deliberate design, the High Court enhanced the sentence to two years' rigorous imprisonment though there was grave provocation.[3]

'Sudden provocation.'—A person who, by a *single* blow with a deadly weapon, killed another, entering at dead of night into a dark room where he and his wife were sleeping separately, for the purpose of having criminal intercourse with her, was held guilty of causing *grievous* hurt on a grave and sudden provocation.[4]

Not sudden provocation.—*A husband, suspecting* his wife of infidelity, hid himself so as to see her with her paramour, and, having seen an improper act being committed, he came out and caused *grievous hurt to the wife. It was held that*

[1] *Bhola Chula*, (1863) 1 B. H. C. 17.
[2] *Bechoo Sanat*, (1873) 19 W. R. (Cr.) 35.
[3] *Bhagwan Chhagan*, (1914) 17 Bom. L. R. 68, 3 Bom. Cr. C. 1.
[4] *Chullundee Poramanick*, (1865) 3 W. R. (Cr.) 55.

assuming the provocation to be 'grave' it was not 'sudden' within the meaning of this section.[1]

Amendment.—The word 'voluntarily' was inserted by Act VIII of 1882, s. 8. As to the meaning of this word see s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused caused bodily pain, disease, or infirmity.
(2) That he did so with the intention or knowledge of causing grievous hurt.
(3) That it was caused when he was under grave and sudden provocation
(4) That he neither intended nor knew it to be likely to cause it to any person other than the person who gave the provocation.

Onus.—The onus of proving sudden provocation, etc., would, as in s. 334, lie on the accused.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Court of Session Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, voluntarily caused grievous hurt to XY on grave and sudden provocation given to you by the said XY [(*or if the person hurt is another*) say on grave and sudden provocation given to you by AB and not intending to (*or* knowing it to be likely that you would thereby) cause hurt to XY] and thereby committed an offence punishable under s 335 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Act endangering life or personal safety of others.

336. Whoever does any act[1] so rashly or negligently[2] as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

COMMENT.

Rash and negligent acts, which endanger human life or the personal safety of others, are punishable under this section even though no harm follows. They are additionally punishable under ss. 337 and 338 if they cause hurt or grievous hurt.

Many specific acts of rashness or negligence likely to endanger life or to cause hurt or injury are made punishable by Chapter XIV.

Object.—The provisions of s. 336 are intended to meet cases where acts which are in themselves lawful are done so rashly or negligently as to endanger human life or the personal safety of others.

The offence punishable by this and the following two sections is the doing of an act so rashly or negligenly as to put in peril the lives and safety of others, but without an intention of causing hurt or any knowledge that hurt is likely to be thereby caused.

1. **Act.**—See s. 52, *supra*.

In order to determine whether an act was done rashly or negligently, no distinction ought to be drawn between the act itself and the instrument with which it is

[1] *Ramzani*, (1889) 9 A. W. N. 9.

done. The accused, of whom four were Dharmakartas of a temple, were charged with having drawn a car which was not in a good condition and to have thereby done an act so rashly or negligently as to endanger human life. The Magistrate acquitted them on the ground that the rashness or negligence must relate to the act to bring it within the meaning of the section and not to the article or thing in respect of or in connection with which the act is done, because the rashness or negligence is the quality of the agent that does the act and not that of the subject of the action. The High Court disagreed with the opinion of the Magistrate and held that the real question for decision was whether the Dharmakartas had put the car into repair so as to satisfy themselves that it could be safely drawn.[1]

2. 'Rashly or negligently.'—See s. 304-A, *supra*.

Act endangering personal safety of others should have been knowingly done.—A person, having a license to conduct swinging during a Hindu festival, was held not to render himself liable for this offence by allowing persons, in his absence, to swing by hooks inserted in the flesh, instead of by being attached to the pole by cloth, unless it was shown that he knew of it.[2]

The accused was the lessee of a certain temple. It appeared that on a certain day in the year pilgrims and others in large numbers visited this temple. Close by the gate leading from an outer courtyard into the inner temple there was a well which was surrounded by a masonry platform 1½ to 2 feet high and the ring or the parapet of the well stood again about one foot above the platform. Early at night on the day of the congregation of pilgrims, an accident having occurred, the accused at the instance of the police-officer in charge had a light placed on or near the one-foot parapet, but at a later hour the accused had the light removed and thereafter between 1 and 2 A.M., while the people were again entering into the inner temple, a boy, who had no previous knowledge of the well and, in the darkness, could not see it, fell into it, it was held that the accused was guilty under this section.[3]

The accused, a taxi-cab driver, was licensed to drive, but owing to his defective eyesight, was asked to wear spectacles at the time of driving. One night, whilst he was driving without spectacles, his car collided with another; but it appeared that he was not to blame for the accident. Medical evidence showed that the defect in the eyesight of the accused was not very much and that it would not appreciably interfere with his efficiency as a driver. He was charged under s. 279 with driving his car in a manner so rash or negligent as to endanger human life. The trying Magistrate convicted him under this section of doing an act so rashly or negligently as to endanger human life. The High Court held that the accused had committed no offence under this section, inasmuch as it was not made out that if he drove his car without wearing spectacles he would be acting so rashly or negligently as to endanger human life or the personal safety of others.[4]

Engine-driver letting off steam near a thoroughfare.—An engine-driver was taking an engine which was letting off steam, along a public thoroughfare, at a time when the traffic was exceptionally heavy and within a few yards of a large number of horses and carriages which had been parked together, in spite of warnings from the police that to do so would endanger the public safety. It was held that he was guilty of this offence though he might have believed that no danger would in fact be caused.[5]

Throwing stones on a person's house.—The mere throwing of stones on the roof of a person's house was held not to amount to a criminal offence, unless it was done

[1] *Thippana*, (1890) 1 Weir 337.
[2] *Gopi Nath Mahto* v. *Mansaram Koomar*, (1900) 5 C. W. N. 376.
[3] *Narsing Charan Mahapatra*, (1914) 18 C. W. N. 1176.
[4] *Abas Mirza*, (1918) 20 Bom. L. R. 37.
[5] Bom. Cr. C. 231.
[6] *George Loveday*, (1887) 1 Weir 337.

rashly or negligently so as to endanger human life or the personal safety of others.[1] But if a person intentionally throws a stone at a house or on a house under such circumstances that, although he does not intend to cause hurt, and does not in fact cause hurt, yet he must know that he is likely to cause hurt, he commits an offence punishable under this section.[2]

2. 'Rashly or negligently.'—See s. 304-A, *supra*.

PRACTICE:

Evidence.—Prove (1) that the accused did the act in question.
(2) That it was done rashly or negligently.
(3) That it was such as to endanger the life or personal safety of others.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

Causing hurt by act endangering life or personal safety of others.

337. Whoever causes hurt to any person by doing any act[1] so rashly or negligently[2] as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

COMMENT:

"Hurt may be caused involuntarily, yet culpably. There may have been no design to cause hurt, no expectation that hurt would be caused; yet there may have been a want of due care not to cause hurt."[3]

A party shall not be deemed to be culpable in respect of any hurt, damage or other evil consequence resulting from his act, although he did not use the utmost degree of caution that was possible, provided he used such a reasonable degree of caution for the exclusion of mischief as was appropriate to the nature of the act and the probability of danger in the particular case.[4]

Scope.—This section applies only to acts done without any criminal intent. Personal injury intentionally caused is neither a rash nor a negligent act.[5]

1. 'Act.'—See s. 32, *supra*.

2. 'Rashly or negligently.'—See s. 304-A, *supra*.

CASE:

Negligence with reference to a gun.—The causing of hurt by negligence in the use of a gun was held to fall within the purview of this section rather than of s. 286. [illegible] not sufficient evidence of rashness or negligence to support a conviction under this section.[6]

Negligence with reference to poisonous drugs.—A wife administered to her husband a love potion in his food to save her from the quarrelsome tongue of her husband. The husband took ill on eating the food but subsequently recovered. The potion was prepared from *dhatura* seeds by accused No. 2 who was her lover and by accused No. 3 who was his friend. It was held that the wife was guilty under this section as she administered to her husband without any care or caution a powder which she received from her lover who was at enmity with her husband;

[1] *Nga Tha Ku*, (1879) S. J. L. B. 91.
[2] *Nga Myat Thin*, (1898) P. J. L. B. 426.
[3] Note M, p. 154.
[4] 7th Parl. R. 33.
[5] *Nga Shwe Lu*, (1904) U. B. R. (P. C.) 6.
[6] *Abdus Sattar*, (1906) 28 All. 464.

that the accused No. 2 was guilty of an offence under ss. 307 and 109; and that accused No. 3 was guilty under ss. 328 and 109.[1]

Rash operation.—The accused performed an operation with a pair of scissors on the lid of the complainant's eye, and stitched the wound with ordinary thread and needle. The operation was needless and performed in a primitive way without any precautions. The complainant's eyesight was damaged permanently to a certain extent. It was held that the accused was guilty under this section.[2]

PRACTICE.

Evidence.—Prove (1), (2) and (3) as for s. 336; and further (4) that hurt was actually caused.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Causing grievous hurt by act endangering life or personal safety of others.

338. Whoever causes grievous hurt to any person by doing any act[1] so rashly or negligently[2] as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

COMMENT:

This section deals with grievous hurt engendered by an act done so rashly or negligently as to endanger human life or the personal safety of others. Otherwise the section is similar in terms to the last section.

1. 'Act.'—See s. 33, *supra*.

2. 'Rashly or negligently.'—See s. 304-A, *supra*.

CASES.

Sexual intercourse causing injury to wife.—Under no law it is a rule that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her. Hence, where a husband had sexual intercourse with his wife, aged eleven years, and she died from the injuries thereof, he was held guilty of causing grievous hurt by doing a rash act under this section.[3] This case led to the passing of Act IV of 1891. See s. 375.

Death caused by allowing a cart to go unattended.—Where a person, by allowing his cart to proceed unattended along a road, ran over a boy who was sleeping on the road, it was held that he had committed an offence under s. 337 or under this section although the boy might have contributed to his own injury by going to sleep on the side of the road.[4]

Running over by a carriage.—Where the accused's carriage which was driven at an ordinary pace, on a dark night, knocked down an old deaf man and killed him, it was held that the question for the Court was whether there was any evidence that the death of the deceased was induced by an act negligently or rashly directed by the accused. If there was no such evidence the accused could not be convicted.[5]

[1] *Bhagava Girigappa*, (1916) 19 Bom. L. R. 64, 4 Bom. Cr. C. 1.

[2] *Gulam Hyder Panjabi*, (1915) 17 Bom. L. R. 334, 3 Bom. Cr. C. 47.

[3] *Hurree Mohun Mythee*, (1890) 16 Cal. 49. In a similar case in the Central Provinces the husband was punished under s. 325: *Mohammad Miyan*, (1893) 12 C. P. L. R. (Cr.) 11. See *Shambhu Khatri*, (1924) 3 Pat. 410.

[4] *Malkaji*, (1884) Unrep. Cr. C. 198.

[5] *(1871)* 6 M. H. C. App. 31.

PRACTICE.

Evidence.—Prove (1), (2), (3) as for s. 336, and (4) that such act caused grievous hurt.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which a prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, caused grievous hurt to AB by doing an act, to wit——, so rashly or negligently as to endanger human life or the personal safety of others, and thereby committed an offence punishable under s. 338 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Wrongful Restraint and Wrongful Confinement.

THE provisions under this head are for the punishment of offences, in which the offender, though he may have no design against human life, and no intention to inflict bodily hurt, either wholly deprives the injured person of his freedom or in some degree abridges his personal liberty. The personal restraint or confinement may, in some cases, be so slight as to deserve little more than a nominal punishment; but the arbitrary imprisonment of a preson, which is ofter a quiet and convenient mode of persecuing him, is a most serious offence, deserving of exemplary punishment.[1]

Wrongful restraint.

339. Whoever voluntarily obstructs any person[1] so as to prevent that person from proceeding in any direction in which that person has a right to proceed,[2] is said wrongfully to restrain that person.

Exception.—The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

ILLUSTRATION.

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

COMMENT.

Wrongful restraint means the keeping of a man out of a place where he wishes to be, and has a right to be.[2]

The slightest unlawful obstruction to the liberty of the subject to go when and where he likes to go, provided he does so in a lawful manner, cannot be justified, and is punishable under this section.[3]

The following illustrations, given in the original Draft Code, elucidate the meaning of this section :—

(*a*) A builds a wall across a path along which Z has a right to pass. Z is thereby prevented from passing. A wrongfully restrains Z.

(*b*) A illegally omits to take proper order with a furious buffalo which is in his possession and thus voluntarily deters Z from passing along a road along which Z has a right to pass. A wrongfully restrains Z.

[1] M. & M. 300.
[2] Note M, p. 154.
[3] *Saminada Pillai*, (1882) 1 Weir 339.

(c) A threatens to set a savage dog at Z, if Z goes along a path along which Z has a right to go. Z is thus prevented from going along that path. A wrongfully restrains Z.

(d) In the last illustration, if the dog is not really savage, but if A voluntarily causes Z to think that it is savage, and thereby prevents Z from going along the path, A wrongfully restrains Z.

From these illustrations it will appear that a person may obstruct another by causing it to appear to that other impossible, difficult, or dangerous to proceed, as well as by causing it actually to be impossible, difficult, or dangerous for that other to proceed.

These illustrations were subsequently dropped as they were severely criticised but they indicate that the obstruction mentioned in the section does not mean physical obstruction alone but may mean show of force or threat which will induce a man to change his course. Thus, where the accused removed a ladder and thereby detained a person on the roof of a house, he was held to have committed 'wrongful restraint.'[1]

Ingredients.—The section requires two essentials:—

1. Voluntary obstruction of a person.
2. The obstruction must be such as to prevent that person from proceeding in any direction in which he has a right to proceed.

1. 'Voluntarily obstructs, etc.'—This section relates to voluntary obstruction by a person and not to obstructions which are not voluntarily continued by the persons accused of the obstruction throughout the time the obstruction lasts.[2] See s. 39 as to the meaning of 'voluntarily.'

The obstruction must be physical. A verbal prohibition or remonstrance does not amount to such obstruction.[3] But physical presence is not necessary. Where, therefore, the complainant and his wife and daughter occupied a house and during their temporary absence the accused put a lock on the outer door and thereby obstructed them from getting into the house, it was held that the accused was guilty of wrongful restraint.[4]

2. 'Prevent that person from proceeding in any direction in which that person has a right to proceed.'—The section requires that the obstruction should be so complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed. The wrong here defined is a wrong against the person, and is not completed where the person is at liberty to go in any direction he pleases. Thus, where the complainant driving a bullock cart, was obstructed from taking his cart through the passage; but there was no obstruction to the complainant passing through the passage alone without the cart, it was held that there could be no conviction for wrongful restraint for though the complainant was hindered from driving his cart through the passage, he himself was unobstructed.[5]

Bona fide claim.—If an act is done in good faith under a belief that it is justified by law, a conviction under this section will not stand.[6] A person cannot be convicted of wrongful restriant, if he locks up a house under a *bona fide* claim to the same.[7] The accused, one of the joint-owners of a shop, put her lock on the shop, which was let out by the other joint-owner without her consent. The tenant charged the accused with the offence of wrongful restraint in that he was prevented by the lock from entering the shop. It was held that the accused had committed no

[1] *Telapolu Subbadu*, (1884) 1 Weir 340.
[2] *Abdul Satar Habibax*, (1906) 9 Bom. L. R. 30.
[3] *Karaturi Nagamma*, (1882) 1 Weir 339.
[4] *Arumuga Nadar*, (1910) M. W. N. 727.
[5] *Rama Lala*, (1912) 15 Bom. L. R. 103, 2 Bom. Cr. C. 26; but See *Lahanu Manaji*, (1925) 27 Bom. L. R. 1419.
[6] *Kanai Lal Gowala*, (1807) 24 Cal. 885; *Pramatha Nath Barat* v. *P. C. Lahiri*, (1920) 47 Cal. 818; *Kali Das Raha* v. *Deodhari Mistri*, (1925) 41 C. L. J. 633.
[7] *Hovana*, (1889) Cr. R. No. 10 of 1889, Unrep. Cr. C. 451.

offence, inasmuch as she had affixed her lock to a house of which she was the joint owner and the complainant was no tenant of hers.[1]

Exception.—It is not an offence to erect a wall against one's premises to prevent other persons from passing over it.[2] If the accused has acted *bona fide* then no conviction could be made.[3]

CASES:

Wrongful restraint.—Where [the complainant was taken to a police-station registered as a suspect, and passed on in charge of police-men from one police-beat to another[4]; where a police-officer refused to let a person go home until he gave bail;[5] and where the accused prevented the complainants from proceeding in a certain direction with their carts and exacted from them a sum of money on a false plea,[6] this offence was held to have been committed.

The fact that a person either is or pretends to be an intending emigrant and goes to the depot and is there treated as such, receiving meals and an advance of money does not confer either on the emigration agent or his watchman power to prevent him from leaving the depot when he desires to do so, and a person who restrains him from going out of the depot is guilty of wrongful restraint within the meaning of this section.[7]

The accused, a landlord, prevented a tenant of his who was holding over, from entering the room which the tenant had rented from the accused. It was held that he was guilty of wrongful restraint; for a tenant holding over had a position recognized by the law and he had a right to retain possession of the premises he occupied as even against the landlord himself until dispossessed in course of law.[8] The accused, who were co-owners of a well, obstructed another co-owner (complainant) from using the *mot* to which he had yoked his bullocks on the slope to the well on the ground that he had not paid his share of expenses on the well. It was held that the accused were guilty of wrongful restraint inasmuch as they had obstructed the complainant from proceeding with his bullocks in a direction in which he had a right to proceed with his bullocks.[9]

No wrongful restraint.—Where the accused prevented the building of a party-wall between two adjoining backyards[10]; where toll was demanded of cartmen in good faith, and they went away with their bullocks, leaving the carts[11]; where the complainant had, for the purpose of removal, placed certain goods upon a cart, and the accused came and turned the cart upside down, and the things fell to the ground, upon which the complainant went away[12]; where the accused placed an [illegible] from a mere general dislike or dread of giving offence to A remained there[14]; and where the accused caused Pariahs to stand in a public street in the vicinity of a temple with the object of preventing the complainant from conducting a religious

[1] *Bai Samrath*, (1917) 20 Bom. L. R. 196, 4 Bom. Cr. C. 200.

[2] [illegible]

L. R. 261, 5 Bom. Cr. C. 15.

[9] *Lahanu Manaji*, (1925) 27 Bom. L. R. 1419, 8 Bom. Cr. C. 185.

[10] *Venkatachalam Pillai*, (1881) 1 Weir 339.

[11] *Padati Chenchu Reddi*, (1883) Weir (3rd Edn.) 258.

[12] *Juggeshwar Dass* v. *Koylash Chunder Chatterjee*, (1885) 12 Cal. 55.

[13] (1899) 1 Weir 340.

[14] *Lakshman Kalyan*, (1875) Cr. R. for 1875, Unrep. Cr. C. 89.

procession from fear of pollution, it was held that the act of the accused did not amount to an obstruction within the meaning of this section.[1]

Wrongful confinement.

340. Whoever wrongfully restrains any person[1] in such a manner as to prevent that person from proceeding beyond certain circumscribing limits,[2] is said "wrongfully to confine" that person.

ILLUSTRATIONS.

(*a*) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(*b*) A places men with firearms at the outlets of a building and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

COMMENT:

Ingredients.—The section requires two essentials:—

1. Wrongful restraint of a person.
2. Such restraint must prevent that person from proceeding beyond certain circumscribing limits.

1. **'Whoever wrongfully restraints any person.'**—Wrongful confinement, which is a form of wrongful restraint, is the keeping of a man within limits out of which he wishes to go, and has a right to go.[2]

2. **'Prevent that person from proceeding beyond certain circumscribing limits.'**—"There must be a total restraint, not a partial one. If one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him... Imprisonment is a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him."[3]

"Proof of actual physical obstruction is not essential to support a charge of wrongful confinement. I think, it must, in each case, be proved that there was at least such an impression produced in the mind of the prisoner as to lead him reasonably to believe that he was not free to depart and that he would be forthwith restrained if he attempted to do so. The mere threat of some future harm in case of departure will not suffice if the prisoner knew that it was open to him to go away and refrained from doing so lest he should suffer such harm. But if the circumstances were such as to justify and to create the belief that he could not depart without being seized immediately, then...it would be proper to hold that he was obstructed and confined."[4]

'Prevent that person from proceeding.'—There can be no wrongful confinement when a desire to proceed has never existed, nor can a confinement be wrongful if it was consented to by the person affected[5]; or if an escape is open to a person if he wished to avail himself of it.[6]

The retaining of a person in a particular place, or the compelling of him to go in a particular direction, by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises that exterior will.[7]

[1] *Venkata Subba Reddy*, (1910) 7 M. L. T. 366, [1910] M. W. N. 72.

[2] Note M, p. 154

[3] Per Patteson, J., in *Bird v. Jones*, (1845) 7 Q. B. 742, 751, 752.

[4] Per Fulton, J., in *Shamlal Jairam*, (1902) 4 Bom. L. R. 79, 82.

[5] *Muhammad Din*, (1893) P. R. No. 36 of 1894.

[6] *Ramdai*, (1900) 4 C. W. N. cv.

[7] *Parankusam Narasaya Pantulu v. R. A. C. Stuart*, (1865) 2 M. H. C. 396.

'Certain circumscribing limits.'—"A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed; but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom; it is one part of the definition of freedom to be able to go withersoever one pleases; but imprisonment is something more than the mere loss of his power; it includes the notion of restraint within some limits defined by a will or power exterior to our own."[1] "If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it."[2]

Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.[3]

Moral force.—Detention through the exercise of moral force, without the accompaniment of physical force or actual conflict, is sufficient to constitute this offence.[4]

Malice is not an essential ingredient in the offence of wrongful confinement.[5]

Period of confinement.—The time during which a person is kept in wrongful confinement is immaterial, except with reference to the extent of punishment.[6]

Arrest by third persons at the direction of a police-officer.—If a police-officer, without arresting a person himself, directs some of the neighbours to take charge of him, the police-officer is responsible in the same way as if he had himself made the arrest, the person arrested by his order being in law in his custody.[7]

Difference between malicious prosecution and false imprisonment.—It becomes necessary here to consider the difference between s. 211 and this section, *i.e.*, between malicious prosecution and false imprisonment. "The distinction between false imprisonment and malicious prosecution is well illustrated by the case, where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connection between them."[8] Thus, the question is, does the defendant set a ministerial or a judicial officer in motion? If the former, he may be liable for false imprisonment, if the latter, for malicious prosecution.

CASES.

Wrongful confinement.—Where the accused refused to obey an order in writing improperly issued by a police-officer, and the police thereupon took her into

[1] Per Coleridge, J., in *Bird* v. *Jones*, (1845) 7 Q. B. 742, 744.

[2] Per Coleridge, J., in *ibid*, p. 746.

[3] Blackstone, Vol. III, 4th Edn., p. 121.

[4] *Venkatachala Mudali*, (1881) 1 Weir 341.

[5] *Dhania* v. *F. L. Clifford*, (1888) 13 Bom. 376

[6] *Suprosunno Ghosaul*, (1866) 6 W. R. (Cr.) 88.

[7] *Behary Singh*, (1867) 7 W. R. (Cr.) 3.

[8] Per Willes, J, in *Austin* v. *Dowling*, (1870) L. R. 5 C. P. 534, 540.

custody[1]; where a Superintendent of Police illegally wrote a letter to a person, who was accused of an offence for which he could not be arrested without a warrant, directing him to present himself before a Magistrate, and sent two constables to accompany him, and prevented him from speaking to anyone[2]; where a prisoner discharged by a Magistrate was subsequently re-arrested on the same charge;[3] where a police-officer arrested, without a warrant, a British subject in British India on a charge of criminal breach of trust or other cognizable offence committed outside British India[4]; where a Village Magistrate maliciously ordered a certain person, who had resisted the detention of pigs found trespassing, to be arrested[5]; where a Jail Doctor confined an offender, who was already undergoing imprisonment, in a cell within the jail for the purpose of administering enema against his will[6]; where an Abkari Inspector detained a man all night to prevent his being tampered with[7]; where a person living in a town where medical assistance was available kept in heavy chains his own brother who was subject to insanity of an intermittent kind and who was found to be sane by the District Judge who ordered his production before the Court[8]; and where the accused got the complainant who was their debtor arrested and taken to jail by a bailiff during the subsistence of a protection order in his favour[9] the offence of wrongful confinement was held to have been committed.

The accused, a Police Constable, detained some persons as suspects for several days. They were not fettered, but they were made to stay in a circumscribed limit. Their meals were brought to them, or police or village servants were sent with them to their houses for their meals and they were brought back. It was held that the accused was guilty of wrongful confinement.[10] Where two police-officers arrested without warrant a person who was drunk and creating disturbance in a public street, and confined him in the police station though one of them knew his name and address and it was not found to what extent he was a danger to others or their property, it was held that the arrest having been made by the police-officers without warrant, for a non-cognizable offence, their action amounted to wrongful confinement, unless it was justified under the provisions of the Code relating to the right of private defence or under s. 81.[11] Accused No. 1 brought a woman, who was his kept mistress, from Kolhapur and kept her with accused No. 2, a brothel-house-keeper in Bombay. On previous occasions too he had supplied women to accused No 2 to be used as prostitutes. The woman was made to live as a prostitute in the house, the entrance to which was guarded, and a watch was kept over her movements. Occasionally she was allowed to go out under surveillance. It was held that both the accused were guilty of wrongfully confining the woman.[12]

Mistaken exercise of power by a police-officer.—Where a person went to a police station to lodge a complaint, and the police-officer, in consequence of something, restrained the person until he consulted his superior, and then discharged him on his own recognizance, he was held to have committed no offence. The Court said: "Although the petitioner may have exceeded the limits of his authority, and may have done an act which he was not justified in doing, and so rendered himself liable to a civil suit for damages, the facts found do not, in our judgment, amount to the criminal offence of wrongful restraint."[13] The accused, a police-officer, came down to Bombay from up-country with a warrant to arrest a person. After

reasonable inquiries and on well-founded suspicion he arrested the complainant under the warrant believing in good faith that he was the person to be arrested. The complainant having proceeded against the accused for wrongful confinement, it was held that the accused had committed no offence, since he was protected by s. 76.[1]

Legal arrest.—Where the arrest is legal, the police-officer making the arrest cannot be successfully proceeded against on a charge under this section.[2] An officer arresting a judgment-debtor under a warrant which directs him to produce the judgment-debtor when arrested before the Court with all convenient speed, is not guilty of wrongful confinement if, having effected the arrest when the Court is not sitting, he confines him in the house of the judgment-creditor till the next sitting of the Court.[3]

Punishment for wrongful restraint.

341. Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

PRACTICE.

Evidence.—Prove (1) that the accused obstructed a person.

(2) That such obstruction prevented the person from proceeding in a direction in which he had a right to proceed.

(3) That the accused caused such obstruction voluntarily.[4]

The obstructor must intend or know or have reason to believe it to be likely that the means adopted would cause the obstruction of the complainant.[5]

Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Triable summarily

Magistrate cannot order the removal of an obstruction.—A Magistrate, while convicting an accused person for wrongfully restraining a person by the erection of a hut or by any similar act of obstruction, cannot pass an order, under this section, that the hut or other means of obstruction should be removed.[6]

Statutory application.—See the Madras City Municipal Act (Mad. Act IV of 1919), s. 364

Punishment.—"The offence of wrongful restraint, when it does not amount to wrongful confinement, and when it is not accompanied with violence, or with the causing of bodily hurt, is seldom a serious offence, and we propose, therefore, to visit it with a light punishment."[7]

Punishment for wrongful confinement.

342. Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

PRACTICE.

Evidence.—Prove (1) that the accused obstructed the complainant.

(2) That such obstruction was voluntary.

(3) That the effect of such obstruction was to restrain that person from proceeding beyond a certain limit.

[1] *Gopalia Kallanya*, (1923) 26 Bom. L. R. 138, 7 Bom Cr. C. 128.

[2] *Amarsang Jetha*, (1885) 10 Bom 506.

[3] *Samuel*, (1906) 30 Mad 179

[4] *Vide* s. 39, *supra*

[5] *Arumuga Nadar*, [1910] M W. N. 727

[6] *Mohini Mohan Chowdhry* v. *Harendra Chandra Chowdhry*, (1904) 31 Cal. 691, F. B., overruling *Debendra Chandra Chowdhury* v. *Mohini Mohan Choudhury*, (1901) 5 C. W. N. 432.

[7] Note M, p. 154.

(4) That the restraint was wrongful.

Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Separate sentences.—Where the accused were convicted under this section and s. 352, and sentenced separately for each of the offences, the acts found against them being that they seized, dragged and pushed the complainant to a certain place in order to punish him, it was held that what the accused had been punished for was the whole series of acts, and that series of acts came within the definition both of wrongful confinement and using of criminal force, and accordingly the case fell within the second para. of s. 71.[1] Where wrongful confinement was the common object of an unlawful assembly, and that was the essential ingredient in the constitution of an offence under s. 147, it was held that having regard to the provisions of s. 71, a separate sentence for wrongful confinement was illegal.[2]

Charge.—The charge should run thus :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows —

That you, on or about the——day of——, at——, wrongfully confined AB, and thereby committed an offence punishable under s. 342 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Wrongful confinement for three or more days.

343. Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

The period of three days will be counted from the time that the complainant is illegally confined.

PRACTICE.

Evidence.—Prove (1) to (4) as for s. 342 and (5) that such restraint was for a period of three or more days.

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—See the form of charge for s. 342. In that form for "confined AB" substitute "confined AB for——days."

Wrongful confinement for ten or more days.

344. Whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

Object.—The authors of the Code say: "One aggravating circumstance is the duration of the confinement. Confinement for a quarter of an hour may sometimes be a mere frolic, which would deserve only a nominal punishment, which, indeed, might be so harmless as not to amount to an offence... But wrongful confinement continued during many days will always be a most serious offence. We have attempted to frame the law on this subject in such a manner as to give the offender

[1] *Fakira Khan*, (1903) 4 C. L. J. 90. [illegible] *Sundar*, (1904) 1 Cr. L. J. 365.

[2] *Alim Sheikh* v. *Shabazada Singh Bur-*

a strong motive for abridging the detention of his prisoner."[1] The Law Commissioners observe: "One cannot conceive of a wrongful confinement continued for ten days or more without deliberation and reflection and a special regard to the penal consequences, and when a man sees that by persisting in his offence he is every day becoming liable to a certain additional punishment, the motive to set his prisoner free will grow stronger daily."[2]

PRACTICE.

Evidence.—Prove (1) to (4) as for s. 342 and (5) that such restraint was for a period of ten or more days.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Punishment.—Fine alone is not a legal sentence for a prisoner convicted under this section.[3]

Charge.—See the form of charge for s. 342. In that form for "confined AB" substitute "confined AB for——days."

Wrongful confinement of person for whose liberation writ has been issued.

345. Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

COMMENT.

There must be knowledge on the part of the accused that a writ for liberation has been issued. Mere belief is not sufficient; 'knowledge' is a much stronger word than 'belief' as the latter is stronger than 'suspect.'[4]

PRACTICE.

Evidence.—Prove (1) that the accused kept a person in confinement.
(2) That such confinement was wrongful.
(3) That a writ of liberation had been duly issued.
(4) That the accused knew of such writ, when he kept the person wrongfully confined.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, wrongfully confined AB, knowing at the time of such wrongful confinement that a writ for the liberation of the said AB had been duly issued, and thereby committed an offence punishable under s. 345 of the Indian Penal Code, and within my cognizance [*or* cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

[1] Note M, pp. 154, 155
[2] 1st Rep., s. 393.
[3] *Bahirji bin Krishnaji*, (1863) 1 B. H. C. (Cr. C.) 39.
[4] *Rango Timaji*, (1880) 6 Bom. 402, 403.

Wrongful confinement in secret.

346. Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known[1] to any person interested in the person so confined, or to any public servant,[2] or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement.

COMMENT.

The offence consists in wrongful confinement, aggravated by the offender's endeavour to deprive his prisoner and those interested in him or bound to protect him of the remedies which the law gives against this wrong.

1. **'Intention that confinement...may not be known.'**—In order to render a person liable under this section, it must be shown that the wrongful confinement was of such a nature as to indicate an intention, that the person confined, should not be discovered. The complainant, a woman, went to the Court to lodge a complaint of ill-treatment and torture against some relatives of the accused. The case not having been finished that day, she was asked to attend the Court the next day. As she was departing she was accosted by the accused who put her into a carriage and drove her away, taking her to various places, all strange and unknown to her at one or other of which she was detained. But a stir having arisen in the meantime on account of her disappearance she was brought back by the accused and produced by them before a pleader, in whose premises she remained till next day when she was made over to the police. The Sessions Judge convicted the accused under this section but the High Court set aside the conviction on the ground that there was no intention that she should not be discovered and that her confinement was not actual but potential as she was induced but not forced.[1]

2. **'Public servant.'**—See s. 21, *supra*.

PRACTICE.

Evidence.—Prove (1) to (4) as for s. 342; and (5) that such confinement was secret against (*a*) any person interested in the captive, or (*b*) a public servant, or (*c*) discovery of the place of confinement

Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Wrongful confinement to extort property or constrain to illegal act.

347. Whoever wrongfully confines[1] any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security,[2] or of constraining the person confined, or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence,[3] shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[1] *Sreenath Banerjee*, (1882) 9 Cal. 221.

COMMENT.

This and the next section may be compared with ss. 329 and 330, as the aggravating circumstances mentioned in the former are the same as in the latter.

1. **'Wrongfully confines.'**—A Head Constable in charge of a police outpost agreed to drop proceedings against K, who had been arrested on a certain charge, on condition that K paid to him a sum of money. The Head Constable sent away K in charge of two *chowkidars* to procure the money. In order to effect this object the *chowkidars* subsequently confined K at various places and maltreated him. It was held that it would be impossible to hold the Head Constable guilty of abetting an offence under this section in the absence of proof that he gave definite orders to that end [1]

2. **'Valuable security.'**—See s 30, *supra*.

3. **'Offence.'**—The word "offence" means a thing punishable under this Code or any special or local law (s 40)

PRACTICE.

Evidence.—Prove (1) to (4) as for s. 342; and

(5) That such confinement was for the purpose of (*a*) extorting property, or (*b*) a valuable security, or (*c*) constraining the doing of anything illegal, or (*d*) the giving of information which might facilitate the commission of an offence.

(6) That such extortion or constraint was from, or of, the person confined, or someone else interested in him.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate, of the first or second class.

Charge.—I (*name and office of Magistrate, etc*), hereby charge you (*name of the accused*) as follows —

That you, on or about the ——day of——, at ——, wrongfully confined AB for the purpose of extorting from the said AB [*or* from a certain person interested in the said AB, to wit, CD] a certain property, to wit——, and thereby committed an offence punishable under s 347 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)]

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Wrongful confinement to extort confession, or compel restoration of property

348. Whoever wrongfully confines[1] any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence,[2] or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security[3] or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

This section may be compared with s. 330.

[1] *Lachman Singh*, (1904) 31 Cal. 710.

1. **'Whoever wrongfully confines.'**—The person liable is the person who wrongfully confines. The appellants charged the prosecutor with theft, and he was handed over to the police. It was held that the police, and not the appellants, were responsible for any oppression or extortion practised by the police on the prosecutor while in confinement.[1]

2. **'Offence.'**—The word "offence" means a thing punishable under this Code or any special or local law (s. 40).

3. **'Valuable security.'**—See s. 30, *supra*.

PRACTICE.

Evidence.—Prove (1) to (4) as for s. 342; and

(5) That such confinement was for the purpose (*a*) of extorting a confession, or (*b*) some information, etc., or (*c*) of constraining the restoration of some property, or (*d*) valuable security, etc.

(6) That such extortion or constraint was from, or of, the person confined, or some other person interested in him.

Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

As to joinder of charges, see *Fakirapa*.[2]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, wrongfully confined one AB for the purpose of extorting from the said AB (*or* from one CD in whom the said AB was interested) any confession (*or* any information which may lead to the detection of an offence, *or* misconduct, *or* for the purpose of constraining the person confined to restore, *or* to cause the restoration of any property *or* valuable security, *or* to satisfy any claim or demand, or to give information which may lead to the restoration of any property *or* valuable security), and thereby committed an offence punishable under s. 348 of the Indian Penal Code, and within my cognizance [*or* the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Of Criminal Force and Assault.

Force.

349. A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion or cessation of motion as brings that substance into contact, with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion or change of motion or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described :

First.—By his own bodily power.

[1] *Shumbhoonath Pandey*, (1864) 1 W. R. (Cr.) 26.

[2] (1890) 15 Bom. 491.

Secondly.—By disposing any substance in such a manner that the motion or charge or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly.—By inducing any animal[1] to move, to change its motion, or to cease to move.

COMMENT.

This section gives an elaborate explanation of the expression "to use force." The illustrations to s. 350 exemplify the various clauses of the definition given in this section.

1. **'Animal.'**—See s. 47, *supra.*

Criminal force.

350. Whoever intentionally uses force to any person, without that person's consent,[1] in order to the committing of any offence,[2] or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury,[3] fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

ILLUSTRATIONS.

(*a*) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part. A has therefore intentionally used force to Z; and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(*b*) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has therefore used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.

(*c*) Z is riding in a palanquin. A, intending to rob Z, seizes the pole, and stops the palanquin. Here, A has caused cessation of motion to Z, and he has done this by his own bodily power. A has therefore used force to Z; and as A has acted thus intentionally, without Z's consent, in order to the commission of an offence, A has used criminal force to Z.

(*d*) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, he has used criminal force to Z.

(*e*) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water, and dash up the water against Z's clothes or something carried by Z. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with Z, or Z's clothes, A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z, he has used criminal force to Z.

(*f*) A intentionally pulls up a woman's veil. Here A intentionally uses force to her and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(*g*) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling. A has therefore intentionally used force to Z; and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force.

(*h*) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z.

COMMENT.

The preceding section defined 'force.' This section says that 'force' becomes criminal when it is used (1) without consent and in order to the committing of an offence, or (2) when it is intentionally used to cause injury, fear, or annoyance to another to whom the force is used. The term 'force' as defined here applies to force used in connection with the human body.[1]

The term 'criminal force' includes what in English law is called 'battery.' It will, however, be remembered that 'criminal force' may be so slight as not to amount to an offence (*s.* 95), and it will be observed that 'criminal force' does not include anything that the doer does by means of another person. The definition of 'criminal force' is so wide as to include force of almost every description of which a person is the ultimate object.[2]

The present definition of 'criminal force' was called 'assault' in the original Code. Speaking of it, the framers of the Code say: "We have found great difficulty in giving a definition of assault, and are by no means satisfied with that which we now offer. As, however, it at present appears to us to include all that we mean to include, and to exclude all that we mean to exclude, we have adopted it in spite of the objections which we feel to its harsh and quaint phraseology. We have adopted it with the less scruple, because we trust that the illustrations will render every part of it intelligible to an attentive reader.

"A large proportion of the acts which we have designated as assaults will be offences falling under the heads of hurt and restraint. Thus, a stab with a knife is an offence falling under the head of hurt, and it is also an assault. The seizing a man by the collar, and thus preventing him from proceeding on his way, is unlawful restraint, and is also an assault. But there will be many assaults which it is absolutely necessary to punish, yet which cause neither bodily hurt nor unlawful restraint. A man who impertinently puts his arm round a lady's waist, who aims a severe stroke at a person with a horsewhip, who maliciously throws a stone at a person, squirts dirty water over a person, or sets a dog at a person, may cause no hurt and no restraint, yet it is evident that such acts ought to be prevented."[3]

Ingredients.—The section requires the following essentials:—

1. The intentional use of force to any person.
2. Such force must have been used without that person's consent.
3. It must have been used—

(*a*) in order to the committing of any offence; or

(*b*) with the intention to cause, or knowing it to be likely that he will cause, injury, fear or annoyance to the person to whom it is used.

Illustrations.—Illustration (*a*) exemplifies 'motion', in *s.* 349; ill. (*b*), 'change of motion'; ill. (*c*), 'cessation of motion'; ills (*d*), (*e*), (*f*), (*g*), and (*h*), 'causes to any substance any such motion'; ills. (*d*), (*e*), (*g*), and (*h*), 'brings that substance into contact with any part of that other's body'; ills. (*f*) and (*g*), 'other's sense of

[1] *Sadasib Mawlal*, (1913) 18 C. W. N. 1150. T. L. R 132.

[2] *Rasul*, (1888) P. R. No. 4 of 1889. See *Rose v. Kempthorne*, (1910) 22 Cox. 356, 27

[3] Note M, p. 155.

feeling.' Clause (1) of s. 349 is illustrated by ills. (*c*), (*d*), (*e*), (*f*) and (*g*); cl. 2, by ill. (*a*); and cl. 3, by ills. (*b*) and (*h*).

1. 'Whoever intentionally uses force to any person without that person's consent.'—The use of force must be intentional. Mere submission by one who does not know the nature of the act done cannot be consent.[1] See s. 90 as to the meaning of 'consent.'

Where the accused went to the field of another and cut the crops sown by him and on the latter resisting they raised their sticks to strike him and that other ran away to save himself, it was held that the accused were guilty of using force by means of bodily power within the meaning of this section.[2] The accused having been brought to a certain place to serve as a cooly attempted to run away, but was obstructed and prevented from doing so by a peon. In the struggle which ensued the accused seized the peon by the wrist, and attempted to get away. It was held that the accused did not commit this offence as he had acted in self-defence.[3]

2. 'In order to the committing of any offence.'—The force must have been used for the purpose of committing an offence. See s. 40 as to the definition of 'offence.'

3. 'Intending by the use of such force to cause...injury, fear or annoyance to the person to whom the force is used.'—The force must have been used with the intention to cause or knowing it to be likely that by the use of such force he will cause injury, fear, or annoyance to the person to whom the force is used.

See s. 44, *supra*, as to the meaning of the word 'injury.'

Diseased spleen.—Where the accused struck a person, who had an enlarged spleen, in the course of a quarrel, and that person died owing to his bodily infirmity, it was held that the accused was guilty under this section.[4] For other similar cases, see ss. 319 and 320.

Rescuing persons arrested by the police.—Two police constables in the *bona fide* execution of their duty carried out an arrest under a warrant which, unknown to them, was in fact not legally issued; whereupon certain persons came up and rescued the prisoner and tore up the warrant but did not cause hurt to any one. It was held that the rescuers were guilty of using criminal force.[5]

Assault.

351. Whoever makes any gesture,[1] or any preparation,[2] intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.[3]—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

ILLUSTRATIONS.

(*a*) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(*b*) A begins to unloose the muzzle of a ferocious dog, intending, or knowing it to be likely, that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

[1] *Lock*, (1872) L. R. 2 C. C. R. 10, 14.
[2] *Jai Ram*, (1914) 12 A. L. J. R. 154.
[3] *Ganpati*, (1892) Unrep. Cr. C. 605.
[4] *Jai Dyal*, (1876) P. R. No. 21 of 1876.
[5] *Gokul*, (1922) 45 All. 142.

(c) A takes up a stick, saying to Z, "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

COMMENT.

[illegible] personal violence, that constitutes [illegible] so that [illegible] ped, then, this is an assault in point [illegible] he is stopped, [illegible] his blow to take effect.

Assault: [illegible] criminal force, the force [illegible] assist in an attempt or offer by a person having [illegible] hurt [illegible] person of another. And it is committed whenever [illegible] nded [illegible] already partially or fully put in motion is created. An [illegible] of criminal force.[2]

English law.—An assault consists in an attempt or offer by a person having present ability, with force, to do any hurt or violence to the person of another. Striking at another with a cane, stick, or fist, although the blow misses, drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike, presenting a loaded gun at a man within range, or any other act indicating an intention to use violence against the person of another, is an assault. Battery is defined to be "any least hurt or violence unlawfully and wilfully or culpably done to the person of another."

Ingredients.—The section requires two things—

1. Making of any gesture or preparation by a person in the presence of another.

2. Intention or knowledge of likelihood that such gesture or preparation will cause the person present to apprehend that the person making it is about to use criminal force to him.

1. 'Makes any gesture or preparation.'—See ill. (a) which illustrates that gestures which cause a person to apprehend that the person making them is about to use criminal force amount to an assault It is an assault to point a loaded pistol at anyone.[3]

See ill. (b) as to 'preparation' Though mere preparation to commit a crime is not punishable (see Comment on s. 511, infra) yet preparation with the intention specified in this section amounts to an assault

2. 'Intending or knowing it to be likely, etc.'—Intention is the gist of the offence The gesture or preparation must be of such a nature that the person in whose presence it is made should apprehend that criminal force would be used to him Throwing a bottle into a house, among the inmates, with the intention of hurting or frightening them, constitutes assault.[4]

Where one of the accused hit a constable and the others surrounded the constable in a threatening manner, it was held that this finding was not sufficient to convict the others of assault.[5]

The appellant met the respondent in the street and tendered him an order for discovery, which had been made against the respondent in a County Court action, the appellant acting on behalf of the solicitor to the other party to the action. The respondent refused to accept the document, and the appellant thrust

[1] *Stephens v. Myers*, (1830) 4 C. & P. 349
[2] M. & M. 350
[3] *Jeremiah James*, (1844) 1 C. & K. 530.
[4] *Po Tan*, (1909) 3 L. B. R. 191
[5] *Munisami*, (1910) 8 M. L. T. 118.

it into the inner-fold of the respondent's coat. It was held that, as the appellant was entitled to serve the respondent personally, and as there was no evidence that the appellant touched the respondent more than was necessary to bring the document home to the respondent, the appellant was not guilty of an assault on the respondent.[1]

Mere words do not amount to an assault, but the words which the party threatening uses at the time may either give his gestures such a meaning as may make them amount to an assault, or, on the other hand, may prevent them from being held to amount to an assault. In the latter case the effect of the words must be such as clearly to show the party threatened that the party threatening has no present intention to use immediate criminal force.[2] A preparation taken with words which would cause a person to apprehend that criminal force would be used to him, if he persisted in a particular course of conduct, does not amount to an assault. There must be evidence to show that the accused was about to use criminal force to him then and there.[3] See ill. (c)

Punishment for assault or criminal force otherwise than on grave provocation.

352. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Explanation.[1]—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence.[2]

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

COMMENT.

This section provides punishment for assault or use of criminal force when there are no aggravating circumstances.

1. **'Explanation.'**—See Comment on exception 1 to s. 300, p. 629. If there is grave provocation very light punishment is to be inflicted.

2. **'Right of private defence.'**—See ss. 96 to 100 and Comment thereon.

PRACTICE.

Evidence.—Prove (1) that the accused made a gesture of preparation to use criminal force.

(2) That the same was made in the presence of the complainant.

(3) That he intended, or knew, that it was likely that such gesture, etc., would cause the complainant to apprehend that such criminal force would be used.

[1] *Rose v. Kempthorne*, (1910) 22 Cox 356, 27 T. L. R. 132.

[2] *Cama v. Morgan*, (1864) 1 B. H. C. 205.

[3] *Birbal Khalifa*, (1902) 30 Cal. 97.

(4) That such gesture, etc., did cause the complainant to apprehend the same.

(5) That the accused received no grave or sudden provocation from the complainant.

To substantiate a charge of assault on a particular person, it is not enough to [illegible] and the preparations made by the accused were calculat- [illegible] criminal force would be used to him, if he persisted in a [illegible] e must be evidence to show that the accused was about to use criminal [illegible] m then and there.[1]

Or prove (1) that the accused used force[2] to the complainant.

(2) That he did so intentionally.

(3) That he used such force, without the complainant's consent.

(4) That he did so in order to commit an offence; or that he thereby intended to cause, or knew that he would thereby be likely to cause, injury, fear or annoyance to the complainant.

(5) That he received no grave or sudden provocation from the complainant.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Triable summarily.

The Punjab Rule.—It has come to notice that Magistrates are apt to confound ss. 352 and 323 of the Indian Penal Code, and to issue process and convict under the former section in cases in which the complaint is laid under s. 323, and the evidence for the prosecution establishes the fact of violence having been actually used

2. In some cases this is possibly done purposely, because charges under s. 352 are triable as summons cases, whereas a charge under s. 323 must be tried as a warrant case. The procedure in the former class of cases is, no doubt, easier to the Magistrate; but it is less favourable to the accused, for in warrant cases the Magistrate is bound to call upon the accused for his defence, unless he discharges him (see ss. 253 to 256 of the Code of Criminal Procedure), while in a summons case the accused is primarily responsible for the production of his evidence on the day fixed for hearing (s 244).

3. It is accordingly pointed out that s. 352 of the Indian Penal Code does not apply to cases where the offender uses criminal force which actually causes hurt to the person against whom it is displayed, and that such cases fall under s. 323 of the Indian Penal Code.

4. It has been ruled that s. 304-A is inapplicable to cases in which an assault, however petty, is deliberately made, and death ensues. Such cases fall either under s. 302, s. 304, or s. 335, s. 325 or s. 323.[3]

Autrefois acquit.—A person who is tried and discharged for the offence of using criminal force under this section cannot again, upon the same complaint, be tried for causing hurt, for, under whatever denomination the offence is classed, it is the one offence of assault.[4]

Complaint.—A Munsiff held an enquiry under s. 476, Criminal Procedure Code, and having come to the conclusion that the accused had committed offences under ss. 183 and 352 in connection with certain execution proceedings sent the case to the District Magistrate who transferred it to a Deputy Magistrate. The Deputy Magistrate acquitted the accused on the ground that there was no sanction. On appeal, the High Court held that with regard to s. 183 the Magistrate ought to have proceeded with the case according to law, and that with regard to s. 352 no sanction was required.[5]

[1] *Birbal Khalifa*, (1902) 30 Cal. 97.
[2] *Vide* s. 349, *supra*.
[3] P. C. C. R. & O., No. 32, Vol. II, p. 201.
[4] *Kaplan* v. *Smith*, (1871) 7 Beng. L. R. App. 25, 16 W. R. (Cr.) 3.
[5] *Arjan Pramanik*, (1901) 31 Cal. 664.

Punishment.—A sentence inflicting a fine of Rs. 50, and awarding imprisonment for one month in default of payment of fine, was held to be illegal with reference to s. 65 and this section.[1]

Assault or criminal force to deter public servant from discharge of his duty.

353. Whoever assaults[1] or uses criminal force[2] to any person being a public servant[3] in the execution of his duty as such public servant,[4] or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

If hurt is caused under the circumstances mentioned in the section then either s. 332 or s. 333 will apply.

1. **'Assaults.'**—See s. 351, *supra*.

2. **'Criminal force.'**—See s. 349, *supra*.

3. **'Public servant.'**—See s. 21, *supra*.[2] A *pagi* who is a village watchman remunerated by fees paid by the villagers is held to be a public servant within the meaning of this section.[3] Similarly a lascar in the Public Works Department distributing water from public irrigation channels is a public servant[4] The accused cannot claim exoneration on the ground that the person whom he assaulted was not attired in the livery which is ordinarily associated with the duty which he claimed to be discharging, if in fact the accused knew him to be a public servant acting in the execution of his duty as such servant[5]

4. **'In the execution of his duty as such public servant.'**—These words mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done in good faith under colour of his office.[6] The public servant must be acting in the execution of his duty as such public servant. A commissioner attempting to give possession under a time-expired warrant has no authority to go upon land in the possession of the party, who resists the execution. The persons offering resistance are not guilty of an offence under this section[7] A vaccinator who vaccinates in a place where vaccination is not compulsory is not discharging any duty under the law when attempting to vaccinate a child A person, therefore, who prevents a vaccinator from vaccinating a child, in a place where vaccination has not been made compulsory, cannot be said to be committing an offence under this section.[8] Where a cart-owner refused to give his cart for the use of a Forest Settlement Officer, who required it as per executive orders of Government, and assaulted the peon in preventing him from seizing his cart, it was held that he could not be convicted of an offence under this section, because the rules aforesaid had not the force of law, and a public servant acting under them was not acting in the execution of his duty.[9] A Tahsildar deputed his peon by

[1] *Jehan Buksh*, (1871) 16 W. R. (Cr.) 42

[2] *Vide* Weir, (3rd Edn.), 203.

[3] *Aja Narsang*, Unreported (Bom.) Criminal Revision No 377 of 1909, decided on 2nd February 1910. Chandavarkar and Knight, JJ

[4] *Public Prosecutor of Madras v. Annam Naidu*, (1924) 48 Mad. 867.

[5] *Lava*, (1916) 13 N. L. R. 87.

[6] See *Dalip*, (1896) 18 All. 246; *Raman Singh*, (1900) 28 Cal. 411, 414; *Bolai De*, (1907) 35 Cal. 361; *Asa*, (1913) P. L. R. No 325 of 1913.

[7] *Abinash Chandra Aditya v. Ananda Chandra Pal*, (1904) 31 Cal. 424; *Nandlal*, (1923) 19 N. L. R. 183.

[8] *Bozagellaya*, (1909) 19 M. L. J. R. 238

[9] *Rakhmaji*, (1885) 9 Bom. 558.

a written order to procure some camels for the camp of the Settlement Officer. When the peon attempted to seize the camels of the accused he was assaulted by the accused and prevented from seizing the camels. It was held that the accused had committed no offence.[1] The Collector has no authority to issue a distress warrant to a police-officer under the Income Tax Act of 1922 for arrear of income-tax. A police-officer executing such a warrant is not acting in the execution of his duty as a police-officer, and resistance to him does not constitute an offence under this section.[2] A police constable, at midnight, entered upon the premises of a person who was regarded by the police as a suspicious character, and knocked at his door to ascertain if he was there, whereupon he came out and abused and pushed the constable and lifted a stick as if he were about to hit the constable with it. On a complaint being preferred under this section of using criminal force to deter a public servant in the execution of his duty, it was held that no offence had been committed. The constable was not engaged in the execution of his duty as a public servant and was technically guilty of house-trespass and his action was calculated to cause annoyance to the inmates of the house, and was insulting to the accused, who was justified in causing the slight harm which he had inflicted on the constable.[3]

Where a Collector's peon was deputed to keep the peace during a distraint, and, when on the road to execute the order, was assaulted by the accused who attempted to deprive him of his *perwana*, it was held that the accused had committed an offence under this section.[4] A warrant of arrest was issued against R, on a charge of cheating, to the Sub-Inspector within whose jurisdiction R resided. That officer ordered his subordinate constables to be on the look-out for R and arrest him wherever found. One of the constables came across R and proceeded to arrest him informing him of the issue of a warrant against him. The warrant itself was, however, not produced. The accused interfered with the constable in arresting R and managed to prevent his arrest. It was held that under s. 54 (1) of the Criminal Procedure Code the constable was empowered to make the arrest without warrant as he had credible information that the person wanted had committed a cognizable offence and in making the arrest he was occupied in the discharge of his duty as a police-officer and any interference with that arrest amounted to obstructing a police-officer in the discharge of his duty and was an offence under this section.[5] If the act of the public servant is authorized by law any resistance will be deemed penal, *e.g.*, assaulting a public servant carrying on a search,[6] or executing a writ of delivery of possession,[7] or resisting a public servant directed to survey the accused's land.[8]

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Defect in a warrant.—Where the warrant for the arrest of a person, in execution of a civil process, was not signed in full under s. 251 of the Criminal Procedure Code, but was initialled by the officer issuing it, and was resisted by that person when the officer to whom it was entrusted sought to execute it, it was held that the person was guilty under this section, and the preliminary defect of the warrant formed no defence.[9] It was held similarly where the provisions of s. 82 of the Civil Procedure Code were not complied with before the issuing of a warrant under which

[1] *Asa*, (1913) P. L. R. No. 325 of 1913. The case of *Amir Khan*, (1913) P. L. R. No. 183 of 1913, P. W. R. (Cr.) No. 19 of 1913, seems to be of doubtful authority.

[2] *Jairam Sahu*, (1923) 4 P. L. T. 171.

[3] *Dorasamy Pillai*, (1903) 27 Mad. 52.

[4] *Methi Mullah*, (1870) 13 W. R. (Cr.) 49; *Kandaswami Goundan*, (1923) 46 M. L. J. 45. See *Ramasami*, (1889) 13 Mad. 131.

[5] *Gopal Singh*, (1913) 36 All. 6; *Prokash Chandra Kundu*, (1914) 41 Cal. 836.

[6] *Bissar Misser*, (1913) 41 Cal. 261.

[7] *Preo Lal Mukerjee*, (1913) 18 C. W. N. 548.

[8] *Judagi Raut*, (1916) 2 P.L.J. 18, 3 P.L.W. 429.

[9] *Janki Prasad*, (1886) 8 All. 293. See *Dawan Singh*, (1885) 5 A. W. N. 211; *Narsingabhan*, Weir (3rd Edn.) 204; *Lakshmana Goundan*, (1883) 1 Weir 343; *Perumalu*, (1885) 1 Weir 344; *Abdul Gafur*, (1896) 23 Cal. 896; *Banley Behary Singh*, (1918) 3 P. L. J. 493.

the accused was arrested but rescued by his friends.[1] But if the warrant issued to a constable to arrest a person is invalid, as, for instance, where it is signed by an Honorary Magistrate who is not the presiding officer under s. 75, Criminal Procedure Code, the person against whom it is issued cannot be convicted under this section if with the assistance of other persons he manages to free himself from the constable and escapes.[2] But a warrant of execution which does not bear a date on or before which it should be executed is not a good warrant.[3] A warrant issued by a Revenue Officer for the arrest of a defaulting witness, which does not contain the name of the person to be arrested, is illegal, and persons assaulting the public servant to help the witness to escape are not guilty of an offence under this section.[4]

Search without a proper order or warrant.—Where the accused resisted a public officer who attempted to search a house, in the absence of a proper written order authorizing him to do so, he was held to have committed no offence under this section.[5] But a search without a search warrant was held not to justify an obstruction or resistance to an officer, if he was acting in good faith and without malice.[6]

Unlawful act of a public servant is a good defence.—Where a licensed vaccinator attempted to take lymph from a child of one petitioner to vaccinate the child of the other, and was assaulted in consequence and received slight injuries, it was held that he was not entitled to take lymph from the arm of any person who objected, [illegible] tified [illegible] rvant [illegible] with [illegible] lty of assaulting a public servant under this section.[8] An Excise peon with the avowed object of seeing if *chandul* (a smoking mixture of opium) was not being manufactured ascended the stairs of accused No. 1's house and looked into the place where the accused No. 1 and his wife were sitting. The accused No. 1 on perceiving him came to the door, and shoved him down the stairs and followed him, when accused No. 2 came in and hit him. It was found that the peon was not injured in any way. The accused were convicted under s. 353. It was held that the conviction was illegal. The accused No. 1 was justified in turning out the peon for he was not authorized to enter the premises of the accused even with the object of seeing if *chandul* was being manufactured.[9] Where a *surveille* on a domiciliary visit being paid to him by a police-officer, refused to allow his thumb impression to be taken, and, on the officer attempting to take it, produced a club saying he would not allow the impression to be taken, and, if anyone asked for it, he would break his head, it was held that the act of the *surveille* did not amount to an assault and that his conviction under this section could not be sustained.[10] Where, under a warrant authorising distraint of the property of a person who had defaulted to pay water-tax, the person executing the warrant attempted to distrain the property of the lessee of the defaulter and was assaulted by the lessee, it was held that the lessee could not be convicted under this section.[11]

[1] *Narbadeshwar*, (1905) 27 All. 491.
[2] *Jaggut Kora*, (1917) 1 P. L. W. 309.
[3] *Mohini Mohan Banerji*, (1916) 3 P. L. W. 64.
[4] *Jogendra Nath v. Harakil*, (1924) 51 Cal. 902.
[5] *Narain*, (1875) 7 N. W. P. 209, *Jagarnath Mandhata*, (1887) 1 C. W. N. 253, *Mahin Sonar*, (1915) 13 A. L. J. 621.
[6] *Pulot Kora*, (1899) 19 Mad. 349. See also *Poomalai Udayan*, (1899) 21 Mad. 296.
[7] *Manjunad Mackh*, (1899) 3 C. W. N. 627, *Nowranji Singh*, (1900) 5 C. W. N. 134; *Bakal*, (1900) 3 A. L. J. R. 327.
[8] *Pitkin Koran*, (1900) 1 Weir 345.
[9] *Allah Bakish*, (1904) P. L. R. No. 105 of 1904.
[10] *Bakal Khalifa*, (1902) 30 Cal. 97.
[11] *Mahimpati Narasimam v. Sub Inspector of Police*, (1924) 47 M. L. J. 447.

PRACTICE.

Evidence.—Prove (1) that the person assaulted, etc., was a public servant.

(2) That the accused assaulted, or used criminal force to such public servant.

(3) That when the accused assaulted, etc., him, he was acting in the execution of his duty as such public servant; or

that such assault, etc., was committed with intent to prevent or deter such [illegible]

[illegible]

Procedure. [illegible] compoundable—Triable by P[illegible] second class.

[illegible] ge that he had assaulted a public officer in the discharge of his duties, on failure of that charge, be convicted of an offence of having assaulted a private individual, viz., a witness in the case, especially in the absence of a complaint by that private individual.[1]

Sanction.—A charge under this section requires no sanction for initiation of proceedings.[2]

Non-production of warrant at the trial.—One of the accused was convicted under this section, and two others of abetment of an offence under it. But the warrant of attachment under which the public servant was acting was not produced at the trial, nor was any secondary evidence given to show its contents. It was held that in the absence of any evidence as to the terms of the warrant either by the production of the original or in the form of secondary evidence, it was impossible to hold that the conviction was good.[3]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or abo[illegible] criminal force to] AB, a public servant. [illegible] servant [or with intent to [illegible] such public servant] and [illegible] the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Assault or criminal force to woman with intent to outrage her modesty.

354. Whoever assaults or uses criminal force to any woman,[1] intending to outrage or knowing it to be likely that he will thereby outrage her modesty,[2] shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

An indecent assault upon a woman is punished under this section.[4] Rape is punished under s. 376. The offence under this section is of less gravity than the one under s. 376.

Scope.—Assaults committed with the intention to commit rape are not contemplated by this section.

1. 'Woman' is defined as a female human being of any age (*s.10*). The accused took a girl of six years to his room, where he made her lie down and he lay on her. The girl immediately screamed and ran away. For this act the accused was convicted and sentenced by the Magistrate under s. 352 and not under this

[1] *Akbar Momin*, (1901) 6 C. W. N. 202.
[2] *Arjun Pramanik*, (1904) 31 Cal. 664.
[3] *Tafazzul Ahmed Chowdhry*, (1899) 26 Cal. 630; *Chunder Coomar Sen*, (1899) 3 C. W. N. 605; *Shwe Ko*, (1905) 3 L. B. R. 128.
[4] *Shankar*, (1881) 5 Bom. 493.

section, on the ground that the girl was too young to have any modesty. It was held that the act of the accused was punishable under this section, for the girl, though young, was a 'woman' as defined by s. 10.[1]

2. **'Intending to outrage or knowing it to be likely that he will thereby outrage her modesty.'**—There must be intention or knowledge that the woman's modesty will be outraged. What constitutes an outrage to female modesty is nowhere defined. This will differ according to the country and the race to which the woman belongs. It would be an outrage to the modesty of one woman to do to her what would be thought nothing of by another. A kiss that would be highly resented by a lady might be no affront to the maid.[2] To place hands on the shoulder of a woman will be an outrage on the modesty of a Hindu or a Mahomedan woman, but not a European.[3]

Knowledge that modesty is likely to be outraged is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. For instance, the pulling of a woman by the arm coupled with a request for sexual intercourse amounts to an offence under this section.[4]

CASES.

Where a master took indecent liberties with a female scholar it was held he was guilty of assault though she did not resist.[5] Making a female patient strip naked under the pretence that the accused, a medical man, could not otherwise judge of her illness was held to be an assault.[6] But where the evidence showed that the accused stripped a girl of eighteen or twenty nearly naked and was lying upon her when her cries attracted people to the spot, the accused was liable under s. 376 for attempt to commit rape and not under this section.[7]

PRACTICE.

Evidence.—Prove (1) that the person assaulted, etc., was a female.

(2) That the accused assaulted or used criminal force to her.

(3) That he intended thereby to outrage her modesty; or that he knew it to be likely that he would thereby outrage her modesty.

The charge under this section is one which is very easy to make and very difficult to rebut, and when such a charge is made it is necessary to see whether it is supported by independent evidence besides that of the woman herself, or is corroborated by her conduct and the surrounding circumstances and is consistent with ordinary probabilities.[8]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate, of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, assaulted [*or* used criminal force to] AB, a woman, intending to outrage [*or* knowing it to be likely that you would thereby outrage] the modesty of the said AB by such assault [*or* criminal force], and thereby committed an offence under s. 354 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

[1] *Tatia Mahadev*, (1912) 14 Bom. L. R. 961, 1 Bom. Cr. C. 205.

[2] 1st Rep., s. 413.

[3] *George Evans*, (1906) Unreported (Bombay) Criminal Application for Revision No. 58 of 1906, decided on the 10th April 1906. Per Jenkins, C. J., and Aston, J.

[4] *Sena Shetty*, (1896) 1 Weir 347.

[5] *John Nichol*, (1807) R. & R. 130; *Mc Gavaran*, (1852) 6 Cox 64.

[6] *Peter Rozinski*, (1824) 1 Mood. Cr. C. 19.

[7] *Khadam*, (1910) P. W. R. (Cr.) No. 42 of 1910.

[8] *Nga Aung Dwe*, (1894) 1 U.B. R (1892-1896) 229.

Punishment.—See the Frontier Crimes Regulation, 1901, ss. 11 (3) (d) and 12 (2).

Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation[1] given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

The intention to dishonour may be supposed to exist when the assault or criminal force is by means of gross insults, such as kicking a man, pulling a man's nose, assaulting with a shoe, or laying a whip across the shoulders.

Where an accused, while under trial, struck a Sub-Inspector of Police, who was in the witness-box giving evidence against him, it was held that he was guilty of an offence under this section.[1]

1. **'Grave and sudden provocation.'**—See exception 1 to s. 300, p. 629.

PRACTICE.

Evidence.—Prove (1) the assault or use of criminal force by the accused.

(2) That the accused intended thereby to dishonour the person assaulted, etc.

(3) That he did not receive grave or sudden provocation from the person so assaulted, etc.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, assaulted [*or* used criminal force to] AB, intending by such assault [*or* criminal force] to dishonour the said AB, and thereby committed an offence punishable under s. 355 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Assault or criminal force in attempt to commit theft of property carried by a person.

356. Whoever assaults or uses criminal force to any person, in attempting[1] to commit theft[2] on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Object.—This section applies to cases of using criminal force in an attempt to commit theft and not to those cases in which theft has been actually committed.[2] It provides a separate punishment for the rare case of criminal force used in an attempt to commit theft, and yet not amounting to robbery.

The section will generally apply to pickpockets.

1. **'Attempting.'**—See s. 511, *infra*.

2. **'Theft.'**—See s. 378, *infra*.

[1] *Altaf Mian*, (1907) 47 A. W. N. 186

[2] *Mukun*, (1865) Unrep. Cr. C. 3.

PRACTICE.

Evidence.—Prove (1) the assault or use of criminal force by the accused.

(2) That the person assaulted, etc., at the time, was wearing, or carrying the property in question.

(3) That the accused committed such assault, etc., in attempting to commit theft of such property (*vide* ss. 511 and 378).

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, assaulted [*or* used criminal force to] AB in attempting to commit theft of certain property, to wit——, which the said AB was then wearing [*or* carrying], and thereby committed an offence punishable under s. 356 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Assault or criminal force in attempt wrongfully to confine a person.

357. Whoever assaults or uses criminal force to any person, in attempting[1] wrongfully to confine[2] that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

This section deals with an assault committed in attempting wrongfully to confine a person.

1. **'Attempting.'**—See s. 511, *infra*.
2. **'Wrongfully to confine.'**—See s. 340, *supra*.

PRACTICE.

Evidence.—Prove (1) the assault, or use of criminal force by the accused.

(2) That he did so in an attempt to wrongfully confine the person assaulted, etc.

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by any Magistrate.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, assaulted (*or* used criminal force to) AB, in attempting wrongfully to confine the said AB, and thereby committed an offence punishable under s. 357 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Assault or criminal force on grave provocation.

358. Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Explanation.—The last section is subject to the same explanation as section 352.

COMMENT.

This is a somewhat mitigated form of the offence described in s. 352.

The Explanation is not happily worded. The expression 'the last section' is incorrect. The purport of the Explanation is that this section is subject to the same Explanation as s. 352.

PRACTICE.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate—Summary trial.

Of Kidnapping, Abduction, Slavery and Forced Labour.

359. Kidnapping is of two kinds: kidnapping from British India, and kidnapping from lawful guardianship.

COMMENT.

Kidnapping is divided into two kinds. But there may be cases in which the two kinds overlap each other. For instance, a minor may be kidnapped from British India as well as from his lawful guardianship.

Kidnapping from British India.

360. Whoever conveys any person beyond the limits of British India[1] without the consent[2] of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from British India.

COMMENT.

The offence of kidnapping is sometimes committed by means of assault, and is sometimes attended with restraint; but this is not always the case. For instance, a labourer who has been induced to embark on board a ship by false assurances that he shall be taken to a country where he shall have good wages, but whom the captain of the ship intends to sell for a slave, has not as yet been either assaulted or retained although he is kidnapped.

Ingredients.—This section requires two essentials—

1. Conveying of any person beyond the limits of British India.
2. Such conveying must be without the consent of that person.

1. **'Conveys any person beyond the limits of British India.'**—This offence may be committed on a grown-up person or a minor by conveying him or her beyond the limits of 'British India.'

See s. 15, *supra*, as to the definition of 'British India.'

2. **'Without the consent of that person.'**—The conveying must be without the consent, express or implied, of the person conveyed. Where the accused induced certain women to leave British India for Ceylon on the misrepresentation that they were to be married to his sons, and after arriving at Ceylon made them work as coolies on a tea estate, it was held that the women must be held to have been taken without their consent and that the accused was guilty of kidnapping from British India.[1]

A person kidnapping a girl of fifteen years of age out of British India with her consent does not come within the purview of this section.[2]

See s. 90, *supra*, as to the definition of 'consent.'

[1] *Periasawmi Kangani*, (1910) 8 M. L. T. 91, [1910] M. W. N. 262.

[2] *Moribhai Dada*, (1918) 20 Bom. L. R. 372, 4 Bom. Cr. C. 227.

Kidnapping from lawful guardianship.

361. Whoever takes or entices any minor[1] under fourteen years of age, if a male, or under sixteen years of age, if a female,[2] or any person of unsound mind, out of the keeping of the lawful guardian[3] of such minor or person of unsound mind, without the consent of such guardian,[4] is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

COMMENT:

Object.—The object of this section is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons.

Under English law this offence is known as 'child-stealing.'

Scope.—Kidnapping is an offence irrespective of any intent with which it is committed. It may be committed without assault or wrongful restraint or confinement. A child, for example, who is decoyed from its guardian, who soon forgets its home, and who consents to remain with the kidnapper, cannot be said to have been assaulted or restrained. This offence may be committed in respect of either a minor or a person of unsound mind. To kidnap a grown up person, therefore, is not this offence [1]

Ingredients.—The section has four essentials—

1. Taking or enticing away a minor or a person of unsound mind.
2. Such minor must be under fourteen years of age, if a male, or under sixteen years of age, if a female.
3. The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.
4. Such taking or enticing must be without the consent of such guardian.

1. 'Takes or entices any minor...or person of unsound mind.'—The taking need not be by force, actual or constructive, and it is immaterial whether the girl consents or not.[2] There must be a taking of the child out of the possession of the parent. If a child leaves its parents' house for a particular purpose with their consent, it cannot be said to be out of the parents' keeping. A mere leading of a not unwilling child will be sufficient.

The period of detention is immaterial to the offence. Where, therefore, it was proved that the accused having met a girl by arrangement, stayed with her away from her father's house for three days, sleeping with her at night; and that he took her away without her father's consent and against his will, in order to gratify his passions and then allowed her to return home, but not with a view of keeping her away from her home permanently, it was held that he was guilty of this offence.[3]

[1] (1867) 6 W. R. (Cr. L.) 11.
[2] *Manketlow*, (1853) 6 Cox 143.
[3] *Timmins*, (1860) 8 Cox 401; *Boillie*, (1859) 8 Cox 238. But see *Hibbert*. (1869) L. R. 1 C. C. R. 184.

If a girl under sixteen has been found in the streets by herself and seduced away, that is not a taking out of the possession of the father, even though he is living in the place and she lives with him.[1] If a man, by previous promises to a girl as to what he will do if she will leave her parents' house and go to live with him, induces her at length to do so, and then receives and harbours her secretly, he is guilty of taking her out of the possession of her parents.[2]

It is not necessary to show a trespass or any thing of that nature in the taking, other than the act of taking.[3]

Bramwell, B., in stating the law on the subject, said: "I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of this Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away. It is, however, equally clear that, if the girl, acting under his persuasion, leaves her father's house, although he is not present at the moment, yet, if he avails himself of that leaving which took place at his persuasion that would be a taking her out of her father's possession, because the persuasion would be the motive cause of her leaving. Again, although she may not leave at the appointed time, and although he may not wish that she should have left at that particular time, yet if, finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment he is also guilty, if his persuasion operated on her mind so as to induce her to leave."[4]

If the suggestion to go away with the accused came from the girl only, and he took the merely passive part of yielding to such suggestion, he is entitled to an acquittal.[5]

'When taking is complete.'—A Full Bench of the Calcutta High Court has decided that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship; it is not an offence continuing so long as the minor is kept out of such guardianship. The act of taking is not, in the proper sense of the term, a continuous act; when once the boy or girl has been actually taken out of the keeping, the act is a completed one.[6]

The Madras High Court is of opinion that so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted.[7] In the above Calcutta case this ruling has been distinguished on the ground that this was a case of kidnapping out of British India and, as, when the accused in this case intervened, the minor had not been actually taken out of British India, the process of taking was regarded as still going on, or continuing. In a later case the ruling in the above-mentioned Calcutta case has been approved of.[8]

The Allahabad High Court has laid down that the offence of kidnapping from lawful guardianship is not a continuing offence.[9] The offence is completed as soon as the minor is actually taken out of the custody of his or her guardian and is not an offence continuing as long as the minor is kept out of such guardianship. There can be no abetment of this offence in such a case on the hypothesis that the offence is a continuing one.[10] But if there is a conspiracy before the kidnapping takes place, a conviction for abetment of kidnapping can be sustained.[11]

[1] *Green*, (1862) 3 F. & F. 274, followed in *Hibbert*, (1869) L. R. 1 C. C. R. 184; *Primelt*, (1888) 1 F. & F. 50.

[2] *Robb*, (1864) 4 F. & F. 59; *George Kipps*, (1850) 4 Cox 167.

[3] *Fraser*, (1861) 8 Cox 446.

[4] *Christian Olifier*, (1866) 10 Cox 402, 404.

[5] *James Jarvis*, (1902) 20 Cox 249. See *Nga San Hlaing*, (1902) 1 L. B. R. 205.

[6] *Nemai Chattoraj*, (1900) 27 Cal. 1041, F. B.

[7] *Samin Kaundan*, (1876) 1 Mad. 173.

[8] *Chekutty*, (1902) 26 Mad. 454.

[9] *Ram Dei*, (1896) 18 All. 350; *Ram Sundar*, (1896) 19 All. 109.

[10] *Abdur Rahman*, (1916) 38 All. 664. Followed in *Gokaran*, (1920) 24 O. C. 329.

[11] *Taka*, (1903) 26 All. 1 F.

The former Chief Court of the Punjab took the same view as the Calcutta and Allahabad High Courts. It said that there could be no abetment of kidnapping by conduct, which commenced only after the minor had once been completely taken out of the keeping of the guardian and the guardian's keeping of the minor was consequently at an end, the question whether such taking was or was not complete being one for determination with reference to the circumstances proved in the particular case.[1] Speaking generally, the keeping of the guardian will be at an end when the person of the minor has been transferred from the custody of the guardian or some person on his behalf into the custody of some person not entitled to the custody of the minor.[2] The offence of kidnapping not being a continuing one there could be no abetment of the taking after the minor had once been completely taken out of the keeping of her lawful guardian.[3]

'Enticing' is an act of the accused by which the person kidnapped is induced of his own accord to go to the kidnapper. It is not necessary that the taking or enticing should be shown to have been by means of force or fraud.[4] For instance, the enticing away of a child playing on a public road is sufficient.[5]

'Minor.'—This word includes married as well as unmarried female minors.[6] According to Mahomedan law the occurrence of puberty determines minority and the mother's right to custody, but for the purpose of this section regard must be had only to the definition of minority in s. 3, Indian Majority Act.[7]

2. 'Under [illegible] under sixteen years [illegible] to be under sixteen, [illegible] s of a greater age.[8] [illegible] turns out to be under sixteen he must take the consequences[9]; even though he *bona fide* believed and had reasonable ground for believing that she was over sixteen [10]

3. **'Out of the keeping of the lawful guardian.'**—"The Legislature has advisedly preferred this phrase to the word 'possession' which frequently recurs in the Code—in connection with inanimate objects. The word 'keeping'...connotes the fact that it is compatible with independence of action and movement in the object kept. It implies neither prehension nor detention but rather maintenance, protection and control, manifested not by continual action but as available on necessity arising. And this relation between the minor and the guardian is... certainly not dissolved so long as the minor can at will take advantage of it and place herself within the sphere of its operation."[11] Similarly, where a girl was driven away from her parental roof and was found some days after in the company of the accused, no offence was held to have been committed [12]

There must be a taking or enticing of a child out of the keeping of the lawful guardian without his consent. Where, therefore, a girl runs away from home in consequence of ill-treatment, and, on meeting the accused on the road, agrees to take service as a cooly and goes with him, this offence is not committed.[13]

A child under ten years of age is, *prima facie*, subject to guardianship, and any one removing such child without permission properly obtained takes the risk

[1] *Chanda*, (1892) P. R. No 6 of 1894; *Muhammad Bakhsh*, (1892) P R No. 8 of 1894.

[2] *Gurdit Singh*, (1916) P. W. R. No. 25 of 1916, P. L. R. No. 55 of 1916.

[3] *Durga Das*, (1904) P. R. No 13 of 1904

[4] *Bhungee Ahur*, (1865) 2 W. R. (Cr.) 5, *Amgad Bugeah*, (1865) 2 W. R. (Cr.) 61; *Koordan Singh*, (1865) 3 W. R. (Cr) 15.

[5] *Mussamut Oozeerun*, (1867) 7 W. R. (Cr.) 62 [98].

[6] *Kammu*, (1878) P. R. No. 12 of 1879.

[7] *Muthu Ibrahi*, (1913) 37 Mad. 567.

[8] *Robins*, (1844) 1 C. & K. 456.

[9] *Christian Olifer*, (1866) 10 Cox 402; *Mycock*, (1871) 12 Cox 28.

[10] [illegible]

[11] [illegible] (190[illegible] (1916, [illegible]

[12] *Pandyaram Sastrulu*, [1912] M. W. N. 538.

[13] *Gunder Singh*, (1865) 4 W. R. (Cr.) 6.

of such act upon himself; the fact of having omitted to inquire whether the child has a guardian or not is no defence.[1]

If the minor is not in the custody of a lawful guardian the offence cannot be committed whatever the belief of the taker may be.[2] If a minor girl leaves the protection of her husband and parents of her free will or voluntarily, and subsequently stays with another man of her own accord, that man will not be guilty of taking her out of the keeping of the lawful guardian of such minor.[3]

In the case of a grown-up person of unsound mind there must be evidence of some kind of persuasion or moral force as a result of which he was taken out of the protection of his guardian.[4]

'Lawful guardian.'—The word 'lawful' does not necessarily mean that the person who entrusts a minor to the care or custody of another must stand in the position of a person having a legal duty or obligation to the minor. It is a sufficient compliance with the section and its Explanation if the entrusting of the minor to the care of another is effected without illegality or the commission of any unlawful act by a person legally competent to do so.[5] The explanation of these words is intended to obviate the difficulty the prosecution might be put to in being bound to prove strictly, in cases of abduction, that the person from whose care the minor had been abducted was the guardian of such minor within the meaning of the legal acceptation of the word.[6] But it must be shown that the minor was abducted from lawful guardianship, and lawful guardianship is the guardianship of a person who is lawfully entrusted with the care or custody of the minor. A girl of fourteen years, being left an orphan, accompanied a woman to a town where they lived by begging and selling grass. She was persuaded by a man G to depart with him without the knowledge of the woman. She remained with him for some months and was betrothed to one of his sons. One B persuaded her to quit G's house and to go with him. This she did. B was, thereupon, convicted of an offence under s. 363. The High Court quashed the conviction on the ground that G was not the lawful guardian of the minor as he had not been lawfully entrusted with the care or custody of her.[7]

"The explanation . . is not intended to limit the protection which the section gives to parents and minors. It is intended to extend that protection by including in the term 'lawful guardian' any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child to be in the custody of a servant or friend, for a limited purpose and for a limited time, cannot...determine the father's rights as guardian or his legal possession for the purposes of the criminal law...the Court must consider all the facts and see whether they are consistent or not with the continuance of the father's legal possession of the minor. If the facts are not inconsistent, the minor must be held to be in the father's possession or keeping even though the actual physical possession should be temporarily with a friend or other person."[8] *De facto* guardianship is sufficient.[9] The term 'lawful guardian' does not include a person who has himself gained possession of the minor by an offence under this section. But it does include, not only the parents or relations in whose house the minor lives and is brought up, but any other person with whom the minor resides by the consent, express or implied, of those who have the higher legal right. Thus, w[illegible] husband of a minor girl, under sixteen years of age, sold her to anoth[illegible] while she was living with that man she

[1] *Umsa*[illegible] 3 Bom. 178.
[2] *Hard*[illegible] . No. 7 [illegible] *Khuda Ba*[illegible] . No. 27 o[illegible]
[3] *Ram* [illegible] A. L. J. *Ewaz Ali*, [illegible]
[4] *Abdul* [illegible] *alla*, (Bom.) Crin[illegible] 86 of decided on 2[illegible] tt, nd Shah, J.
[5] *Mussammat Kesar*, (1918) 4 P. L. J. 74,
[illegible] *Pema* [illegible] 8 Cal. 971.
[illegible] *ulde* [illegible] . W. P. 286.
[illegible] in *Jagannadha Rao* v. [illegible] Mad. 284, 291 *Baz*;
[illegible] v. *Narayana Sastri*, [illegible] L. J. 195.

was persuaded by the accused to leave his house and to go away with a third man, it was held that for the purpose of this section the person to whom the girl was sold was the lawful guardian of the girl and that the accused was consequently guilty of kidnapping her from lawful guardianship.[1]

Explanation.—The word 'entrusted' means the giving, handing over, or confiding of something by one person to another. It involves the idea of active power and motive by the person reposing the confidence towards the person in whom the confidence is reposed. For an entrusting, within the meaning of this explanation, there must necessarily be three persons, *viz.*, (1) the person reposing the confidence or trust; (2) the person in whom the trust is reposed; and (3) the person constituting the subject-matter of the trust. This Explanation contemplates a declaration of trust by a person competent to make such a declaration, conveying, handing over and confiding a minor to the care and custody of another in whom a confidence and trust is imposed. It is necessary for the person accepting the trust to do so either by express assent, or by necessary implication arising from tacit acquiescence in the performance of the trust. Neither the declaration of trust nor its acceptance need be necessarily in writing; it is sufficient if the declaration is verbally made and given, or if it arises from a course of conduct consistent only with the existence of such antecedent declaration, and accepted verbally or by necessary implication arising from the conduct of the person so entrusted with the duty imposed.[2]

Hindu law.—A father is the guardian of his children and is ordinarily entitled to their custody. A mother cannot have a right to the custody of her legitimate children adversely to the father. Ordinarily, the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the right of the father as guardian, and not as taking out of his keeping. If a mother removes a girl from her father's house for the express purpose of marrying her without his consent, it will a- [illegible]

I [illegible]

of the [illegible]

from the mother. If he does so he will be guilty of kidnapping.[4] The taking away of a minor Hindu girl from the custody of a person in temporary charge of her by [illegible]

major male relation of the minor and such a relationship would not in law be a defence to a charge of kidnapping a minor from the custody of a *de facto* guardian.[5]

The mother is the natural guardian of her minor children after the father, if the father has not appointed any one else as their guardian.[6]

The mother of an illegitimate child is its proper and natural guardian during the period of nurture. And where the mother, on her death-bed, entrusts the care of such child to a person who accepts the trust and maintains the child, such a person is "lawfully entrusted" with the care and custody of the minor.[7]

The husband is the lawful guardian of a girl after marriage. The husband of a Hindu girl of fifteen is her lawful guardian; and, if the father of the minor takes away the girl from her husband, without the latter's consent, such taking

[1] *Fatti*, (1911) P. R. No. 7 of 1911.

[2] *Musammat Kesar*, (1918) 4 P. L. J. 74, r. n.

[3] *Prankrishna Surma*, (1882) 8 Cal. 969 See *Dhera Singh* v. *Musammat Kahno*, (1877) P. R. No. 8 of 1878.

[4] *Damodardas Kuberdas Soni*, (1917) Crim. Appln. for Revision No. 313 of 1917, decided by Heaton and Shah, JJ., on 30th November 1917.

[5] [illegible] *Neela-*

away amounts to kidnapping from lawful guardianship even though the father may have had no criminal intention in so doing.[1]

The husband's relations, if any exist, within the degree of a *sapinda* are guardians of a minor widow in preference to her father or his relations. If a minor widow has taken up her residence with her husband's mother, the husband's mother is the lawful guardian of the girl.[2]

A minor brother cannot be the guardian of his sister and cannot therefore maintain a complaint for kidnapping.[3]

Mahomedan law.—Under Mahomedan law, if the father take away a son under seven years; or a daughter under puberty, if *Sunni*, or under seven years, if *Shiah*, or an illegitimate child from the custody of the mother, he can be said to kidnap his own child: because the mother is by law the lawful guardian.[4] According to Sunni law, the mother is the guardian of the minor daughter till she reaches puberty which is presumed when the daughter completes her fifteenth year. Even a divorced wife is entitled to the custody of her children.[5] In the absence of mother, mother's mother is the lawful guardian of a girl who has not attained puberty.

The husband becomes the guardian of his wife after she attains puberty.[6] The husband is not the lawful guardian of her person before puberty. In the absence of any evidence that a lawful guardian entrusted the custody of a Mahomedan minor girl to her husband, a person cannot be convicted for kidnapping her from the custody of her husband. Where the maternal uncle of a minor girl carried her away from her husband's house by force, it was held that, in the absence of evidence to prove that the husband was lawfully entrusted with the care and custody of the girl, the maternal uncle had committed no offence.[7]

The mother is the natural guardian of her illegitimate children.

Other nationalities.—In the case of Europeans, Parsis, and Native Christians the father has the preferential right to the guardianship of minor children.

In the case of illegitimate children, under the English law, neither the father nor the mother has a preferential right. During the period of nurture the mother would naturally be preferred,[8] but after that period the putative father would have the preference.[9]

4. **'Without the consent of such guardian.'**—The consent of the minor is immaterial.[10]

Consent given by the guardian after the commission of the offence would be of no avail. Where a temporary guardian is proved to have been in collusion with the other party, and the taking away is accomplished in consequence of such collusion, there could be no such consent of the lawful guardian as the section requires.[11] The English Courts have held that by the fraud of the temporary guardian the right to possession of the child reverts to the natural guardian.

A consent given on a misrepresentation of a fact is one given under a misconception of fact within the meaning of s. 90, and as such is not useful as a consent under this section. A misrepresentation as to intention of a person is a mis-

[1] *Dhuronidhur Ghose*, (1889) 17 Cal. 298; *Behari Maharaj*, (1906) 1 P. W. R. (Cr. J.) 14

[2] *Tek Chand*, (1915) P. R. No 27 of 1915.

[3] *Mam Raj*, (1921) 3 L. L. J. 588.

[4] *Musst. Raj Begum* v. *Nawab Reza Hossein*, (1865) 2 W. R. (Civ. Rul.) 76; *Nur Kadir* v. *Zuleikha Bibi*, (1885) 11 Cal. 649; *Hamid Ali* v. *Imtiazan*, (1878) 2 All. 71; *Idu* v. *Amiran*, (1886) 8 All. 322.

[5] *Ayshabai*, (1904) 6 Bom. L. R. 536; *Zarabibi* v. *Abdul Rezzak Nakshbandi*, (1910) 12 Bom. L. R. 891

[6] *Nur Kadir* v. *Zuleikha Bibi*, sup.; *Wazeer Ali* v. *Kaim Ali*, (1873) 5 N. W. P. 196.

[7] *Derajuddin Alanda*, (1923) 27 C. W. N. 531, 37 C. L. J. 320.

[8] *Pemantle*, (1882) 8 Cal. 971; *Barnardo* v. *McHugh*, [1891] A. C. 388.

[9] *Nash*, (1883) 10 Q. B. D. 454.

[10] *Bhungee Ahur*, (1865) 2 W. R. (Cr.) 5; *Amgad Bugeah*, (1865) 2 W. R. (Cr.) 61; *Koordan Singh*, (1865) 3 W. R. (Cr.) 15; *Sooke*, (1867) 7 W. R. (Cr.) 36 [54]; *Goorodoss Bajbunnee*, (1865) 4 W. R. (Cr.) 7; *Mussammat Soma*, (1916) P. R. No. 17 of 1916.

[11] *Ganesh*, (1909) 31 All. 448.

representation of a fact.[1] If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping.[2]

If a man by false and fraudulent representations induce the parents of a girl to allow him to take her away, such taking will amount to kidnapping.[3] But where a mother had by her conduct countenanced the daughter in a lax course of life, by permitting her to go out alone at night and to dance at public houses, and she was taken away for a day by the accused, it was held that the act of the accused could not be said to have happened against her will.[4] Similarly, where a female minor went to the house of a mutual friend and had sexual intercourse with the accused, she having previously had sexual intercourse with the accused in the presence and with the consent of her guardian, her mother, in her mother's house, it was held that the accused could not be convicted of kidnapping as there was no taking of the minor; and even if there was a constructive taking, as the mother was proved to have connived at the seduction of her daughter, there was reason to believe that the subsequent taking was effected with her consent.[5]

CASES.

Taking away out of the keeping of the lawful guardian.—Where a person carried [illegible] street and went away voluntarily with that person, it was held that she was just as much in the possession of her legal guardian when she was walking in the street, unless she had given up the intention of returning home, as if she had actually been in her guardian's house when taken off.[7] Where a female minor, by preconcerted arrangement with the accused, left the house of her parents of her own accord, intending not to return, and met the accused at a place appointed and eloped with him willingly, it was held that the accused was an active participator in the minor's leaving her parents' house, and was, therefore, guilty of this offence.[8] Where a female minor went to the accused's house and asked him to take her away, and she had no intention of leaving her parents if the accused did not consent, it was held that the minor had no such intention of not returning as to remove her from her parents' guardianship, and consequently the accused had committed this offence.[9] A *jat* girl under sixteen years of age was ordered by her father to take food to the bullocks. As she was coming home, one of the accused came to her and persuaded her to accompany him. Her hair was cut and she was dressed in boy's clothes. She lived for some time with both the accused. After this both the accused were taking away the girl when they were discovered by a *chowkidar*. She was crying and told the *chowkidar* that she was a girl and not a boy. The *chowkidar* then arrested the accused. It was held that the accused were guilty of kidnapping having removed the girl from the lawful guardianship of her father without his consent.[10]

A low class girl under sixteen years of age left the custody of her husband and his parents and voluntarily stayed with the accused for a month. After that she was made over to certain other persons who performed certain operations on her so as to make her appear as much as possible a *jat* woman. She then changed hands several times and was finally made over to a person in order to be married

[1] *Jaladu*, (1911) 36 Mad. 453; *Mussamat Soma*, (1916) P. R. No. 17 of 1916.
[2] *Ibid.*
[3] *James Hopkins*, (1842) Car. & M. 254.
[4] *Primelt*, (1858) 1 F. & F. 50.
[5] *Abdul Rahman*, (1912) U. B. R. 136.
[6] *Goorvodoss Rajbunsee*, (1865) 4 W. R. (Cr.) 7; *Moahoo Paul*, (1865) 3 W. R. (Cr.) 9.
[7] *Nga Shwe Thwe*, (1907) 1 U. B. R., (1907-1909) (P.C.) 1.
[8] *Nga Te Hla*, (1907) 1 U. B. R. (1907-1909) (P.C.) 11; *Nga San Hlaing*, (1902) 1 L. B. R. 205.
[9] *Asgar Ali*, (1909) 1 U. B. R. (1907-1909) (P.C.) 27.
[10] *Harkesh*, (1918) 40 All. 507.

to his brother. It was held that the accused was not guilty of the offence of taking or enticing a minor out of the keeping of her lawful guardian.[1]

A, a married woman under sixteen years of age, being dissatisfied with her mother-in-law, left her husband's home to go to her maternal uncle. On the way she was induced by K to accompany him and he deceitfully took her to a village where she was kept in the house of K's brother. Here negotiations were set on foot by K to re-marry the girl as a *jat*, but on the girl disclosing her indentity to the enquirers K left the village. Thereupon K's brother took her to the police-station, and pending enquiry by the police she lived for a month at his place. It was held that K was guilty of kidnapping, inasmuch as although the girl left home of her own accord she did not cease to be under the guardianship of the husband, her lawful guardian, but that K's brother was not guilty of any offence as he had done nothing in furtherance of a common intention.[2]

Where on an application by the husband for divorce the District Judge made a decree *nisi* for dissolution of marriage and also directed the wife to deliver up to the husband the son born of the marriage, and subsequent to the decree the husband without the assistance of the Court obtained the custody of the son, but before the confirmation of the decree by the High Court the wife removed the boy from the father's custody and was charged for kidnapping, it was held that the order for custody which was made was an order *nisi* without legal effect until confirmed by the High Court and the wife had committed no offence in removing the boy from the father's custody.[3]

Where the accused was put in charge of a boy, below the age of fourteen, by his father for the purpose of teaching and feeding but he took him away to a distant city with the object of teaching him how to paint scenes so that he might join a theatrical company, it was held that the removal of the boy amounted to taking him out of the keeping of the lawful guardian.[4]

English cases.—A went in the night to the house of B, and placed a ladder against a window, and held it for J, the daughter of B, to descend, which she did, and then eloped with A. It was held that this was a taking of J out of the possession of her father.[5] A girl under the age of sixteen years having, by persuasion, been induced by the accused to leave her father's house and go away with him without the consent of the father, left her home alone by a preconcerted arrangement between them, and went to a place appointed, where she was met by the accused, and then went away together some distance, without the intention of returning. It was held that there was a taking of the girl out of the father's possession when he met the girl and went away with her at the appointed place, as up to that moment she had not absolutely renounced her father's protection.[6] A met a girl in the street going to school, and induced her to go with him to a town some miles distant, where he seduced her. They returned together and he left her where he met her. The girl then went to her home, where she lived with her father and mother, having been absent some hours longer than would have been the case if she had not met A. A made no inquiry, and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to, and did not, believe that she was a girl of the town. It was held that A was not guilty of having unlawfully taken the girl out of the possession of her father under s. 55 of 24 & 25 Vic., c. 100, which says 'whosoever shall take an unmarried girl, under the age of sixteen, out of the possession and against the will of her father or mother, or of any other person having the lawful care and charge of her, shall be guilty of a misdemeanour.'[7] Under similar circumstances the accused in this

[1] *Ekaz Ali*, (1915) 37 All. 624.
[2] *Karan Singh*, (1916) 14 A. L. J. R. 792.
[3] *Barthwick* v. *Barthwick*, (1913) 18 C. W. N. 434.
[4] *Mohammad Husain*, (1924) 23 A. L. J. R. 10.
[5] *Robins*, (1844) 1 C. & K. 456.
[6] *Manklelow*, (1853) 6 Cox 143.
[7] *Hibbert*, (1869) L. R. 1 C. C. R. 184.

country will be guilty of kidnapping because his omission to inquire whether a minor has a guardian or not is no defence.[1]

Marrying a girl without the consent of her 'lawful guardian.'—Where the mother had assigned by a will the guardianship of her minor daughter, and the duty of marrying her, to R, and a paternal relative of the daughter removed her by fraud and force for the purpose of getting her married to a person other than the one selected by R, it was held that the paternal relative had been guilty of kidnapping as well as abducting.[2] Where a Hindu woman left her husband's house, taking with her infant daughter and went to the house of A, and on the same day the daughter was married to B, the brother of A, without the father's consent, it was held that A had committed an offence, under ss. 109 and 363, of abetting the offence of kidnapping.[3]

Taking away in good faith is not kidnapping.—Where the mother in good faith believed that she was entitled to the custody of her own minor children a [illegible] was set aside.[4] [illegible] he believes in [illegible]

Kidnapping from guardianship is not a continuing offence.—J, a minor girl, was taken away from her husband's house to the house of R and there kept for two days. Then one M came and took her away to his own house and kept her there for twenty days, and subsequently clandestinely removed her to the house of the petitioner, and from that house the petitioner and M took her through different places to Calcutta. It was held that the taking away out of the guardianship of the husband was complete before the petitioner joined the principal offender in taking the girl to Calcutta, and that the petitioner, therefore, could not be convicted under s. 363.[6]

Temporary guardianship does not oust lawful guardian's right.—Where a girl who was under the temporary guardianship of a person was taken away with his consent and married to a boy without the consent of her father, this offence was held to have been committed.[7] A girl under sixteen years of age, living under the guardianship of her mother, was sent by the latter with another woman. On a visit to her sister and on the way there the accused kidnapped her and took her to their own village and there she was married to one of the accused. The accused were convicted of an offence under s. 366 as it was immaterial whether the girl was kidnapped with the consent of the woman in charge of her, as she had no authority to give such consent.[8]

The taking should be out of the keeping of the lawful guardian.—Where a servant girl had permission from her master to go and see her parents from Sunday to Monday night, and went to see them on the Sunday for a few hours only, and then told them that she was going back to her employment, instead of which she remained with the prisoner all night, and did not return to her master's employment until some days afterwards, it was held that the girl was under the lawful charge of her master, and not of her father, at the time of the alleged offence, and that there would be no conviction for kidnapping.[9] Similarly, where a girl was employed as a bar-maid at a distance from her father's home, it was held that she was under the lawful charge of her employer, and not in the possession of her father.[10]

[1] *Umaidbakh*, (1878) 3 Bom 178

[2] *Bai Mahalor*, (1895) Cr. R. No 66 of 1895, Unrep. Cr. C. 820

[3] [illegible]

[4] [illegible]

[5] *Nemai Chattoraj*, (1900) 27 Cal 1041, F B

[6] *Jagannadha Rao* v. *Kamaraju*, (1900) 24 Mad. 284.

[7] *Baz*, (1922) 3 Lah. 213.

[8] *Miller*, (1876) 13 Cox 179.

[9] *Henkers*, (1886) 16 Cox 257

Removal of a child wife from the custody of her mother-in-law.—The removal of a Mahomedan girl of eleven or twelve years of age from the house of her mother-in-law in whose charge her husband had left her, by a third person acting at the instance, and under the instigation, of her mother, was held to be not a taking from "lawful guardianship" because under the Mahomedan law the mother was entitled to the custody of her daughter, in preference to the husband, until the girl attained the age of puberty.[1]

Removal of a child wife from the custody of her mother.—S, a Mahomedan married girl under sixteen years of age, who had attained puberty, was taken away from her mother's house with whom she was living (her father being dead) by the respondents. The Magistrate convicted the accused under ss. 366 and 368. On appeal, the Sessions Judge quashed the conviction on the ground that as under Mahomedan law a mother could be a guardian only until her daughter attained puberty or completed her fifteenth year, S had become *sui juris* and that therefore the accused had not kidnapped her from lawful guardianship. On an appeal being preferred by Government against the acquittal, it was held that the mother of the girl was her lawful guardian within the terms of this section; and that the accused had been rightly convicted of the charge of kidnapping S from the guardianship of her mother.[2]

Abduction.

362. Whoever by force compels, or by any deceitful means induces,[1] any person to go from any place,[2] is said to abduct that person.

COMMENT.

This section merely gives a definition of the word 'abduction,' which occurs in some of the penal provisions which follow. There is no such offence as abduction under the Code, but abduction with certain intent is an offence.[3]

Ingredients.—The section requires two essentials—

1. Forceful compulsion or inducement by deceitful means.
2. The object of such compulsion or inducement must be the going of a person from any place.

1. 'Whoever by force compels, or by deceitful means induces.'—Where no force or deceit is practised on the person abducted, a conviction cannot stand.[4] The force or fraud must have been practised upon the child itself.[5]

An orphan girl about seventeen years of age was brought up by A as his own daughter. The accused, A's neighbour, induced her to leave home on the pretext that he would either marry her himself or get her married. He did neither but debauched her himself and handed her over to a friend of his who also proceeded to have connection with her. It was held that the expression 'deceitful means' is wide enough to include the inducing of a girl to leave her guardian's house by means of a representation that the person to whom she went would either marry her himself or arrange for her marriage and that the accused was guilty of this offence.[6]

2. 'Any person to go from any place.'—The offence of abduction is a continuing offence and a girl is being abducted not only when she is first taken from any place but also when she is removed from one place to another.[7]

Abduction and kidnapping.—'Abduction' differs from 'kidnapping' because there may be abduction without a removal of the person from the protection of

[1] *Korban*, (1904) 32 Cal. 444.
[2] *Miran Bakhsh*, (1905) P. R. No. 60 of 1905.
[3] *Bidhoomookhee Dabee v. Sreenath Haldar*, (1870) 15 W. R. (Cr.) 4, 6 Beng. L. R. App. 129; *Ganga Dei*, (1914) 12 A. L. J. R. 91.
[4] *Komul Dass*, (1865) 2 W. R. (Cr.) 7.
[5] *Barret*, (1885) 15 Cox 658.
[6] *Mahbub*, (1907) 27 A. W. N. 199.
[7] *Ganga Dei*, sup.

the law, or even from lawful guardianship. It differs from kidnapping as regards the element of force or fraud existing in it.

Abetment.—A married woman cannot abet her own abduction as herein defined.[1]

Punishment for kidnapping.

363. Whoever kidnaps any person from British India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT

This section specifies the punishment for the offences defined in ss. 360 and 361.

PRACTICE.

Evidence.—For kidnapping from British India prove—

(1) That the person in question was at the time of the offence in British India.

(2) That the accused conveyed that person beyond the limits of British India.

(3) That he did so without the consent of that person, or of some person legally authorised to consent on that person's behalf.

For kidnapping from guardianship prove—

(1) That the person in question was at the time of the offence a minor under fourteen years of age (if a male), or under sixteen years of age (if a female); or that such person was of unsound mind.

Where in a case under this section the Magistrate finds that there is *prima facie* sufficient evidence to show that the girl was enticed away he should not be content merely with finding that the girl was not proved to be under sixteen, but should examine and decide the question whether the accused can be charged with an offence under s. 363 or some other cognate offence against a female of over sixteen.[2]

(2) That such minor, or person of unsound mind, was, at the time, lawfully entrusted to the keeping of a guardian.

(3) That the accused took or enticed such minor, or person of unsound mind, out of such keeping.[3]

(4) That he so took or enticed, etc., without the consent of such guardian.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

[illegible]

Court in British India within the local limits of whose jurisdiction the person kidnapped may be conveyed or concealed or detained.[5]

The offence of kidnapping may be tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.[6]

[illegible]

(Cr.) 39

[3] *Bhuta Santal* v. *Dama Santal*, (1915) 20 C. W. N. 62.

[5] The Criminal Procedure Code, s. 181 (4). This section as framed now by Act V of 1898 settles the conflict of opinion existing between several High Courts. See *Thaku*, (1884) 8 Bom 312; *James Ingle*, (1891) 16 Bom. 200; *Ram Dei*, (1896) 18 All. 350; *Surja*, (1883) 13 A. W. N. 164, *Abbi Redds*, (1894) 17 Mad. 402, *Jaimal Singh*, (1900) P. R. No. 1 of 1901.

Magistrates should not give themselves jurisdiction by trying cases under s. 363 which really fall under s. 366. The form of kidnapping which is punishable by s. 366 is a seriously aggravated form, which only Sessions Courts and the District Magistrates in the exercise of their special powers have jurisdiction to try.[1]

Section 348 and 363.—Where an act of restraint or confinement in an attempt to kidnap has been exercised in furtherance of the attempt, and goes to form part of that offence, and is not done with an intention or object which can be separated from the general intention to kidnap, it will constitute an integral part of that offence and should not form the subject of a separate conviction and sentence.[2]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, kidnapped AB [a female minor under——years] from British India [or from lawful guardianship of CD, her——], and thereby committed an offence punishable under s. 363 of the Indian Penal Code, and within my cognizance [or cognizance of the Court of Session (or the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.[3]

Punishment.—The maximum sentence prescribed for this offence should only be awarded in a case of the most aggravated nature.[4] See the Frontier Crimes Regulation, 1901, ss. 11 (3) (*d*) and 12 (2).

Kidnapping or abducting in order to murder.

364. Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

ILLUSTRATIONS.

(*a*) [illegible] British India, intending or knowing it to be likely that Z may b[illegible]

(*b*) [illegible]

murdered. A has committed the offence defined in this section.

COMMENT.

This section punishes the kidnapping or abducting of a person in order to take his life.

PRACTICE.

[illegible] by the accused.[5]

[illegible] question in order (*a*) that such person [illegible] might be so disposed of, as to be put [illegible]

(1) [illegible] question.

(2) [illegible] be induced that person to do so by deceitful means.

[1] *Nga Po Saw*, (1901) 1 U. B. R. (1897-1901) 328.

[2] *Mangroo and Pattoo*, (1874) 6 N. W. P. 293.

[3] (1866) 5 W. R. (Cr. L.) 1; (1867) 18 W. R. (Cr. L.) 11.

[4] *Mussamut Bhoodeeo*, (1867) 8 W. R. (Cr.) 3.

[5] *Vide* s. 363, *sup.*

(3) That he so abducted the person in question in order that (*a*) such person might be murdered, or (*b*) such person might be so disposed of as to be put in danger of being murdered.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, kidnapped [*or* abducted] AB in order that the said AB might be murdered [*or* might be so disposed of as to be put in danger of being murdered], and thereby committed an offence punishable under s. 364 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Kidnapping or abducting with intent secretly and wrongfully to confine person.

365. Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section lays down the same penalty as s. 363, but it punishes abduction not mentioned in that section. It requires an intention to confine a person secretly and wrongfully.[1]

Where a person was abducted in order that he might be held to ransom by his abductors, it was held that this section was applicable.[2]

The accused abducted a girl B in order to put pressure upon her friends to restore another girl whom they had abducted. She was restored a few days after B was abducted and then B was also let go. It was not found that any harm was done to B. It was held that under such circumstances heavy sentences of imprisonment were not necessary.[3]

PRACTICE.

Evidence.—Prove (1) kidnapping by the accused;[4] or abduction by him.[5]

(2) That the accused thereby intended that the person kidnapped or abducted should be kept in wrongful or secret confinement.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Conviction under s. 452 no bar to a subsequent trial under this section.—One Merai Kurmi formed intimacy with one Mussammat Hulla, a widow, and Hulla took up her abode in Merai's house. Some of Hulla's relations attacked the house of Merai, beat him and his brothers, and carried off Hulla. For this they were tried and convicted under s. 452 of the Code. After being removed from Merai's house, Hulla disappeared, and, after all efforts to find her had been unavailing for a space of some two years, the persons who had been concerned in the attack on Merai's house were put on their trial under this section. It was held that their previous conviction under s. 452 was no bar to their being tried under this section.[6]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

[1] *Akbar Ali*, (1925) 7 L. L. J. 520, 26 P L R 734.

[2] *Po Lan*, (1912) 6 L B R 160; *Samundar*, (1923) 1 L. C. 17.

[3] *Waris*, (1916) P. L. R No. 89 of 1916.

[4] *Vide* s. 363, sup.

[5] *Vide* (1) and (2), s. 364, sup

[6] *Baldeo Prasad*, (1906) 26 A. W. N. 32.

That you, on or about the——day of——, at——, *kidnapped (or abducted)* one XY with intent to cause the said XY to be secretly and wrongfully confined, and thereby committed an offence punishable under s. 365 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of *Session or the High Court*).

And I hereby direct that you be tried [by the said Court (*in cases tried by the Magistrate omit these words*)] on the said charge.

Kidnapping or abducting woman to compel her marriage, etc.

366. Whoever kidnaps or abducts any woman[1] with intent that she may be compelled, or knowing it to be likely that she will be compelled,[2a] to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse,[2b] or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

And whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

COMMENT.

The offence under this section is merely an aggravated form of the offence under s 363 and the same person cannot be convicted on the same facts under both the sections.[1] An intention to seduce subsequent to the elopement is an essential part of this offence.

Scope.—The former Chief Courts of Lower Burma and the Punjab held that this section did not apply to a case in which a minor girl, at the time of the kidnapping from lawful guardian, intended to cohabit of her own free will with the kidnapper.[2] It applied where she was compelled to marry a person against her will or where she was forced or seduced to illicit intercourse. But the Calcutta High Court is of opinion that the offence of kidnapping a minor girl, in order that she may be seduced to illicit intercourse, is established by the accused taking her from lawful guardianship, with such object, although she left home with the intention of having illicit intercourse with him. Sanderson, C. J., observed. "It is further conceded that the offence dealt with by this section is merely an aggravated form of the offence created by s. 363; and it would, therefore, seem to follow that when the matter under consideration, in relation to this section, is the seduction to illicit intercourse of a girl under sixteen years of age, as in this case, her consent or intention would be just as immaterial as it would be in connection with the offence dealt with under s. 363. One object of the sections under consideration is not only to protect the rights of parents and others having the lawful guardianship of girls under the age of sixteen, but also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience."[3]

Ingredients.—This section requires—

1. Kidnapping or abducting any woman.
2. Such kidnapping or abducting must be

[1] *Isree Pandey*, (1867) 7 W. R (Cr) 56.
[2] *Nga Ghon Mye* (1902) 1 L B R 297. *Nga Nge*, (1905) 11 Burma L. R. 326. U B R (P. C.) 17; *Durga Das*, (1904) P. R No. 13 of 1904
[3] *Safdar Reza*, (1922) 49 Cal. 905, 909

(*a*) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or

(*b*) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

The second part of the section requires two things:

(1) By criminal intimidation or abuse of authority or by compulsion inducing any woman to go from any place.

(2) Such going must be with intent that she may be, or with knowledge that it is likely that she will be forced or seduced to illicit intercourse with some person.

1. 'Kidnaps or abducts any woman.'—See s. 10 as to the definition of 'woman.' The word 'woman' includes a minor female.[1]

It is not necessary that the accused should know definitely who the guardian of a minor girl is whom he finds wandering about and makes use of for his own ends.[2]

2a. 'With intent that she may be compelled.. to marry against her will, etc.'—This section makes use of the words "compelled, or knowing it to be likely that she will be compelled." If, therefore, a woman is not compelled to do the acts specified in the section no offence under this section is committed. Where a procuress induced a married woman of twenty years of age to become a prostitute, [illegible]

[illegible] whatever the woman's secret inclinations were, she would have had no opportunity of carrying them out but for the prisoner.[3] Where certain persons conspired together to induce by deceitful means a girl of eighteen to leave her home and accompany them to another place with the intention of making her over to the accused's [illegible] to accept the company of the acc[illegible] agged her, it was held that the a[illegible][4]

The section requires a special intent or knowledge. Such intent could not be presumed in the case of a young girl of thirteen years[5]

If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping.[6]

The word 'marry' implies going through a form of marriage whether the same is in fact valid or not.[7]

2b. 'Forced or seduced to illicit intercourse.'—'Seduction' in its ordinary sense means the inducing of a girl to part with her virtue for the first time.[8] The words 'illicit intercourse' mean merely sexual intercourse between a man and a woman who are not husband and wife[9] Where a man kidnaps a minor girl from lawful [illegible]

minor girl and quite independent of any question as to whether she had surrendered her chastity before the act of kidnapping[10] "I am unable to hold that the words in s. 366, 'seduce to illicit intercourse,' refer only to the first act of seduction or

[1] *Dhera Singh* v. *Mussummat Kahno*, (1877) P. R. No. 8 of 1878.
[2] *Idu*, (1923) 27 C. C. 32.
[3] *Srimotee Poddeej* (1864) 1 W. R. (Cr.) 45.
[4] *Sundar Singh*, (1924) 2 O. W. N. 17.
[5] *Mussammat Mehran*, (1916) P. R. No. 13 of 1916.
[6] *Jaladu*, (1911) 36 Mad. 453.
[7] *Taher Khan*, (1917) 45 Cal. 641.
[8] *Moon*, [1910] 1 K. B. 818, 820.
[9] *Mahbub*, (1907) 27 A. W. N. 199.
[10] *Nga Ni Ta*, (1903) 10 Burma L. R. 196, U. B R. (P. C.) 15.

That you, on or about the——day of——, at——, kidnapped (*or* abducted) one XY with intent to cause the said XY to be secretly and wrongfully confined, and thereby committed an offence punishable under s. 365 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by the Magistrate omit these words*)] on the said charge.

Kidnapping or abducting woman to compel her marriage, etc.

366. Whoever kidnaps or abducts any woman[1] with intent that she may be compelled, or knowing it to be likely that she will be compelled,[2a] to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse,[3b] or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

And whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

COMMENT.

The offence under this section is merely an aggravated form of the offence under s. 363 and the same person cannot be convicted on the same facts under both the sections.[1] An intention to seduce subsequent to the elopement is an essential part of this offence.

Scope.—The former Chief Courts of Lower Burma and the Punjab held that this section did not apply to a case in which a minor girl, at the time of the kidnapping from lawful guardian, intended [illegible] kidnapper.[2] It applied where she was compelle[illegible] was forced or seduced to illicit interc[illegible] opinion that the offence of kidnapping a[illegible] seduced to illicit intercourse, is established [illegible] guardianship, with such object, although she left [illegible] illicit intercourse with him. Sanderson, C. J., obse[illegible] that the offence dealt with by this section is merely an [illegible] offence created by s. 363; and it would, therefore, seem to follow that when the matter under consideration, in relation to this section, is the seduction to illicit intercourse of a girl under sixteen years of age, as in this case, her consent or intention would be just as immaterial as it would be in connection with the offence dealt with under s. 363. One object of the sections under consideration is not only to protect the rights of parents and others having the lawful guardianship of girls under the age of sixteen, but also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience."[3]

Ingredients.—This section requires—

1. Kidnapping or abducting any woman.
2. Such kidnapping or abducting must be

[1] *Isree Panday*, (1867) 7 W. R. (Cr.) 56.
[2] *Nga Ghan Mya* (1902) 1 L. B. R. 297, *Nga Nge*, (1905) 11 Burma L. R. 326, U. B. R. (P. C.) 17; *Durga Das*, (1904) P. R. No. 13 of 1904.
[3] *Safdar Reza*, (1922) 49 Cal. 905, 909.

Object.— The section and s. 366-B were introduced to punish the export and import of girls for prostitution.

1. **'By any means whatsoever.'**— The means employed may be legal or illegal.

2. **'Forced or seduced to illicit intercourse.'**— See Comment on s. 366, *supra*, p. 757.

PRACTICE.

Evidence.— Prove (1) that the accused induced a girl.

(2) That the girl was under eighteen years of age.

(3) That the girl was induced to go from a place or to do an act.

(4) That the accused did as above with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person.

Procedure.—Warrant— Not bailable—Not compoundable— Triable by Court of Session.

Charge.— I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, induced AB — a girl under eighteen years of age [to go from—(*specify the name of the place*)] or [to do the following act, to wit——] with intent that the said AB may be (or knowing that it is likely that the said AB will be) forced (or seduced) to illicit intercourse with—(*name the person*) and thereby committed an offence punishable under s. 366-A of the Indian Penal Code and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

366 B Whoever imports into British India from any country outside India, any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely, that she will be, forced or seduced to illicit intercourse with another person,

Importation of girl from foreign country.

and whoever with such intent or knowledge imports into British India from any State in India any such girl who has with the like intent or knowledge been imported into India, whether by himself or by another person,

shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

COMMENT.

This section was introduced along with s. 366-A by Act XX of 1923. See Comment on s. 366-A.

Object.—Section 366-A dealt with procuration of minor girls from one part of British India to another. This section makes it an offence to import into British India from any country outside India or from any State in India girls below the age of twenty-one years for the purpose of prostitution.

1. **'Forced or seduced to illicit intercourse.'**—See Comment on s. 366, *supra*, p. 757.

PRACTICE.

Evidence.—Prove (1) that the accused imported a girl into British India ;

(2) That the girl was imported from any country outside India or from any State in India.

(3) That such girl was under the age of twenty-one years.

means of criminal intimidation (or abuse of authority or other method of compulsion to wit——) and thereby committed an offence punishable under the second part of s. 366 of the Indian Penal Code and within the cognizance of the Court of Session (or High Court).

Procuration of minor girl.

366-A. Whoever, by any means whatsoever,[1] induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse[2] with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

COMMENT.

This section and s. 366-B were added by Act XX of 1923 to give effect to certain Articles of International Convention for the Suppression of the Traffic in Women and Children. The material Articles of the Convention which was signed at Paris on 4th May 1910 are as follows :—

"Article 1.—Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished notwithstanding that the various acts constituting the offence may have been committed in different countries."

"Article 2.—Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished notwithstanding that the various acts constituting the offence may have been committed in different countries."

"Article 3.—The Contracting Parties whose legislation may not at present be sufficient to deal with the offences contemplated by the two preceding articles engage to take or to propose to their respective Legislatures the necessary steps to punish these offences according to their gravity."

The Statement of Objects and Reasons stated:[1] "The principles in this International Convention were endorsed in the International Convention regarding the Traffic in Women and Children which was adopted by the Second Assembly of the League of Nations. In Article 1 of this Convention it is provided that the High Contracting Parties in the event of their not being already parties to the International Convention of the 4th May 1910 shall transmit with the least possible delay their ratifications of, or adhesions to, that instrument in the manner laid down therein. Further, the term "under age" which did mean under 20 completed years of age according to paragraph B of the Final Protocol of the Convention o 1910 is now interpreted as meaning under 21 completed years of age by virtue of the provisions of Article 5 of the International Convention, adopted by the Second Assembly of the League of Nations

In view of the resolutions adopted by the Council of State on the 31st January 1922 and by the Legislative Assembly on the 7th February 1922 the International Convention adopted by the Second Assembly of the League of Nations was signed at Geneva on behalf of the Government of India by His Majesty's Minister at Berne on the 28th March 1922, with the following reservation:-

"India reserves the right of its discretion to substitute the age of sixteen years or any greater age that may be subsequently decided upon for the age limits prescribed in paragraph B of the Final Protocol of the Convention of May 4th, 1910, and in Article 5 of the present convention."

[1] Vide *Gazette of India*, (1922) Part V, p. 343.

Object.—This section and s. 366-B were introduced to punish the export and import of girls for prostitution.

1. **'By any means whatsoever.'**—The means employed may be legal or illegal.

2. **'Forced or seduced to illicit intercourse.'**—See Comment on s. 366, *supra*, p. 757.

PRACTICE.

Evidence.—Prove (1) that the accused induced a girl.

(2) That the girl was under eighteen years of age.

(3) That the girl was induced to go from a place or to do an act.

(4) That the accused did as above with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person.

Procedure.—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, induced AB——a girl under eighteen years of age [to go from——(*specify the name of the place*)] *or* [to do the following act, to wit——] with intent that the said AB may be (*or* knowing that it is likely that the said AB will be) forced (*or* seduced) to illicit intercourse with—(*name the person*) and thereby committed an offence punishable under s 366-A of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Importation of girl from foreign country.

366-B. Whoever imports into British India from any country outside India, any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely, that she will be, forced or seduced to illicit intercourse with another person,

and whoever with such intent or knowledge imports into British India from any State in India any such girl who has with the like intent or knowledge been imported into India, whether by himself or by another person,

shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

COMMENT.

This section was introduced along with s. 366-A by Act XX of 1923. See Comment on s 366-A

Object.—Section 366-A dealt with procuration of minor girls from one part of British India to another. This section makes it an offence to import into British India from any country outside India or from any State in India girls below the age of twenty-one years for the purpose of prostitution.

1. **'Forced or seduced to illicit intercourse.'**—See Comment on s. 366, *supra*, p. 757.

PRACTICE.

Evidence.—Prove (1) that the accused imported a girl into British India;

(2) That the girl was imported from any country outside India or from any State in India.

(3) That such girl was under the age of twenty-one years.

(4) That the accused imported the girl with intent that she may be, or knowing it to be likely that she will be, forced or seduced to 'illicit intercourse' with some person.

Procedure.—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, imported into British India from——(*specify the name of the country*) a country outside India (*or a State in India*) by yourself [*or by*——(*mention the name of the person*)] AB, a girl under the age of twenty-one years with intent that she may be (*or knowing it to be likely that she will be*) forced or seduced to illicit intercourse with another person to wit,—and thereby committed an offence punishable under s. 366-B of the Indian Penal Code, and within the cognizance of the Court of Session (*or High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.

367. Whoever kidnaps or abducts any person[1] in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous hurt,[2] or slavery,[3] or to the unnatural lust[4] of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Kidnapping for grievous hurt, slavery, or unnatural offence, is punishable under this section.

1. **'Person.'**—See s. 11, *supra*.
2. **'Grievous hurt.'**—See s. 320, *supra*.
3. **'Slavery.'**—See ss. 370, 371, *infra*.
4. **'Unnatural lust.'**—See s. 377, *infra*.

PRACTICE.

Evidence.—Prove (1) kidnapping by the accused ;[1] or abduction by him.[2]

(2) That he so kidnapped or abducted the person in question—

(*a*) in order that such person might be subjected to grievous hurt, slavery, etc , or to unnatural lust, etc. ;

(*b*) in order that such person might be so disposed of as to be put in danger thereof ;

(*c*) knowing it to be likely that such person would be so subjected or disposed of

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.— I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, kidnapped (*or* abducted) XY in order the said XY may be subjected (*or* may be so disposed of as to be put in danger of being subjected) to grievous hurt [(*or* slavery *or* to the unnatural lust of ——) or knowing it to be likely that such person will be so subjected or disposed

[1] *Vide* s. 363, *sup.*

[2] *Vide* (1) and (2), s. 364, *sup.*

of], and thereby committed an offence punishable under s. 367 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court)

And I hereby direct that you be tried by the said Court on the said charge.

Wrongfully concealing or keeping in confinement kidnapped or abducted person.

368. Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals[1] or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

COMMENT.

This is one of those sections in which subsequent abetment is punished as a substantive offence.

Scope.—This section refers to some other party who assists in concealing any person who has been kidnapped and not to the kidnappers [1]; and for the purpose of this section, it is not necessary to prove that the person confined was abducted by any particular person.

1. 'Wrongfully conceals.'—These words, taken in their plain and ordinary meaning, refer to some act or omission whereby the actual person of the individual concealed is withdrawn from observation. Doubtless lies told about such a person may as effectually hoodwink those interested in discovering him or her; but what we have to assign to the word "conceals" is only its plain signification. On this principle, as well as on that of "*noscuntur a sociis*"—looking at the alternative act mentioned in the same section, which is keeping such person in confinement, it appears that the act of concealment refers to the withdrawal from the actual observation of others, by removal or otherwise, of the person kidnapped or abducted, and does not include the mere giving of false information about such person.[2] The mere fact of a girl being received into a house and retained there by the owner, even after he may have become aware of or found reason to believe that she had been kidnapped, does not amount to concealment of her unless an intention of keeping her out of view be apparent.[3]

CASES.

Concealing a kidnapped girl.—Where a girl of eleven years of age was taken out of the custody of her lawful guardian by the first prisoner and offered for sale in marriage to another, and the second prisoner illegally concealed her, the conviction of the former was upheld under s. 363, and of the latter, under s. 368.[4] A girl under sixteen years of age who lived with her widowed mother was going to a vegetable market in search of work. On her way she met another woman who asked the girl to accompany her under a promise of obtaining work for her. The woman took the girl to her house and kept her there till evening, when she was removed by the accused in a closed carriage to a solitary bungalow far away from the town. The girl was kept there during two days and nights, after which she was permitted to return to her house. It was held that the accused had committed this offence.[5]

PRACTICE.

Evidence.—Prove (1) that the person in question has been kidnapped or abducted.

[1] *Sheil Oozeer*, (1886) 6 W. R. (Cr.) 17.
[2] *Phula Singh*, (1874) P. R. No. 10 of 1874.
[3] *Jhurrup*, (1873) 5 N. W. P. 133, *Mussumat Chubbooa*, (1873) 5 N. W. P. 189.
[4] *Ivree Panday*, (1867) 7 W. R. 56.
[5] *Jetha Nathoo*, (1904) 6 Bom. L. R. 785.

And I hereby direct that you be tried by the said Court on the said charge.

Habitual dealing in slaves.

371. Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves shall be punished with transportation for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

COMMENT.

This section is enacted for the punishment of the slave-trader, who is habitually engaged in the traffic of buying and selling human beings. The last section dealt with a casual offender. A slave dealer on land is punished under this section; such a dealer on sea is treated as a pirate by all civilised nations and punished severely.

PRACTICE.

Evidence.—Prove (1) that the accused imported, exported, etc., slaves.
(2) That he did so habitually.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Selling minor for purposes of prostitution, etc.

372. Whoever sells, lets to hire, or otherwise disposes of[1] any person under the age of eighteen years[2] with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose,[3] or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section 'illicit intercourse' means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a *quasi*-marital relation.

COMMENT.

This section has been materially altered.

The age-limit was raised to eighteen years from sixteen by Act V of 1924, s. 2. The words "person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be" were substituted for the words minor

under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by Act XVIII of 1924, s. 2. Explanations I and II were added by s. 3 of the same Act. "The amendment is designed to make it clear that an offence is committed under section 372 or 373 of the Indian Penal Code, when the minor is either disposed of or procured for the purpose of being sexually known either before or after attainment of the age of eighteen years, and whether she is made over to a life of immorality or merely subjected to an isolated act of carnal intercourse. In either case the child is equally deserving of protection."[1]

The gist of the offence under this section or s. 373 consists in the intention that the person under the age of eighteen years shall be employed or used for the purpose of prostitution, or for illicit intercourse, or for any unlawful and immoral purpose, or in the knowledge that it is likely that such person will be employed or used for any such purpose. In the absence of any intention or knowledge of the kind referred to the mere buying, selling, letting, or obtaining possession of such person is not *per se* a criminal act.[2] But where such intention or knowledge does exist, and a change in the position or circumstances of the person has been effected with such knowledge or intention, it is quite immaterial whether third persons have or have not observed any ceremonies recognized by custom as necessary to give prostitutes a particular status.[3] The offence consists in the intentional or conscious exposure of a person under eighteen years, whether a male or a female, to the danger of degradation.

This section deals with the person who sells such person, the next section punishes the person who buys such person.

Scope.—This [illegible]
age of eighteen [illegible]
the dancing gi[illegible]
ted even thoug[illegible] immoral life.[6]

Ingredients.—The sec[illegible] requires the following essentials:—

1. Selling, or letting to hire, or other disposal of a person.
2. Such person should be under the age of eighteen years.
3. The selling, letting to hire, or other disposal must be with intent, or knowledge of likelihood that the person shall at any age be employed or used for
   (i) the purpose of prostitution, or
   (ii) illicit intercourse with any person, or
   (iii) any unlawful and immoral purpose.

1. **'Sells, lets to hire, or otherwise disposes of.'**—The terms 'sell' and 'hire' do not necessarily connote a present or immediate transfer of possession and where a transfer of possession is contemplated the offence is complete on proof of the sale or hiring and without any proof of a transfer of possession.[7] The words 'lets to hire' are the counterpart of the word 'hire' in s. 373. The section now contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse, or with the intention of subjecting her to an isolated act of sexual intercourse.[8] Where a young

[1] Statement of Objects and Reasons appended to Bill No. 9 of 1924, *Gazette of India*, 1924, Part V, p. 36.

[2] See *Khushala*, (1880) P. R. No. 27 of 1880.

[3] *Bamda Panda Deoli*, (1905) 7 Bom. L. R. 562.

[4] *Kanma*, (1878) P. R. No 12 of 1879.

[5] See *Ramanna*, (1889) 12 Mad. 273.

[6] See *Ismail Rustomkhan*, (1908) 8 Bom. L. R. 236.

[7] (1881) 1 Weir 359, 362, r. 8.

[8] *Ahmed Khan*, (1898) Unrep. Cr. C. 902; *Dwelath Bee* v. *Shaik Ali*, (1870) 5 M. H. C. 473; *Mussumat Rahman*, (1872) P. R. No. 29 of 1872; *Mohubbut*, (1873) P. R. No. 10 of 1873; *Ngo Shwe Thee*, (1907) 1 U. B. R. (1907-09) (P. C.) 1 are of no authority.

prostitute was brought to a house of assignation by the accused at the request of the complainant and for his supposed use on that one occasion, it not being contemplated that the girl should be sold or let out for a period of employment, or for the purpose of being employed by the complainant as a prostitute, or for the purpose of being disposed of by him for that course of life, it was held that such a letting out by the accused was not within the meaning of this section.[1] Under the present amended section such letting out will amount to an offence.

Where a girl was deserted by her husband and after living with prostitutes and others for a time, finally took up her residence in the brothel kept by the accused, well knowing their occupation and there prostituted herself to all comers, the accused housing, feeding and clothing her in consideration of receiving the wages of her prostitution, it was held that the accused by thus receiving money did not let the girl to hire within the meaning of this section, and that the persons, whom the girl, in consideration of a money payment to the accused, allowed to have intercourse with her, did not hire her within the meaning of s. 373.[2]

A Full Bench of the Madras High Court held that the term 'dispose of' has many meanings. It denotes (*inter alia*) "to bestow for an object or purpose;"; "to make a change in the circumstances"; it does not necessarily imply that there has been a transfer of possession, nor indeed do the terms 'sell' or 'hire' necessarily connote a present or immediate transfer of possession, and where, as is no doubt generally the case, a transfer of possession is contemplated, the offence is complete on proof of the sale or hiring and without any proof of a transfer of possession.[3] It is not necessary that there should have been a disposal tantamount to a transfer of possession or control over the minor's person.[4] In a later case, the same Court said: "The term 'dispose of' has many meanings. In Webster's Dictionary it is defined as (*a*) to determine the fate of, to exercise the power of control over, to fix the condition, employment, etc., of, to direct or assign for a use; (*b*) to exercise finally one's power of control over, to pass over into the control of someone else as [illegible] 372, Indian Penal Code, is used [illegible] would seem that the Legislature [illegible] lercenary purpose or the exercise of some power of control which would be final and irrevocable in its *moral effects*, more especially as the words used are 'sells, lets to hire, or *otherwise* disposes of,' thus suggesting other acts *ejusdem generis*."[5] Where the accused, who was a customer of a brothel, came across a minor girl, who had run away from her father's house, unable to bear the ill-treatment of her step-mother, and directed her to the brothel, it was held that such a mere direction to her or recommending to her to go there would not c[illegible]

The Bombay [illegible] minor girl does no[illegible]

Similarly, it has held that the ceremony of tying a Talimani to a minor girl, worshipping a basin of water by her and distributing food, is merely a preliminary step before the selling, letting out, or disposing of the girl for the purpose of prostitution, and is no offence under this section.[6]

2. 'Person under the age of eighteen years.'—The age-limit was raised to eighteen years by Act V of 1924, s. 2. The section applies to all persons under eighteen years, whether males or females.

[1] *Sukre Raur*, (1893) 21 Cal. 97; *Noorjan*, (1880) 14 W. R. (Cr.) 39, 6 Beng. L. R. App. 34. See *Maddila Mutyalu*, (1918) 35 M. L. J. 187.

[2] *Ahmedkhan*, (1898) Unrep. Cr. C. 962.

[3] (1881) 1 Weir 359, 362, F. B.; *Meravithan* (1881) 1 Weir 364. See *Noorjan*, sup.

[4] *Arunachellam*, (1876) 1 Mad. 164.

[5] Per Parker, J, in *Srinivasa* v. *Annaswami*, (1892) 15 Mad. 323, 329.

[6] *Nari*, (1924) 48 M. L. J. 594, 21 L. W. 472.

[7] *Parmeshwari Subbi*, (1920) 22 Bom. L. R. 894, 5 Bom. Cr. C. 237.

[8] *Sakebara Bhappa*, (1923) 27 Bom. L. R. 1022, 8 Bom. Cr. C. 66.

3. **'With intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose.'**—It is necessary [illegible] person *shall* be employed for an immor[illegible] being so used is not *sufficient*. It wo[illegible] given and accepted with the intention mentioned in the section. When an act is not *per se* criminal the specific intent which renders it criminal must be established by cogent evidence.

'At any age.'—The introduction of these words takes away the defence that though a girl was made over to a prostitute it was not intended that she should actually be used for the purpose of prostitution until she had passed the age of eighteen years.[1]

'Prostitution.'—This word is not confined to acts of natural sexual intercourse, but includes any act of lewdness. Prostitution is proved if it is shown that a woman offers her body for purposes amounting to common lewdness in return for the payment of money.[2]

'Illicit intercourse with any person.'—These words were added by Act XVIII of 1924, s. 2. If the person disposing of a girl knew that she would be used for illicit intercourse he would be liable. Explanation II explains what is meant by 'illicit intercourse' These words take away the defence that though the girl was handed over to a particular man for his carnal knowledge of her, yet it was not intended that she should be a prostitute at all, and that though the act or acts for which she was given may have been immoral, yet they were not unlawful.[3] The accused will not be able to rely on the plea that the girl was not destined for a life of prostitution but merely for a single act of sexual intercourse.

'Unlawful and immoral purpose.'—The purpose must be both unlawful and immoral. The accused transferred his daughter to a person for the purposes of concubinage. It was held that the accused was guilty under this section.[4]

Adoption of a daughter by a dancing girl.—Where a dancing girl adopted a daughter, it was held that she had committed no offence if the girl was to be brought up as a daughter, [illegible] of prostitute or [illegible] girl was adopted: [illegible] same High Court has held that such a [illegible] Penal Code.[5] The Bombay High Court [illegible] Under the present section such act wo[illegible] section. The burden of proof that the [illegible] obtained by a prostitute for leading an [illegible] he possession of such girl and the person [illegible] to this section and s. 373.

Explanation. 1.—This explanation provides that if a minor girl is disposed of to a prostitute or to a brothel-keeper or manager, the person so disposing of her shall be presumed to have done so with the improper intent mentioned in the section.[6] The same presumption is raised in the case of a prostitute or a brothel-keeper who obtains possession of a girl under Explanation I to s. 373.

[1] *Ramanna*, (1889) 12 Mad. 273; *Karuna Baistob*, (1894) 22 Cal. 164, overruled.
[2] *De Muncl*, (1918) 1 K. B. 635.
[3] *Mula*, (1888) P. R. No. 13 of 1888, overruled.
[4] *Ponrangam*, (1885) 1 Weir 373.
[5] *Ramanna*, sup.; *Ponrangam*, sup.
[6] *Guddati Redd. Ofala v. Ganapati Kondanna*, (1912) M. W. N. 1138, 23 M. L. J. 493.
[7] *Mathura Naikin v. Esu Naikin*, (1880) 4 Bom. 545; *Hira Naikin v. Radha Naikin*, (1912) 14 Bom. L. R. 1129. But see *Manjamma v. Sheshagiriraa*, (1902) 4 Bom. L. R. 116.
[8] Statement of Objects and Reasons appended to Bill No. 9 of 1921, Gazette of India, Part V, p. 36.

Explanation 2.—This explanation defines the expression 'illicit intercourse.'

Dev Dasi.—The dedication of girls under eighteen years to the service of a temple as *dasis* will amount to a disposal of such minors, knowing it to be likely that they will be used for the purpose of prostitution, within the meaning of this section.[1] The Member introducing the Bill amending this section said: "We have not...definitely assumed that employment as *dev dasis* is equivalent to employment for purposes of prostitution, but should such employment actually prove to come within that definition our Bill will enable it to be dealt with more effectively than hitherto"[2]

In a Madras Full Bench case[3] under the old s. 372 it was suggested:—"The acts imputed to the accused could not constitute an offence because they are sanctioned by the religious usages of Hindus." But the Court said: "The 372nd and 373rd sections of the Indian Penal Code were intended for the protection of minors. They involve the declaration as a matter of general law that no person under the age of majority shall be devoted to a life of prostitution nor employed in, nor used for, any unlawful or immoral purpose nor placed in a position in which it is likely such person will be employed in, or used for, any such purpose.

"This rule, which is obviously suggested by the highest considerations of justice and morality, must control the exercise of all private law, even in those cases in which the private law assumes to vindicate itself on the specious plea of religion. If the terms in which the law is expressed are sufficient to include within their provisions acts done under colour of religion, those who participate in such acts are liable to the penal consequences, however laudable their motives according to the peculiar standard of morality adopted by the professors of their religion.

"The point was fully considered and decided by this Court in *ex parte Padmavati*[4]...The learned Judges observe: 'The argument that the treatment of such a transaction as criminal is impossible, because the Hindu religion sanctions the practice, and the private law recognizes private rights as flowing from it, is manifestly of no weight. An offence is every transgression of a penal law, and a rule of penal law is a rule of public law, and necessarily overrides every precept of private law, and cannot be affected by any argument derived from that law...With respect to the argument from religion, it is only necessary to observe that, if the precepts of a particular religion enjoin acts which transgress the rules of penal law, these acts will clearly be offences. Where the Legislature intended that acts which would otherwise be offences should not be so because connected with religious observances, they have expressed that intention (Penal Code, s. 292).'

"The cases in which persons have been held amenable to the penal law for participation in Sati, in Meriah sacrifices, and in the procuring of slaves, though these acts were sanctioned by the religious law of the parties implicated, show that the plea, that the practice is enjoined or allowed by the religious law of the accused, is not allowed to prevail over the injunctions of the penal law.

"The word 'allowed' is used advisedly, because the Court do not understand that the dedication of minors is anywhere enjoined. A dedication may be made after the girl has attained her age of majority. It is represented to the Court that it is only because it is regarded as a point of honour that a girl should be married before she attains puberty, that the dedication which is deemed equivalent to marriage takes place ordinarily during minority. Where the objection is founded

[1] See (1881) 1 Weir 359, *v. n.*; *Dasi Marimuthu*, (1884) 1 Weir 364; *Padmavati*, (1870) 5 M. H. C. 415; *Arunachellam*, (1876) 1 Mad. 164; *Basava*, (1891) 15 Mad. 75; *Srinivasa* v. *Annasami*, (1891) 15 Mad. 41, 323, *Kannammal*, [1913] M. W. N. 207, 13 M. L. T. 131, 24 M L. J. 211; *Rajammall*, [1911] 2 M. W. N. 479, 10 M. L. T 501; *Jaili Bhavin*, (1869) 6 B. H. C. (Cr. C.) 60; *Tippa*, (1892) 16 Bom. 757. See *Baku*, (1889) 24 Bom. 287, 1 Bom. L. R. 678, where the question of jurisdiction is discussed.

[2] Proceedings of the Legislative Assembly, dated February 11, 1924, pp. 447, 448.

[3] 1 Weir 359, 360, *v. n.*

[4] (1870) 5 M. H. C. 415, 416.

not on a religious injunction but on a usage allowed by religion and suggested merely by sentiment, there can be no reluctance on the part of the Court so to interpret the law as to protect minors from a life considered by civilized nations as shameful."

Amendment.—The age-limit was raised to eighteen years from sixteen years by Act V of 1924, s. 2. The words "person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be" were substituted for the words "minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by Act XVIII of 1924, s. 2.

PRACTICE.

Evidence.—Prove (1) that the person in question was under eighteen years of age at the time of the offence.

(2) That the accused sold, let to hire, or otherwise disposed of such person.

(3) That he did so with intent that such person should be employed or used at any age for the purpose of prostitution, or for illicit intercourse with any person, or for any unlawful and immoral purpose; or with knowledge that it was likely that such person would be employed or used for any such purpose.[1]

The question whether or not the disposal of the person was effected with the [illegible] this section is a question of fact which must [illegible] e.[2]

[illegible] —Not compoundable—[illegible] istrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*) charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, sold (*or* let to hire, *or* disposed of) a person under the age of eighteen years, to wit——, [with intent that such person should at any age be employed or used for the purpose of prostitution *or* for illicit intercourse with a person to wit——, *or* for any unlawful and immoral purpose, *viz.*, (*state the purpose*)] *or* [knowing it to be likely that such minor would be employed or used for any such purpose], and thereby committed an offence punishable under s. 372 of the Indian Penal Code and within my cognizance (*or* within the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*omit these words if the case is tried by a Magistrate*)] on the said charge

Buying minor for purposes of prostitution, etc.

373. Whoever buys, hires or otherwise obtains possession[1] of any person under the age of eighteen years[2] with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose,[3] or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—Any prostitute, or any person keeping or managing a brothel, who buys, hires, or otherwise obtains possession of a female under the age of eighteen years shall, until the

[1] *Sri Lal*, (1880) 2 All. 694, F. B.; *Khushala*, 1880) P. R. No. 27 of 1880; *Durga Das*, (1904) P. R. No. 13 of 1904, P. L. R. No. 114 of 1904.

[2] (1881) 1 Weir 359, F. B.

contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.—'Illicit intercourse' has the same meaning as in section 372.

COMMENT.

This section has been materially altered similar to s. 372. The age-limit was raised to eighteen years from sixteen by Act V of 1924, s. 2. The words "person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be" were substituted for the words "minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by Act XVIII of 1924, s. 2, Explanations I and II were also added by s. 4 of the same Act.

This section applies to a case of buying or hiring or other similar transaction by which possession of a person under eighteen years of age is obtained with the intention of employing or using that person for prostitution, or illicit intercourse with any person, or for any unlawful and immoral purpose. It includes both males and females under the age of eighteen years. It is a counterpart of s. 372.

Sections 372 and 373.—Both the sections relate to the same subject-matter. The former contemplates an offence committed by the person who 'sells, lets to hire, or otherwise disposes of' any person under the age of eighteen years, with the requisite intent or knowledge The latter relates to the case of the person who 'buys, hires, or otherwise obtains possession of' any person under the age of eighteen. Section 372 strikes at any bargain of the nature contemplated by it, whoever may be the party who sells or lets the person, even though it should be the father, mother or lawful guardian. Section 373 strikes at the bawds, keepers of brothels and all others who fatten on the profits arising from the general prostitution of the girls

[illegible]

3. The buying, hiring, or otherwise obtaining possession must be with intent or knowledge of likelihood that the person shall at any age be employed or used

(i) for the purpose of prostitution, or

(ii) for illicit intercourse, or

(iii) for any unlawful and immoral purpose.

1. **'Buys, hires, or otherwise obtains possession.'**—It is not essential to the offence that the buying, hiring, or otherwise obtaining of the possession of the person should be from a third person. The language of the section is [illegible] cable to an agreement or [illegible] vention of a third person [illegible] certainly not of any less enormity in the latter case.

Scotland, C. J., observed in *Dowlath Bee's case*: "But to bring a case within the section, it is, in my opinion, essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be, for some time completely in the keeping and under the control and direction of the [illegible] ostensibly for a proper purpose or not. The [illegible] that meaning

according to their ordinary acceptation; and, giving them due effect, it seems to me that the associated words 'or otherwise obtains possession' were not intended to do more than include other modes of obtaining the same kind of possession as that of a buyer or hirer. This, I think, is shown more clearly to be the meaning intended by the provision which follows as to the other essential of the offence—the intent or knowledge of its being likely 'that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose,' indicating plainly as it does an employment or use of the minor at some time future to the obtaining of possession:—its effect is to my mind strong to show that complete possession and control of the minor's person obtained by buying, hiring, or otherwise, with the intent or knowledge that, by the effect of such possession and control, the minor should or would afterwards be employed or used for either of the purposes stated, is what the section was intended to make punishable as a crime. The provision seems to me to exclude the supposition that an obtaining of possession in the sense in which that expression is, no doubt, sometimes used, of merely having sexual connection with a woman, could have been in the contemplation of the framers of the section."[1] The present section expressly overrules this view as it contains the words "illicit intercourse with any person" which were not in the old section.

'Possession' means possession with a power of disposal.

The offence is complete so soon as the obtaining possession, with the requisite intention or knowledge, of the girl is accomplished.

A person taking possession of a girl under eighteen years for the purpose indi- [illegible] who has given him the [illegible] ce under the [illegible] It is not necessary that the possession of the girl should be obtained [illegible] person.[2]

2. 'Person under the age of eighteen years.'—The age-limit was raised to eighteen years by Act V of 1924, s. 2.

3. 'With intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose.'—Proof of intention or knowledge is almost entirely a matter of inference from circumstances. Under the old section, the Calcutta and the Allahabad High Courts held that the offence was not committed if, notwithstanding the existence of the requisite guilty intention or knowledge, the employment that was intended or known to be likely was to take place after the completion of the [illegible] year.[3] The Madras High Court,[4] though once of this opinion, latterly [illegible] with [illegible] bould [illegible] esent [illegible] section speaks of employment or use 'at any age. The Calcutta and Allahabad cases and the earlier ruling of the Madras High Court are, therefore, no longer of any authority.

[1] *Dowlath Bee* v. *Shaik Ali*, (1870) 5 M. H. C. 473, 476; *Maddila Muttyalu*, (1918) 35 M. L. J. 157; *Nga Shwe Thwe*, (1907) U. B. R. (1907-09) (P. C.) 1, 13 Burma L. R. 289; *Ganga*, (1897) 11 C. P. L. R. (Cr.) 6.

[2] *Shamsunderbai*, (1920) 22 Bom. L. R. 1234, 5 Bom. Cr. C. 269.

[3] [illegible] 172; [illegible] 51; [illegible] 895) 18 All. 24.

[4] *Kamalakshi* v. *Ramasami Chetti*, (1895) 19 Mad. 127, 135.

[5] *Kannammal*, (1913) M. W. N. 297, 24 M. L. J. 211, 13 M. L. T. 131.

'**For the purpose of prostitution.**'—Prostitution means the surrender of a girl's chastity for money.[1] "Acts of improper sexual intercourse are acts of prostitution in one strict sense of the term. But proof of more than that. is required. The ordinary and commonly understood meaning of the word prostitution is the offering of the person for promiscuous sexual intercourse with men, and that... must be taken to be its meaning in the section, there being nothing in the context opposed to it, but rather the contrary."[2]

'**Illicit intercourse with any person.**'—*The meaning of 'illicit intercourse' is* explained in Explanation II to s. 372. See Comment on s. 372. Cases which laid down that no offence is committed if employment for prostitution is not habitual are no longer of any authority.[3]

'**Unlawful and immoral purpose.**'—Section 372 and this section do not "prohibit by punishing a transaction in which the employment or use contemplated is for a purpose that is merely unlawful or for a purpose that is merely immoral, except the purpose of prostitution. No transaction of the kinds described in these sections, with the exception just noted, is an offence under these sections, unless the purpose of the contemplated use of the person is both unlawful and immoral."[4]

Amendment.—The word 'eighteen' was substituted for 'sixteen' by Act V of 1924, s. 2, before the section was altered by Act XVIII of 1924.

CASES.

Selling and buying a girl for prostitution.—A, the father of two girls, [illegible] this section.[5] In a charge against a dancing girl for having purchased a girl with intent that she would be used for the purpose of prostitution or knowing it to be likely that she would be so used, evidence was given of the fact of purchase for a consideration and that numerous other dancing girls residing in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls or prostitutes, and that there were no instances of girls brought up by dancing girls ever having been married. On its being contended that there was no evidence of intent to support a conviction under this section, it was held that there was evidence to support it.[6]

PRACTICE.

Evidence.—Prove (1) that the person in question was under eighteen years of [illegible] ossession of, such person. [illegible] hall at any age be employed or used for the purpose of prostitution, or illicit intercourse with any person, or for any unlawful and immoral purpose; or with knowledge that it was likely that such person would be employed or used for any such purpose.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—See s. 372.

1 [illegible]

35 M. L. J. 157, 24 M. L. T. 77.

4 Per Plowden, J., in *Mula*, (1888) P. R. No. 13 of 1888, p. 20.

Unlawful compulsory labour.

374. Whoever unlawfully compels[1] any person to labour against the will[2] of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

Object.—This section is intended to prevent abuses arising from forced labour which ryots were sometimes compelled to render to landlords.

Ingredients.—The section requires two essentials—

1. Unlawful compulsion of any person.
2. Such compulsion must be to labour against the will of that person.

1. 'Unlawful compulsion of any person.—"I do not think that a person who insists that another who has consented to serve him shall perform his work, unlawfully compels such person to labour, because it is the thing which he or she has agreed to do, and although if the employer assault the servant for not working to his satisfaction, he undoubtedly renders himself liable to rigorous imprisonment under s. 352, I do not think he thereby commits an offence under s. 374."[1] Where the accused induced the complainants, who, he alleged, were indebted to him in various sums of money, to consent to live on his premises and to work off their debts, and the complainants were to, and did in fact, receive no pay, but were fed by the accused as his servants, and he insisted on their working for him, and punished them by beating them if they did not do so, it was held that a conviction under this section could not be upheld.[2]

2. 'To labour against his will.'—The word 'labour' will apply either to mental or to bodily labour, though probably the latter was principally contemplated by the framers of the Code.

PRACTICE.

Evidence.—Prove (1) that the accused compelled the person in question to labour.

(2) That such compulsion was unlawful.

(3) That the accused did so against the will of that person.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, unlawfully compelled AB to labour against his will and thereby committed an offence punishable under s 374 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Rape.

Rape.

375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse[1] with a woman under circumstances[2] falling under any of the five following descriptions :—

First.—Against her will.

[1] Per Petheram, C. J., in *Madan Mohan Biswas*, (1892) 19 Cal. 572, 581.

[2] *Madan Mohan Biswas, ibid.*

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under fourteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

[*Sexual intercourse by a man with his own wife is not rape although the wife has not attained the age of thirteen years, if he was married to her before the date on which this Act comes into operation and she had attained the age of twelve years on that date.*]†

Punishment for rape.

376. Whoever commits rape shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

In the definition of rape, the first clause operates, where the woman is in possession of her senses, and therefore capable of consenting; the second, where she is insensible whether from drink or any other cause, or so imbecile that she is incapable of any rational consent; the third and the fourth, where there is consent, but it is not such a consent as excuses the offender, because in the one case it is extorted by putting the woman in fear, and in the other, it is obtained by deception of a particular kind, and the fifth, where the intercourse is with a girl so young that consent is immaterial.

English law.—A boy under fourteen years of age cannot be convicted of rape.[1] "The rule at common law is...that in regard to the offence of rape malitia non supplet ætatem; a boy under fourteen is under a physical incapacity to commit the offence. That is a presumptio juris et de jure, and judges have time after time refused to receive evidence to show that a particular prisoner was in fact capable of committing the offence."[2] But a boy under fourteen can be convicted of an indecent assault under the Criminal Law Amendment Act.[3] The presumption of English law against the possibility of the commission of the offence of rape by a boy under the age of fourteen years has no application to India.[4]

† This is enacted by s. 4 of Act XXIX of 1925 which came into force on September 23, 1925.

[1] *Jordan*, (1839) 9 C. & P. 118.

[2] Per Coleridge, C. J., in *Waite*, [1892] 2 Q. B. 600, 601.

[3] 48 & 49 Vic., c. 69, ss. 4, 9; *Williams*, [1893] 1 Q. B. 320.

[4] *Paras Ram Dube*, (1915) 37 All. 187.

374. Whoever unlawfully compels[1] any person to labour against the will[2] of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Unlawful compulsory labour.

COMMENT.

Object.—This section is intended to prevent abuses arising from forced labour which ryots were sometimes compelled to render to landlords.

Ingredients.—The section requires two essentials—

1. Unlawful compulsion of any person.
2. Such compulsion must be to labour against the will of that person.

1. **'Unlawful compulsion of any person.**—"I do not think that a person who insists that another who has consented to serve him shall perform his work, unlawfully compels such person to [illegible] has agreed to do, and although if [illegible] to his satisfaction, he undoubtedly [illegible] under s. 352, I do not think he thereby commits an offence under s. 374."[1] Where the accused induced the complainants, who, he alleged, were indebted to him in various sums of money, to consent to live on his premises and to work off their debts, and the complainants were to, and did in fact, receive no pay, but were fed by the accused as his servants, and he insisted on their working for him, and punished them by beating them if they did not do so, it was held that a conviction under this section could not be upheld.[2]

2. **'To labour against his will.'**—The word 'labour' will apply either to mental or to bodily labour, though probably the latter was principally contemplated by the framers of the Code.

PRACTICE.

Evidence.—Prove (1) that the accused compelled the person in question to labour.

(2) That such compulsion was unlawful.

(3) That the accused did so against the will of that person.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, unlawfully compelled AB to labour against his will and thereby committed an offence punishable under s. 374 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Rape.

375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse[1] with a woman under circumstances[2] falling under any of the five following descriptions:—

Rape.

First.—Against her will.

[1] Per Petheram, C. J., in *Madan Mohan Biswas*, (1892) 19 Cal. 572, 581.

[2] *Madan Mohan Biswas, ibid.*

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under fourteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

[*Sexual intercourse by a man with his own wife is not rape although the wife has not attained the age of thirteen years, if he was married to her before the date on which this Act comes into operation and she had attained the age of twelve years on that date.*]†

Punishment for rape.

376. Whoever commits rape shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

In the definition of rape, the first clause operates, where the woman is in possession of her senses, and therefore capable of consenting; the second, where she is insensible whether from drink or any other cause, or so imbecile that she is incapable of any rational consent; the third and the fourth, where there is consent, but it is not such a consent as excuses the offender, because in the one case it is extorted by putting the woman in fear, and in the other, it is obtained by deception of a particular kind; and the fifth, where the intercourse is with a girl so young that consent is immaterial.

English law.—A boy under fourteen years of age cannot be convicted of rape.[1] "The rule at common law is...that in regard to the offence of rape malitia non supplet ætatem; a boy under fourteen is under a physical incapacity to commit the offence. That is a presumptio juris et de jure, and judges have time after time refused to receive evidence to show that a particular prisoner was in fact capable of committing the offence."[2] But a boy under fourteen can be convicted of an indecent assault under the Criminal Law Amendment Act.[3] The presumption of English law against the possibility of the commission of the offence of rape by a boy under the age of fourteen years has no application to India.[4]

† This is enacted by s. 4 of Act XXIX of 1925 which came into force on September 23, 1925.

[1] *Jordan*, (1839) 9 C. & P. 118.

[2] Per Coleridge, C. J., in *Waite*, [1892] 2 Q. B. 600, 601.

[3] 48 & 49 Vic., c. 69, ss. 4, 9; *Williams*, [1893] 1 Q. B. 320.

[4] *Paras Ram Dube*, (1915) 37 All. 182.

Ingredients.—This section requires two essentials.—

1. Sexual intercourse by a man with a woman.

2. The sexual intercourse must be under circumstances falling under any if the five clauses in the section.

1. **'Sexual intercourse.'**—The sexual intercourse must be with a woman. The term 'man' is defined as a male human being of any age (s. 10). The term 'woman' is defined as a female human being of any age (s. 10).

2. **'Under circumstances.'**—The five clauses of the section denote the circumstances which render the sexual intercourse an offence under this section.

Second clause: 'Without consent'—Consent of the woman should have been obtained prior to the act. It is no defence that the woman consented after the fact.[1] As to the elements which make a consent void, see s. 90, *supra*.

Stephen, J., in *R.* v. *Clarence* says: "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled... The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act."[2]

A sleeping person can never consent. Where, therefore, a man had connection with a woman while she was asleep, he was held to have committed rape.[3]

Consent of a girl under ten was held to be quite immaterial where the charge was for attempt to commit rape. Consent means a willing mind on the part of the girl to allow the act to be done. If from her tender years, not knowing what was being done, she merely submits without the exercise of any will by her, it will not amount to a consent.[4]

Consent given by a woman of unsound mind is of no avail (s. 90). Where, therefore, a man had carnal knowledge of a girl of imbecile mind, and the jury found that it was without her consent, she being incapable of giving consent from defect of understanding, it was held that his act amounted to rape.[5] But there must be evidence that the connection was against the will or without the consent of the woman.[6] However, if the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and the prisoner had connection with her consent, he ought to be convicted.[7]

Similarly, consent given by an intoxicated woman is of no avail. Where the accused made a girl of thirteen years quite drunk, and whilst she was insensible violated her person, he was held to have committed rape.[8]

Passive non-resistance or consent obtained by fraud.—If a girl does not resist intercourse in consequence of misapprehension, this will not amount to a consent on her part. Where a medical man, to whom a girl of fourteen years of age was sent for professional advice, had criminal connection with her, she making no resistance from a *bona fide* belief that he was treating her medically, it was held

[1] 1 Hawk. P. C., p. 122.

[2] (1889) 22 Q. B. D. 23, 43, 44.

[3] *Mayers*, (1872) 12 Cox 311; *Young*, (1878) 14 Cox 114.

[4] *Beale*, (1865) 35 L. J. (M. C.) 60.

[5] *Fletcher*, (1859) 8 Cox 131; *Pressy*, (1867) 10 Cox 635.

[6] *Fletcher*, (1866) L. R. 1 C. C. R. 39.

[7] *Barratt*, (1873) L. R. 2 C. C. R. 81; *Ryan*, (1849) 2 Cox 115.

[8] *William Camplin*, (1845) 1 Cox 220; *Ryan*, sup.

that he could be convicted of rape.[1] Similarly, where the accused professed to give medical advice for money, and a girl of nineteen consulted him with respect to illness from which she was suffering, and he advised that a surgical operation should be performed and, under pretence of performing it, had carnal intercourse with her, it was held that he was guilty of rape.[2] The accused who was engaged to give lessons in singing and voice production to a girl of sixteen years of age, had sexual intercourse with her under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under the belief, wilfully and fraudulently induced by the accused, that she was being medically and surgically treated by the accused and not with any intention that he should have sexual intercourse with her. It was held that the accused was guilty of rape.[3]

"That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent."[4]

Third clause.—The mere fact that a woman submits through fear does not take the offence out of the category of rape.[5]

The fear must be of death or hurt. 'Hurt' is defined in s. 319, *supra*.

Fifth clause.—There may be cases in which the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely. Instances of abuse by the husband in such cases will fall under this clause.

The age-limit was raised from ten to twelve years by Act X of 1891 for the following reasons: "The limit at which the age of consent is now fixed (*i.e.*, ten years) favours the premature consummation by adult husbands of marriages with children who have not reached the age of puberty, and is thus, in the unanimous opinion of medical authorities, productive of grievous suffering and permanent injury to child-wives and of physical deterioration in the community to which they belong."

It was raised from twelve to fourteen years by Act XXIX of 1925, s. 2, for the following reasons: "Books of medical jurisprudence establish the fact that the age of puberty in India is attained by a girl upon her reaching the age of fourteen. Even though puberty may be reached at that age, it is obvious that girls are unfit for sexual cohabitation till they are older and more developed in physic and strength. The appalling infant mortality in the country is partially ascribed to early marriages and the consummation which follows with immature girls. It is, [illegible] progeny that the [illegible] premature cohabitation,[7] and (*b*) from immature prostitution.

The accused, a youth of about eighteen, had, without any ancillary violence, sexual intercourse with a well-developed girl probably under twelve years of age; the girl did not consent; her vagina was ruptured and, as a result, she died of shock; it was held that the accused was guilty of rape.[8]

Explanation.—The explanation says that penetration is sufficient to constitute rape. To constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no

[1] [illegible] D. [illegible].

[2] *Akbar Kazee*, (1864) 1 W. R. (Cr.) 21.

[4] Statement of Objects and Reasons to Bill No. 12 of 1924, *Gazette of India*, 1924, Part V, p. 45.

[7] Vide *Hurree Mohun Mythee*, (1890) 18 Cal. 49.

[8] *Shambhu Khatri*, (1924) 3 Pat 410

Complaint of prosecutrix—Evidence of the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint may, so far as they relate to the charge against the prisoner, be given on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negativing consent on her part.[1] The prisoner was indicted for an indecent assault on a girl under the age of thirteen years, whose consent to the act was therefore immaterial. At the trial evidence was admitted of the answer given by the girl to a question put by another child, in the absence of the prisoner, as to why the girl had not waited for the other child at the prisoner's house. The girl's reply was a complaint of the prisoner's conduct to her. It was held that the evidence was admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the girl and as evidence of the consistency of [illegible]

case, cannot be given in evidence.[3] In rape, not only what the prosecutrix said immediately after the occasion but what was said in answer to her is evidence.[4] See also illustration (j) to s. 8 of the Indian Evidence Act.

In cases of rape, where the prosecution evidence is not sufficiently strong to warrant a conviction, it is unsafe to convict merely on the accusation of the woman who has been raped.[5]

Collateral evidence in confirmation or otherwise—It is no mitigation of this offence that the woman at last yielded to the violence. Nor is it any excuse for the party indicted that the woman consented after the fact; nor that she was a common strumpet, for she is still under the protection of the law, and may not be forced; nor that she was first taken with her own consent, if she were afterwards forced against her will; nor that she was a concubine to the ravisher, for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

If the sexual intercourse was by a man with his own wife not being under twelve years of age—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Chief Presidency Magistrate or District Magistrate.

If the sexual intercourse was by a man with his won wife being under twelve years of age—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session.

False charge of rape—Rape is an offence punishable with transportation for life or with imprisonment for a term which may extend to ten years. The offence, therefore, of making false charge of rape is triable exclusively by the Court of Session.[6]

Punishment—The offence is capable of degrees. On the one hand let us take the case of the chaste high caste female, who would sacrifice her life to save her honour, contaminated by the forcible embrace of a man of low caste. . . . On the other hand that of the woman without character, or any pretension to purity, who is wont to be easy of access. In the latter case if the woman, from any motive, refuses to comply with the solicitation of a man and is forced by him, the offender

[1] Lillyman, [illegible] 2 Q. B. [illegible]; Prosecutrix [illegible] 14 Cox 4[illegible].
[2] [illegible], [illegible] 1 K. B. [illegible].
[3] Merry, [illegible] 19 Cox [illegible]
[4] Eyre, [illegible] 2 F. & F. [illegible]
[5] Ameer Ali, [illegible] 1 W. R. (Cr.) No. 11 of [illegible]
[6] Emile, [illegible] Cump. [illegible] F. [illegible]

ought to be punished; but surely the injury is infinitely less in this instance than in the former.

But in a case it has been remarked that the measure of punishment in a case of rape should not depend on the social position of the party injured, but on the greater or less atrocity of the crime, the conduct of the criminal, and the defenceless and unprotected state of the injured female.[1]

Under ss. 57, 376 and 511, a sentence of ten years' transportation, or of fifteen years' rigorous imprisonment, may be passed for the offence of attempt to commit rape; but a sentence of seven years' rigorous imprisonment commutable under s. 59 to seven years' transportation is illegal.[2]

As to whipping, see the Whipping Act.[3]

As to crimes on the frontier see the Frontier Crimes Regulation, 1901, ss. 6, 11 (3) (*d*), and 12 (2).

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, committed rape on AB, and thereby committed an offence punishable under s. 376 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Of Unnatural Offences.

Unnatural offences.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal,[1] shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration[2] is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

COMMENT.

This offence consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast.

According to the English law if the party on whom the offence is committed be within the age of discretion, namely, under fourteen, it is not felony in him, but only in the agent. If both be of the age of discretion, it is felony in both.[4] A man who, as pathic, committed sodomy with a boy of the age of twelve years, was convicted of that offence, though the boy was discharged.[5]

A married woman who consents to her husband's committing an unnatural offence with her is an accomplice.[6]

1. 'Voluntarily has carnal intercourse against the order of nature with any man, woman or animal.'—As to the definition of 'voluntarily,' see s. 39; of 'man,' s. 10; of 'woman' s. 10; of 'animal,' s. 4

Where the accused forced open a child's mouth, and put in his private parts and proceeded to a completion of his lust, it was held that this did not constitute

[1] *Jhandai Noshyo*, (1866) 6 W. R. (Cr.) 59.
[2] *Joseph Merran*, (1868) 10 W. R. (Cr.) 10.
[3] Act IV of 1909, s. 4 (*a*). A sentence of fifteen stripes for the offence of rape was held to be inadequate in the case of a juvenile offender in *Po Ba*, (1914) 8 L. B. R. 143.
[4] 1 East P. C. 480; 1 Hale P. C. 670
[5] *Allen*, (1849) 3 Cox 270.
[6] *Jellyman*, (1838) 8 C. & P. 604.

the offence of sodomy.[1] This decision proceeded upon a special statute which punished the crime of buggery. Under the Penal Code such an act will come under the provisions of this section.

The accused was indicted for an unnatural offence committed on board of an East India ship, lying in St. Katherine's Docks. His defence was that he was a native of Baghdad, and his act was not considered to be an offence there. It was held that this was not a good defence.[2]

A domestic fowl is an 'animal'; and an attempt to commit an unnatural offence with such fowl will be punishable under this section.[3]

2. **'Penetration.'**—See s. 375, *supra*. The crime is complete if the Court is satisfied that penetration took place.[4]

PRACTICE.

Evidence.—Prove (1) that the accused had carnal intercourse with a man, woman, or animal.

(2) That such intercourse was against the order of nature.

(3) That the accused did the act voluntarily.

(4) That there was penetration.

It is unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed, unless for any reasons that testimony is entitled to special weight.[5]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Insufficient particulars in a charge—Where a person was tried for an unnatural offence, and convicted on a charge which did not allege the time when, the place where, or point to any known or unknown person with whom the offence was committed, and without any proof of these particulars, the facts proved against him only being that he habitually wore woman's clothes and exhibited physical signs of having committed the offence, it was held that the conviction was not sustainable.[6]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, had carnal intercourse [illegible] to wit——, [or with a [illegible] lence [illegible] e [or cognizance of the Court of Session (*or the High Court*)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

[1] *Samuel Jacobs*, (1817) R. & R. 331. In [illegible] not be carnal intercourse against the order of nature? If it is, the act will amount to an [illegible] 312. [illegible] 918. [illegible] (1884)

[4] A. W. N. 25.

CHAPTER XVII.

OF OFFENCES AGAINST PROPERTY.

THE following offences affect property :—

1. Theft.
2. Extortion.
3. Robbery and Dacoity.
4. Criminal Misappropriation of Property.
5. Criminal Breach of Trust.
6. Receiving of Stolen Property.
7. Cheating.
8. Fraudulent Deeds and Dispositions of Property.
9. Mischief.
10. Criminal Trespass.

Of Theft.

Theft.

378. Whoever, intending to take dishonestly[1] any moveable property[2] out of the possession of any person[3] without that person's consent,[4] moves[5] that property in order to such taking, is said to commit theft.

Explanation 1.[6]—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.[7]—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

ILLUSTRATIONS.

(*a*) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(*b*) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

[illegible] drives the bullock [illegible] the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(*d*) A being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession; and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the high road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(l) A takes an article belonging to Z, out of Z's possession without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z, her husband. Here it is probable that A may conceive that Z's wife is authorised to give away alms. If this was A's impression, A has not committed theft.

(o) A is a paramour of Z's wife. She gives a valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A, in good faith, believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

Punishment for theft.

379. Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The offence of theft under the Penal Code differs materially from the offence known as larceny in the English law.

English law.—Larceny is the wilful and wrongful taking away of the goods of another against his consent and with the intent to deprive him permanently of his property.

Differences between larceny and theft.—(1) Under larceny, the stolen property should be the property of some one; whereas under theft, it should be in the possession of some one.

(2) Under theft, everything becomes its object which is moveable, *i.e.*, capable of being severed from its place. Hence, it is theft to sever and remove things which are attached to the ground such as trees, vegetables, etc.[1] In larceny, no offence is committed if the objects removed "savour of the reality, and are, at the time they are taken, part of the freehold". So strict was this rule at common law that a larceny could not be committed of title-deeds.[2]

(3) Under larceny, it is necessary to show an intention to appropriate a chattel and exercise an entire dominion over it. If it be taken with the intention of making a temporary use of it only, and then of letting the owner have it again, there is no larceny.[3] Under theft it makes no difference that the person does not intend to assume entire dominion over the property taken, or to retain it permanently.[4]

(4) Under larceny, it must be shown that the taking was against the person's consent and was not only wrongful and fraudulent, but was also "without any colour of right"; under theft, it will be sufficient to show that it was without his consent.

(5) To constitute theft it is not necessary to prove that the thief ever had the stolen thing in his power, but there can be no larceny, even if there has been an actual removal, if the offender has never had the thing in his power.

(6) Theft may be committed though the person from whom the thing is taken has no title thereto; in the case of larceny the alleged owner should have some (general or special) ownership of it, and it must have been taken out of the owner's actual or constructive possession.

Ingredients.—In order to constitute theft five factors are essential:—

(1) Dishonest intention to take property.

(2) The property must be moveable

(3) It should be taken out of the possession of another person.

(4) It should be taken without the consent of that person.

(5) There must be some removal of the property in order to accomplish the taking of it.

1. **'Intending to take dishonestly.'**—Intention is the gist of the offence. It is the intention of the taker which must determine whether the taking or moving of a thing is theft. The intention to take dishonestly exists when the taker intends to cause wrongful gain to one person or wrongful loss to another person.[5] Where, therefore, t[illegible] ding a party of fi[illegible] s, and retained p[illegible] d that the accuse[illegible] must exist at the time of the moving of the property (*vide* ill (*h*)). If the act done is not done *animo furandi*, it will not amount to theft.[7] Where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, the detention does not amount to causing wrongful loss in any sense.[8] Otherwise, a person keeping concealed for a time a valuable thing belonging to a friend, who is a careless man, in jest for the purpose of causing him a little anxiety

[1] Explanation 1; *Shivram*, (1891) 15 Bom. 702.

[2] 1 Hale P. C. 510.

[3] *Trebilcock*, (1858) 27 L. J. (M. C.) 103; *William Holloway*, (1848) 1 Den. 370.

[4] *Nagappa*, (1890) 15 Bom 344, 346.

[5] *Madaree Chowkeedar*, (1865) 3 W. R. (Cr.) 2, 3.

[6] *Nobin Chunder Holdar*, (1866) 6 W. R. (Cr.) 79. See *Sheomeshur Rai*, (1888) 8 A.W.N. 97.

[7] *Thomas Bailey*, (1872) L. R. 1 C. C. R. 347.

[8] *Nabi Baksh*, (1897) 25 Cal. 416.

or in earnest for the purpose of teaching him the salutary lesson of being careful, will be guilty of theft, a result which the legislature could never have intended. Where the accused found the complainant's pony at large, not within the compound or the stable of the complainant, it having broken from its tether to which it had been tied the previous night, and mounted it, and took a ride on it, returning home on the following day in the evening, it was held that the accused had not committed theft.[1] The Calcutta High Court has gone to the extent of deciding that illegal seizure and impounding of cattle is not theft even if effected with the malicious intent of subjecting the owner to additional expense, inconvenience and annoyance.[2]

Where there is no proof of 'taking' of the property found in the possession of the accused, the offence committed is not theft but criminal misappropriation.[3]

Taking need not be with the intention of retaining property permanently.—It is not necessary that the taking should be permanent or with an intention to appropriate the thing taken.[4] The remarks of Norris, J., in *Adu Shikdar's case*[5] that "with regard to the charge of stealing...there is not only no evidence that the prisoner intended to convert it (the property) to his own use, and make it permanently his own property" are in accordance with the English law on the subject, which is quite different from the definition of theft as given in the Code. The learned Judge seems to have overlooked the fact that under the Code a temporary taking might constitute theft (*vide ill. (l)*).

No wrongful gain is necessary.—It matters not whether the intention of the thief was or was not to derive a profit from his crime.[6] Thus, where the accused took [illegible] ed them among her credit [illegible] who clandestinely took their master's oats with intent to give them to their master's horses, and without any intent to apply them to their own private benefit, were held guilty of larceny, even though they were not answerable at all for the condition of the hor[illegible] guilt that the act was not intended to [illegible] uld it be said that a servant would not [illegible] er his master's plate to a pressing tailor, and tell him to pay himself:

Bona fide dispute or claim.—Where property is removed in the assertion of a contested claim of right, however ill-founded that claim may be, the removal thereof does not constitute theft.[9] The dispute as to ownership must be *bona fide*.[10] Mere assertion of a fair claim of property or right, or the mere existence of a doubt, is not enough. The claim to property must be proved by evidence to be fair and good.[11] It is the duty of the Court to determine what was the intention of the offender, and if it arrives at the conclusion that he was not acting in the

[1] *Rup Lal Singh* v. *Durga Prasad*, (1917) 1 P. L. W. 416.

[2] *Aradhun Mundul* v. *Myan Khan*, (1875) 24 W. R. (Cr.) 7.

[illegible] 143.
[illegible] 1017.
[illegible] 416;
[illegible] 1 Weir
[illegible] 1 Weir
[illegible] 407;
[illegible] 908.

[illegible] Cal. & M. 541; *Richard Morfit*, (1818) R. & R. 307.

[9] *Bhicajee*, (1862) Unrep. Cr. C. 22; *Ravishankar Jagjivan*, (1925) 28 Bom. L. R. 8 Bom. Cr. C.; *Khetter Nath Dutt* v. *Indro Jalia*, (1871) 16 W. R. (Cr.) 68, [78]; *Algarasawmi Tevan*, (1904) 28 Mad. 304; *Chaitan* [illegible]

Kishen Goala, (1923) 4 P. L. T. 608; *Harnam Singh*, (1923) 5 Lah. 56.

[10] *Hari Bapuji*, (1897) Cr. R. No. 24 of 1897, Unrep. Cr. C. 920.

[11] *Nassib Chowdhry* v. *Nannoo Chowdhry*, (1871) 15 W. R. (Cr.) 47; *Runnoo Singh* v. *Kali Churn Mister*, (1871) 16 W. R. (Cr.) 18; *Huris Chundra Das* v. *Bolai Audhcaree*, (1871) 16 W. R. (Cr.) 75; *Madhab Hari*, (1887) 15 Cal. 390n; *Bhagwat Saran Misir*, (1916) 14 A. L. J. R. 399.

exercise of a *bona fide* claim of right then it cannot refuse to convict him.[1] If there be any fair pretence of property or right in the prisoner or if it be brought into doubt at all, the Court should direct an acquittal.[2] It should not convict unless it is in a position to say that the claim is a mere pretence.[3] In a case of alleged theft of fish from a tank which the accused claimed to have been in their possession and not in the complainant's, it was held that if the accused asserted a claim to the thing alleged to have been stolen by him, he should not be convicted unless the Court was in a position to say that the claim was a mere pretence.[4]

A went into possession of the disputed land in 1906. B, the complainant, obtained a decree for possession against A and obtained actual possession of the land in September 1917. Before the execution of the decree, A grew paddy but reaped it on the 14th December 1917. It was held that A having been a trespasser on the land at the time the paddy was grown, he had no right to go upon the land after the complainant had obtained possession and removed the paddy. Consequently when the paddy was cut A had no right to remove it and there was no *bona fide* dispute.[5] Where the accused, acting as tenants had planted paddy crops on certain land of which possession was given under a civil Court decree to the claimant, and the accused removed the crops planted by them believing they had a right to the same, it was held that they had acted under a claim of right and were not guilty of theft.[6] Where the accused were convicted of theft for having cut and removed crops which had been sown by the complainant, and in appeal the accused raised the point that the crops stood upon fields which were in the cultivatory possession of themselves, it was held, it was immaterial whether the complainant had or had not good title to cultivate the fields; it was sufficient that she sowed the crops; and the accused were rightly convicted.[7]

Mistake—If a person takes [illegible]
of fact and in ignorance of law, t [illegible]
because there is no dishonest int [illegible]

Stealing one's own property.—The owner of moveable property cannot be [illegible]

[illegible]
B with the value of the [illegible]
to his servant to carry [illegible]

[illegible] in the possession of a Con- [illegible] was held that the Constable had special property in it and the accused was therefore guilty of theft.[10] But if there is no dishonest intention it will not be theft (*vide* ill (i)). Thus, retaking of cattle unlawfully restrained will not amount to theft.[11] If goods have been seized by the sheriff under an execution levied on the property of some person other than the owner of the goods, the owner, by taking possession of them, cannot be guilty of larceny.[12]

[1] *Budh Singh*, (1879) 2 All. 101, referred to in *Sabalsang*, (1902) 4 Bom. L. R. 936, 939; *Panditi* alias *Rahmatulla Pramanik* v. *Rahimulla Akundo*, (1900) 27 Cal. 501.

[2] 2 East P. C. 659. See *Harendra Narayan* v. *Ramjan Khan*, (1913) 41 Cal. 433.

[3] *Hari Bhumali*, (1905) 9 C. W. N. 974.

[4] *Dhirendra Mohan Gosain*, (1909) 14 C. W. N. 403; *Ram Lal Singh* v. *Hari Charan Ahir*, (1909) 11 C. L. J. 410.

[5] *Abinash Chandra Sarkar*, (1918) 28 C. L. J. 120, 23 C. W. N. 385.

[6] *Sit Pein*, (1923) 2 B. L. J. 160.

[7] *Muhammad Ata*, (1921) 19 A. L. J. R. 961.

[8] *Nagappa*, (1890) 15 Bom. 344.

[9] 1 Hale P. C. 513. See *Nowell Wilkinson*, (1821) R. & R. 470.

[10] *Sheik Hasan*, (1887) Unrep. Cr. C. 343.

[11] *Yagamurthi Thevan*, (1883) 1 Weir 422.

[12] *Thomas Knight*, (1908) 1 Cr. App. R. 186.

Liability of servant for an act done at the direction of his master.—*A servant is not guilty of the offence of theft when what he does is at his master's bidding, unless it is shown that the participated in his master's knowledge of the dishonest nature of the act.* There must be some evidence before the Court from which such knowledge on the part of the servant can be inferred.[1]

Cases.—Dishonest intention.—The accused was the brother of a farmer or contractor of a public ferry. He seized a boat belonging to the complainant while conveying passengers across the creek which flowed into the river at a point within three miles from the public ferry. His intention was apparently to compel persons who had to cross the creek to use the ferry in the absence of the complainant's boat, and thereby increase his brother's income derived from fees to be paid by passengers crossing the creek. The accused had no reason to believe that he was justified in seizing the boat. It was held that the accused was guilty of theft, *though it was not his intention to convert the boat to his own use, or deprive the* complainant permanently of its possession.[2] Where the accused was found to have loosened the complainant's cattle at *night from a cattle pen, and to have driven* them to the pound with the object of *sharing with the pound-keeper* the fees to be paid for their release, it was held that *the offence committed was that of theft.*[3]

The accused, an employee under a Steamer Company, whose business it was to check the tickets of passengers, asked *to see the complainant's* ticket, but the complainant not having got one, the accused took *possession* of his umbrella as security that he might be compelled to pay his fare, *it was held* that there being no suggestion that the accused intended *either to get any wrongful gain to himself* by compelling payment of the fare, or to *cause any wrongful loss to the complainant who was bound to pay his fare, a conviction for theft could not be made.*[4] One of the accused gave a kettle for repairs to the complainant who promised to finish the repairs within six or seven days. Some days after the stipulated time the accused who gave the kettle to the complainant went to his shop accompanied by two others and demanded return of the kettle which the complainant refused to part with unless he was paid for the repairs already done. *The accused refused to* pay the amount, took away the kettle from the almirah of the complainant and walked out with it. It was *held that* in order to sustain a *conviction of theft* it was necessary to prove that the accused took away the kettle from the *possession of the complainant with the intention* of causing wrongful gain to himself or wrongful loss to the complainant.[5]

Removal of a debtor's property by his creditor to enforce payment of debt.—A creditor *who took* moveable property out of his debtor's possession, without his *consent, with the intention* of coercing him to pay his debt was held to have committed the offence of theft. The Court said: "*We think that an intention on* the part of the accused to use the possession of the property when taken for the purpose of obtaining satisfaction of a debt due to him, and only *for that purpose,* has no bearing on the question of dishonest intention under the Penal Code. To *hold that such a purpose could render innocent* what would be otherwise a wrongful gain within the meaning of s. 23 would amount to the recognition of a right on [illegible] the science of property [illegible] man might, *if strong enough, take the law into his own hands.* [illegible] ed unyoked the bullocks *belonging to the complainant* and took them away *on the ground* that the complainant's brother owed him Rs. 20 and suggested permission of the

[1] *Hari Bhaimali*, (1903) 9 C. W. N. 974.
[2] *Nagappa*, (1890) 15 Bom. 344.
[3] *Parsay Rai v. Arju Mian*, (1894) 22 Cal. 133.
[4] *Malabbar Sheik*, (1910) 14 C. W. N. 936; *Daulat Shaw*, (1921) 2 P. L. T. 587.
[5] *Judah* (1925) 29 C. W. N. 1011.
[6] *Sri Churn Chungo*, (1895) 22 Cal. 1017, 1022, p. p., overruling *Prosonno Kumar Patra v. Udoy Sail*, (1895) 22 Cal. 969; *Ajhar Muhammad Yusuf*, (1905) 18 All. 88; *Bai[illegible] [illegible]ur*, (1924) 1 L. [illegible] 56.

complainant to the act, but adduced no evidence, it was held that even if the complainant *offered no resistance to the taking through fear of opposing the accused* it was dishonest taking which was covered by the provisions of this section.[1] The complainant pledged some fishing nets with the accused. The nets remained in possession of the complainant, but the accused was at liberty to sell the goods if within three years the debt was not paid. The debt was not paid within the stipulated time and the complainant sold away one of the nets pledged. The accused, in the absence of the complainant, removed the nets. It was held that she could not be convicted of theft as it might fairly be contended that she *bona fide* supposed that she was justified in her action.[2] Where the accused, a ship-owner, alleging that money was due to him on account of certain transactions with the complainant, seized the complainant's goods which were in transit to another ship-owner and detained them, it was held that he was guilty of theft.[3] But where a creditor appropriated payment, which the debtor made under a misapprehension, towards a *time-barred debt, he was held not guilty of this offence.*[4]

Obtaining cigarette from an automatic box.—Against the wall of a public passage was fixed what is known as an 'automatic box,' the property of a company. In such box was a slit of sufficient size to admit a penny piece, and in the centre of one of its sides was a protecting button or knob. The box was so constructed that upon a penny piece being dropped [illegible]
a cigarette would be ejected from the b [illegible]
Upon the box were the following inscrip [illegible] b the [illegible]

2. **'Any moveable property.'**—'Moveable *property*' is defined in [illegible]
Explanations 1 and 2 state that things attached to the land may becom [illegible]
property by severance from earth, and that the act of severance [illegible]
theft (*vide* ill. (*a*)). Thus, the thief *who severs* and carries away [illegible]
the same position as if he carried away *what had previously been* [illegible]
of trees belonging to others and not cut down at the time of sale [illegible]
theft.[6]

It is not necessary that the *thing stolen* must have [illegible]
Theft may be committed with *regard to* anything over [illegible]
the right of property. But an abuse of the section [illegible]
which "will prevent the law of theft from being [illegible]
ing those venial violations of the right of prop [illegible]
mankind readily distinguishes from crime. [illegible]
a twing from a hedge, of a *boy* who takes [illegible]
throw at birds, of a *servant* who slip [illegible]
accused took a false *rupee* from the [illegible] ty
guilty of theft *because* although the [illegible] iw.
value as a piece of metal of which [illegible] out
[illegible] it

[1] [illegible] 135.
[illegible] *Pandita*
[illegible] *Chay Ba*
[illegible] W. N.
[4] *Hammond* [illegible]
J. P. 592.

Carcass.—When a person [illegible] a wild animal on the property of another the [illegible] but to the proprietor of the property, and the [illegible] duly authorised agent, is entitled to demand and, if refused, seize the carcass from the possession of the killer: and such persons as help him to exercise his right are doing no wrong; but as against any person other than the proprietor of the estate or his authorised agent or those lawfully helping the proprietor or his agent the killer has a right to retain possession of the carcass.[1] Where a man buried the carcass of a bullock suspecting it to have been poisoned and another person dug it up and carried it away, it was held that no theft was committed, because property as well as possession in it were abandoned.[2]

Pigeons.—If pigeons are so far tame that they come home every night to roost in wooden boxes, hung on the outside of the house of their owner, and a party come in the night and steal them out of these boxes, this is larceny.[3] Similarly, pigeons kept in an ordinary dove-cote, having liberty of ingress and egress at all times by means of holes at the top, may be the subject of larceny.[4]

Partridges.—Partridges, hatched and reared by a common hen, while they remain with her, and from their inability to escape are practically under the dominion and in the power of the owner of the hen, may be the subject of larceny, though the hen is not confined in a coop or otherwise, but allowed to wander with her brood about the premises of her owner.[5]

3. 'Out of the possession of any person.'—[illegible] definition is given in the Code of the word [illegible] property is in the possession of a [illegible] person, it is in that person's posse[illegible] thing is said to be in the possession [illegible] person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such, that he may be presumed to intend to do so in case of need." The authors of the Code remark: "We believe it to be impossible to mark with precision, by any words, the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists, and about which [illegible] language of lawyers and of the [illegible] doubted, for exampl[illegible] possession, though [illegible] though he may not know whether it is on his writing-table or on his dressing-table. As little will it be doubted that a watch which a gentleman lost a year ago on a journey, and which he has never heard of since, is not in his possession. It will not be doubted that when a person gives a dinner, his silver forks, while in the hands of his guests, are still in his possession; and it will be as little doubted that his silver forks are not in his possession when he has deposited them with a pawnbroker as a pledge. But between these extreme cases lie many cases in which it is difficult [illegible] ice, either that [illegible] prevent- [illegible] we have [illegible] believe to be in accordance with the general sense of mankind as to what shall be held to constitute possession (s. 27)...Much uncertainty will still remain. This we cannot prevent...The provision contained in clause 61 (s. 72) will, we think, obviate all the inconveniences which might arise from doubts as to the exact limits which separate theft from misappropriation and from breach of trust. The effect of that clause will be to prevent the judges from wasting their time and in ingenuity in devising nice distinctions [illegible] h is plainly theft com[illegible] case which is plainly [illegible] as

[1] *Artu Rautra*, (1924) 3 Pat. 549.
[2] (1869) 4 M. H. C. App. 30.
[3] *George Brooks*, (1829) 4 C. & P. 131.
[4] *Cheafor*, (1851) 5 Cox 367.
[5] *Shickle*, (1868) L. R. 1 C. C. R. 158; *Cory*, [illegible]

guilty of breach of trust. If they have to try a case which lies on the frontier, one of those thefts which are hardly distinguishable from breaches of trust, or one of those breaches of trust which are hardly distinguishable from theft, they will not trouble themselves with subtle distinctions, but, leaving it undetermined by which name the offence should be called, will proceed to determine what is infinitely of greater importance, what shall be the punishment."[1]

The property must be in the possession of the prosecutor.[2] Thus, there can be no theft of wild animals, birds, or fish while at large, but there can be a theft of tamed animals. Similarly, where property dishonestly taken belonged to a person who was dead, and therefore in nobody's possession, or where it is lost property without any apparent possessor, it is not the subject of theft, but of criminal misappropriation (*vide* ill. (*g*)). Where the owner of bullocks had lost them and could not find them on search and the bullocks were found in the possession of the accused, it was held that they could not be convicted of theft but of criminal misappropriation.[3] Where the accused removed some bricks from a heap which had been left lying for eight years, it was held that it was open to the assumption that the bricks had been abandoned and their removal under the circumstances did not constitute theft.[4]

Possession of a trustee,[5] or a bailee,[6] is a sufficient possession within the definition of theft.

In a Bombay case it is said that to constitute theft it is sufficient if property is removed, against his wish, from the custody of a person who has an apparent title, or even colour of right, to such property.[7] In this case the accused owed the complainant Rs. 60, and during the accused's absence his wife sold his working implements to the complainant for Rs 25 of the debt On accused's return he took back the implements against the wish of the complainant's wife, complainant himself not being present The Magistrate thereupon convicted the accused of theft. But the Sessions Judge referred the case to the High Court on the ground that the offence of theft was not committed because it was not proved that the accused intended to act dishonestly in taking the implements nor was there evidence that he had authorized his wife to give the implements. West, J., said that the complainant held by an apparent title or at least an assertion of title that was not illusory; and that against even a colour of right a person aggrieved should not take the law into his hands. The conviction was, therefore, upheld. No doubt the accused made himself liable to a suit for damages by taking the law into his own [illegible] proved to be a dishonest [illegible] said to have committed [illegible] paddy was grown upon his *jots*, and that he cut and removed it as a matter of right and in an assertion of a *bona fide* claim to the land. The complainant admitted that there had been a boundary dispute between his landlord and the landlord of the accused, but claimed the paddy as his own as it was in his possession. It was held that the accused had no justification in taking the law into his own hands, even if he was entitled to hold the land because he was not in actual possession of them.[8]

There may be theft without an intention to deprive the owner of the property permanently. In this respect the Penal Code differs from the English law. Where, therefore, a person snatched away some books from a boy as he came out of school and told him that they would be returned when he came to his house, it was held that he had committed theft.[9]

[1] Note N, pp. 159, 160, 161.

[2] *Hossenee Sheikh* v. *Rajkrishna Chatterjee*, (1873) 20 W. R. (Cr.) 80; *Jodha Singh*, (1912) 11 A. L. J. R. 270.

[3] *Nga Shwe Zan*, (1917) 10 B. L. T. 261.

[4] *Talit Tumi*, (1924) 3 R. L. J. 197.

[5] *Nga Po Saw*, (1887) S. J. L. B. 410.

[6] *Soukhi Chand Soo*, (1917) 3 P. L. J. 354.

[7] *Gangaram Santram*, (1884) 9 Bom. 135. See the judgment of Stevens, J., in *Pandita* v. *Rahimulla*, (1900) 27 Cal. 591.

[8] *Pandita* v. *Rahimulla*, sup; *Jagat Chandra Roy* v. *Rakhal Chandra Roy*, (1899) 4 C. W. N. 190. See *Bullava Gowd*, (1897) 1 Weir 426.

[9] *Nawab Ali Khan*, (1911) 34 All. 89.

'Any person.'—For the definition of the word 'person' see s. 11, *supra*. The person from whose possession the property is taken may or may not be the owner of it and may have his possession either rightful or wrongful. Mere physical control of the person over the thing is quite enough (*vide* ills. (*j*) and (*k*).

Attachment—It has been held that theft can be committed by the owner of a crop under attachment by removing it.[1] Here the attachment was by distraint made by a Revenue Court, and the mode and effect of attachment by a civil Court as regards possession was not considered. Hence, where a judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force, it was held that he could not be convicted of theft but of offences under ss. 424 and 403.[2]

The mere cutting and removal of a crop under attachment do not constitute the offence of theft without proof of dishonest intention. Such intention is negatived where the removal was in order to save the crop from being washed away[3], or was in the nature of distraint by a landlord after it was attached.[4]

Goods in the shop of the accused were attached in execution of a decree and the decree-holder himself was given possession of the goods on his executing a [illegible] complainant or gain to himself, and hence there was no theft.[5]

Possessory order.—The order of a Mamlatdar in a possessory suit is operative only as against the parties to the suit. Where in execution of such an order passed against a person, symbolical possession of a field with crops standing thereon was given to another, and the former's brothers cut and removed the crops, it was held that they could not be convicted of theft.[6]

Joint possession.—Where there are several joint owners in joint possession, and any one of them dishonestly takes exclusive possession, he will be guilty of theft.[7] Similarly, if a co-parcener dishonestly takes the separate property of another co-parcener, he will be guilty of theft.[8]

Cases—**Taking out of the possession of another person.**—The complainant washed a carpet at the village tank and hung it up there to dry; the accused dishonestly took the same away. It was held that the carpet had never left the complainant's possession, and the offence committed was that of theft.[9]

Where certain trees were uprooted by a dust-storm and were removed by tenants, it was held that the removal caused wrongful loss to the Zamindar and wrongful gain to the tenants and that they were therefore guilty of theft.[10] Accused Nos. 2 and 3 having made a default in the payment of land revenue, the

[1] *Periyannan*, (1883) 1 Weir 423; *Dadala Atchigadu*, (1881) 1 Weir 420; *Chunnu*, (1911) 8 A. L. J. R. 656.

[2] *Obayya*, (1898) 22 Mad. 151. See also *Subbaiya*, (1882) 1 Weir 421. Cf. *Ramasami*, [illegible] 23.

[illegible] 58.

[illegible] 16 L. W. 15, 42 M. L. J. 490.

[illegible]

4 C. P. L. R. 174. See *Phul Singh*, (1912) 10 A. L. J. R. 527, where it appeared that a landlord had jointly cultivated land with a non-occupancy tenant and had cut and removed the crops, but the Court held that the landlord must be deemed to be part owner and in [illegible] portion of the other part owner. The facts in the report are meagre.

[8] *Sita Ram Rai*, (1880) 3 All. 181.

[9] *Mathi*, (1886) Cr. R. No. 70 of 1886, Unrep. Cr. C. 314.

[10] *Dunyapat*, (1919) 17 A. L. J. R. 974, 1 U. P. L. R. 133.

Mamlatdar proceeded to their house and made a *panchnama* declaring their buffaloes to be under attachment. At the instigation of accused No. 1, the other accused untied and removed the buffaloes. It was held that they were guilty of theft for the Mamlatdar was to be deemed to be in possession inasmuch as he had a statutory right to take possession, he came to the place where the buffaloes were with the intention of taking possession, he made a declaration and a *panchnama* that he had taken possession, and he exercised the right of possession by forbidding the defaulters from removing them.[1]

English cases—Where a person, having ordered a tradesman to bring goods to his house, took out a certain quantity, asked their price, separated them from the rest, and then sent the tradesman home on pretence of wanting other articles, and ran away with the goods, it was held that this amounted to larceny.[2] Getting goods delivered into a hired cart on the express condition that they would be paid for before they were taken out from the cart, and then getting them from the cart without paying the price was held to be larceny.[3] The prisoner put his hand into the prosecutor's pocket, got hold of his purse, and pulled it up to the edge of the pocket when the corner caught on a belt worn by the prosecutor. The prosecutor at that moment grasped the purse and put it back. It was held that the accused was guilty of larceny. Pickford, J., said: "If a man put his hand into another's pocket, and removed a purse from the position in which it was to the edge, and was only prevented from getting full possession of it because it accidentally caught in the belt, there was a sufficient asportation to constitute larceny."[4]

Joint property.—The removal of even the whole of the crop by a ryot in a zamindari holding on a *varam* tenure without delivering to the Zemindar his share of the crop does not constitute theft.[5] A had in her possession forty baskets of paddy out of which B was entitled, under a decree of a civil Court, to thirty-five baskets. The decree awarded her this specific paddy as being the produce of a specified farm. B took the thirty-five baskets of paddy out of A's possession without A's consent It was held that the act of B, though irregular and improper, did not amount to theft.[6]

English cases.—H, a member of a friendly society, was in possession of a shop where goods were sold for the benefit of the society. Each member partook of the profit, and was subject to the loss arising from the shop. H had the sole management, and was answerable for the safety of all the property and money coming to [illegible] l, also a member of [illegible] d for stealing money [illegible] although a member of the society.[7]

4. **'Without that person's consent.'**—The thing stolen must have been taken without the consent of the person in possession of it. The primary inquiry to be made is whether the taking were *invito domino*, or without the will or approbation of the owner. Hence, where a debtor gave certain property to his creditor, and subsequently found out that the debt was time-barred, it was held that the charge of theft could not be sustained against the creditor, inasmuch as there was a full unqualified consent on the part of the debtor at the time of his giving away the

[1] *Lallu Waghji*, (1918) 21 Bom. L. R. 251, 5 Bom. Cr. C. 5

[2] *Sharpless* (1872) 2 East P. C. 675

[3] [illegible]

[4] [illegible]

[5] [illegible]

M. W. N 106; *Sankaranarayana Iyer*, [1914] M. W N. 483.

[6] *Maung Po*, (1902) 1 L. B R. 334.

[7] *William Webster*, (1861) 9 Cox 13; *William Burgess*, (1863) 9 Cox 302; *William Cain*, (1841) 2 Mood. 204.

property.[1] Explanation 5 says that consent "may be expressed or implied, an
may be given either by the person in possession, or by any person having for the
purpose authority either express or implied" (*vide* ills. (*m*) and (*n*)). But
consent given under improper circumstances will be of no avail (*vide* ill. (*o*)). A
to what is a valid 'consent' see s. 90, *supra*.

Cases.—A sought the aid
property of B's master. B,
the purpose of procuring A's
was held that as the property removed was so taken with the knowledge of th
owner, the offence of theft was not committed, but A would be guilty of abetmen
of theft.[2] Really
of the property.
intention: cf. ills. (*m*) and (*o*). The thief had no knowledge of the owner's ac
and it cannot, therefore, be construed as a consent. In two English cases, on simi
lar facts, the offence of larceny was held to have been committed. The owner o
goods, knowing of an intention in the accused to steal them, they having plotted
so to do with his servant, directed his servant to carry on the business with a view
to the detection of the thieves. The servant with the consent of his master agreed
with the accused to open the door of the house and let them in. They broke
open inner apartments and took the goods. It was held that they were guilty of
larceny.[3]

The accused suggested to a servant of the prosecutrix a plan for the commission of a robbery by the accused at the shop of the prosecutrix. The servant, pretending to agree to the accused's suggestion, lent the keys of the shop to the accused, who made duplicate keys, with one of which, on a day arranged with the servant, the accused unlocked a padlock attached to the outer door and entered the shop where he was arrested. The prosecutrix had been informed by the servant of the accused's plan and knew that he intended to enter the shop on the day in question. The accused was convicted on an indictment which charged him with having broken and entered the shop with intent to steal therein. It was held that the conviction was right, notwithstanding that the prosecutrix knew that the accused had been supplied with the means of breaking and entering by her servant.[4] Removal of official papers without the consent of the official head amounts to theft.[5]

Unauthorised consent.—Possession of wood by a Forest Inspector who is a servant of Government, is possession of the Government itself, and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, was held to constitute theft, as the consent obtained was unauthorised and fraudulent.[6]

5. **'Moves that property in order to such taking.'**—The least removal of the thing taken from the place where it was before is a sufficient asportation though it be not quite carried off.[7] It is not necessary that the property should have been removed out of its owner's reach or carried away from the place in which it was found. Upon this ground the guest, who having taken off the sheets from his bed with intent to steal them carried them into the hall and was apprehended before he could get out of the house, was adjudged guilty of larceny. So also was he, who having taken a horse in a close with intent to steal it, was apprehended before he could get it out of the close. And such was the case of him, who, intending to steal plate, took it out of the trunk wherein it was and laid it on the floor, but was surprised before he could remove it any further.[8]

[1] *Muammat Piari Dulaiya*, (1904) 1 A. L. J. R. 508.
[2] *Troylucko Nath Chowdhry*, (1878) 4 Cal. 366. See *Benjamin, Bonnen*, (1844) 1 C. & K. 295, 301.
[3] *Eggington*, (1801) 2 East P. C. 666.
[4] *Chandler*, [1913] 1 K. B. 125.
[5] *Vallabhram*, (1925) 27 *Bom. L. R.* 1391.
[6] *Hanmanta*, (1877) 1 *Bom.* 610.
[7] 2 East P. C. 555.
[8] *Ibid*, 555-556; *Simson*, (1664) Kel 31.

Explanations 3 and 4 state how 'moving' could be effected in certain cases. Illustrations (*b*) and (*c*) elucidate the meaning of Explanation 4.

The offence of theft is completed when there is a dishonest moving of the property, even though the property is not detached from that to which it is secured.[1]

Cases.—The accused, being in the employ of Government in the Post Office Department, while assisting in the sorting of letters, secreted two letters with the intention of handing them to the delivery peon and sharing with him certain moneys payable upon them. It was held that he was guilty of theft and of attempt to commit criminal misappropriation of property.[2]

On suspicion of theft of [illegible] the train, in which four coolie [illegible] was not found, but, hidden [illegible] were discovered pieces of cloth, which on investigation were ascertained to have been abstracted from the next van. It was held that none of the four coolies travelling in the van where the pieces of stolen cloth were found could be convicted of theft of the cloth in the absence of evidence to connect one or more of them individually with the possession of the cloth.[3]

English cases.—Where the accused lifted up a bag from the bottom of a boot of a coach but was detected before he had got it out, and it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied, it was held that this was a complete asportation.[4]

Where the servant of a tallow-chandler removed fat belonging to his master from the room in which it was kept, to a room where his master was accustomed to buy fat from persons who had it to sell, and placed it on a pair of scales there, with intent to sell it to his master, and appropriate the proceeds to his own use, this was held to be larceny[5] Pulling wool from the bodies of live sheep and lambs was held to be larceny[6] The prisoner was a letter-carrier and it was his duty to deliver letters given to him, and, if from any cause he was unable to deliver them, to bring them back to the Post Office in his pouch. He did not deliver a letter containing money which had been sorted to him for delivery, nor did he return it to the Post Office on the completion of his round; but, on being asked for it soon afterwards, *he produced it from his pocket, and gave a false excuse for not having delivered it.* It was held that there was sufficient taking to constitute larceny.[7] In an indictment for stealing five pints of porter, it appeared that the prisoner was discovered standing by a barrel of porter, out of a hole in which the porter was running into a can on the ground, and that above five pints had run into the can It was held that there was sufficient asportation proved of the porter in the can[8]

Explanations 1 and 2.—The moving by the same act which effects the severance may constitute theft.[9] Carrying away of trees after felling them is theft,[10] but mere sale is not.[11] In the case of growing grass, a moving by the same act which effects its severance from the earth amounts to theft.[12] Where certain land, on which there was a standing crop of paddy, was entrusted to the accused to take care of and watch till the paddy was ripe when they were to give notice to the factory people who would reap it, it was held that by cutting the crops themselves

[1] *Nga Po Hle*, (1886) S J L B 399

[2] *Venkatasami*, (1890) 14 Mad 229 See to the same effect, *Eggington*, (1801) 2 East [illegible] 247

[illegible] *Jerry* [illegible]

[5] *Hall*, (1849) 3 Cox 245.

[6] *Robert Martin*, (1777) 1 Leach 171.

[7] *Thomas Poynton*, sup

[8] *Wallis*, (1848) 3 Cox 67

[9] (1870) 5 M. H. C. App. 36.

[10] *Bhagu : Vishnu*, (1897) Cr. R. No 36 of 1897, Unrep Cr C 928.

[11] *Balos alias Hussain Sahib*, (1882) 1 Weir 419.

[12] *Samsuddin*, (1900) 2 Bom. L. R. 752.

and disposing of the same, the accused were guilty of theft if not of criminal breach of trust.[1]

Husband and wife.—Hindu law.—There is no presumption of law that a husband and wife constitute one person in India for the purpose of criminal law. If the wife, removing her husband's property from his house, does so with dishonest intention, she is guilty of theft.[2] A Hindu woman, who removes from the possession of her husband, and without his consent, her *palla* or *stridhan*, cannot be convicted of theft.[3]

So also a husband cannot be convicted of robbing his wife, she being completely under the control of her husband. He can be convicted if he steals his wife's *stridhan* which is her absolute property.

The proposition that everything acquired by a woman during coverture is the property of her husband has no foundation in Hindu law.[4]

Mahomedan law.—It is laid down that a Mahomedan wife may be convicted of stealing from her husband; because under this system of law, there does not exist the same union of interest between husband and wife which exists between an English husband and wife.[5] The same reasoning would apply in the case of a Mahomedan husband.

English law.—There is such a unity of interest between husband and wife that ordinarily the wife cannot steal the goods of the husband, nor can an indifferent person steal the goods of the husband by the delivery on the part of the wife; and if the wife deliver the goods of the husband to an indifferent person, for that person to convert them to his own use, this is no larceny; but if the person to whom the goods are delivered by the wife be an adulterer it is otherwise, and an adulterer can be properly convicted of theft even though they be delivered to him by the wife. If no adultery has actually been committed by the parties, but the goods of the husband are removed from his house by the wife and the intended adulterer, with an intent that the wife should elope with him and live in adultery with him, this taking of the goods is, in point of law, a larceny.[6] But as a husband and wife are one person in law, the wife cannot steal her husband's goods whether she had committed adultery or not.[7] But a person who receives money stolen by a wife from her husband will be punishable for misdemeanour under the Married Women's Property Act.[8] In order to punish the adulterer the goods should be traced in any way to his personal possession.[9]

Under ss. 12 and 16 of the Married Women's Property Act, 1882, the stealing of her husband's goods by a wife when about to leave or desert him or when living separate from him, is made punishable.

Necessitas inducit privilegium quo ad jura privata.—Where a man in extreme want of food or clothing steals either in order to relieve his present necessities, the law allows no such excuse to be considered. See the doctrine of self-preservation discussed at page 139 and of necessity at page 171.

Abetment.—The carrying off of certain buffaloes to the complainant by order of the accused, and the retention of them in the custody of the latter's servant, was held to be an abetment of theft.[10] Where it was found that theft was actually committed by certain members of an unlawful assembly, but it was not

[1] *Durga Tewari*, (1909) 36 Cal. 758.
[2] *Butchi*, (1893) 17 Mad. 401.
[3] *Natha Kaliyan*, (1871) 8 B. H. C. (Cr. C.) 11.
[4] *Ramasami Padeiyatchi* v. *Virasami Padeiyatchi*, (1867) 3 M. H. C. 272.
[5] *Khalabai*, (1869) 6 B. H. C. (Cr. C.) 9.
[6] *Tollette*, (1841) Car & M. 112; *Featherstone* [illegible] (1850) 10 Cox
[7] *Kenny*, (1877) 2 Q. B. D. 307.
[8] *Payne*, (1906) 1 K. B. 97.
[9] *Rosenberg*, (1843) 1 C. & K. 233.
[10] *Tarinee Prosaud Banerjee*, (1872) 18 W.R. (Cr.) 8.

found that the accused himself committed it by removing any property or that he had made any preparation for committing it or aiding anyone in the commission of it, it was held that he could not be convicted under this section read with s. 114, though he could be under this section read with s. 149.[1]

PRACTICE.

Evidence.—Prove (1) that the property in question is moveable property.

(2) That such property was in the possession of a person.

(3) That the accused moved such property whilst in the possession of that person.

(4) That he did so without the consent of that person.

(5) That he did so in order to take the same out of the possession of that person.

(6) That he did so with intent to cause wrongful gain to himself or wrongful loss to that person.[2]

It is not sufficient that the property found in the accused's possession was like the one stolen; there must be a finding to the effect that that property was the stolen property.[3]

Presumption.—Possession of stolen goods soon after the theft raises the presumption that the possessor is either the thief or has received the goods knowing them to be stolen.[4] Whether the possession of stolen property is recent enough to warrant a conviction for the substantive offence is a matter entirely for the jury.[5] But unexplained possession of non-identifiable matter (such as paddy) alleged to be stolen does not amount to proof of theft.[6] In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused.[7] The question of what is or what is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, are lost, and were in the possession of the accused two months after being stolen, and still in the same state, it was held that this was a possession sufficiently recent to call on the accused to show how he came by the property.[8] Where a stolen buffalo was not traced to the accused until twelve months after the theft, it was held that this was not recent possession which would justify the presumption, in the absence of an explanation as to the manner in which the accused got the buffalo, that the accused stole it.[9] Where circumstances are highly suspicious, and the suspicion is not rebutted when rebuttal may be reasonably expected, if the suspicion is wrong, suspicion becomes confirmed and becomes much more than suspicion. Where recent possession of stolen property and *mere* recent possession is relied upon to prove theft or dishonest possession, such *mere possession* must be exclusive.[10]

Where the evidence of theft is not direct but circumstantial, such evidence must be exhaustive and exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused.[11]

[1] *Hansa Pathak* v. *Bansi Lal Das*, (1901) 8 C. W. N. 519.

[2] *Madan*, (1882) 1 Weir 411; *Abdool Biswas* v. *Khater Mondal*, (1899) 3 C W. N. 332

[3] *Bava Chela*, (1886) Cr R. No 5 of 1886, Unrep. Cr. C. 227.

[4] Section 114 of the Indian Evidence Act. *Motee Jolaha*, (1866) 5 W. R. (Cr.) 66; *Jogeshur Bagdee*, (1867) 7 W. R. (Cr.) 73 [109]; No. 19 of 1879; *Tabu*, (1891) P. R. No. 15 of 1891.

[5] *Guzzala Hanuman*, (1902) 26 Mad. 467.

[6] (1873) 7 M. H C. App 19, followed in *Royappan*, (1894) 1 Weir 429; *Sini Tevan*, (1886) 1 Weir 429.

[7] *Malhari*, (1882) 6 Bom. 731.

[8] *Partridge*, (1836) 7 C. & P. 551. See *Poromeshur Aheer*, sup; *Burke*, (1884) 6 All 224, 227.

[9] *Nga Yaul*, (1885) S. J. L. B. 366.

[10] *Nga Tha Dwe*, (1896) P. J. L. B. 279.

[11] *Chiraguddin*, (1914) 18 C. W. N. 1144.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate—Triable summarily if property not worth more than Rs. 50.

Venue.—The offence of theft, or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.[1]

Joint trial.—A and B are both charged with a theft, and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge charging both with one theft, and B alone with the other two thefts.[2]

Joinder of charges.—*Theft and concealing stolen property.*—A charge under s. 380 cannot be joined to a charge under s. 414, such joinder, being opposed to s. 233, Criminal Procedure Code, constitutes not merely an irregularity but an illegality.[3]

House-breaking and theft.—When offences under ss. 457 and 380 are committed in one transaction, it is very desirable that formal convictions under both sections should be recorded, in order that if the accused subsequently commits another theft, technical difficulties may not arise.[4]

Theft and receipt of stolen property.—A person committing theft and a person who receives the stolen property may be tried jointly where practicable.[5] Where there are several receivers of stolen property this should not be done.[6]

Theft and mischief.—Where a person who has stolen an animal subsequently kills it for the purpose of eating it, he cannot be convicted under both ss. 379 and 429. Where after a thief has stolen and killed an animal, another person assists him in skinning the carcass, the person so assisting is not guilty either of an offence under s. 379, or of an offence under s. 429.[7]

Conviction for a different Offence.—A person accused of theft may be convicted of criminal misappropriation, criminal breach of trust, or cheating, and *vice versa.*[8]

It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property.[9]

Repetition.—Every repetition of theft is a grave offence when it indicates a habit not cured by previous light punishments.[10] See s. 75, *supra.*

Single or several thefts.—Removal by one single act of several articles constitutes one offence of theft only, although the articles belong to different persons.[11]

The Central Provinces Rule.—As there appears to be a difference of practice in respect of treating thefts as single or several, if in one transaction things belong- [illegible] have been stolen, it is necessary to issue some instructions [illegible] ime Register or [illegible] s when deciding [illegible] ie time nothing that is here set out can in any way control the discretion given to Magistrates by s. 235 of the Code of Criminal Procedure with regard to the framing of separate charges or the holding of separate trials, whenever it appears appropriate to do so.

[illegible]

[4] *Nga Pan Bee*, (1905) [illegible]

[5] *Bhima*, (1910) 14 A. L. J. R. 344.

[6] *Balabhai Hargovind*, sup.

[7] [illegible]

[8] [illegible]

[9] [illegible]

[10] [illegible]

[11] [illegible] 33 of 1897, Unrep. Cr. C. [illegible]; [illegible] (1869) 11 W. R. (Cr.) 38; *Har Dial*, (1905) P. L. R. No. 144 of 1905.

If the property, which it was the thief's intention (as shown by the circumstances or by his admission) to take, consisted of a number of contiguous articles, which were reached by one and the same act of trespass or which were the subject of a single enterprise, the moving of each article, in the course of removal of the whole bulk of property, cannot ordinarily be considered to be a distinct theft. The thieving project in such a case was single, although it may have been achieved in detail and the fact that the spoil taken consisted of several things, whether belonging to the same or the different owners, does not necessarily break up the unity of the transaction.

If, on the other hand, the property taken consisted of a number of articles so distantly or diversely situated as to require a distinct act of trespass or a distinct enterprise for the removal of each, the transaction must ordinarily be held to have been not single but complex, and its achievement to have involved the commission of more than one separate theft.

The following examples will make the distinction clear—

(*a*) A thief enters a house and removes one by one all the articles of value which he finds there. As all the property is got at by one and the same act of trespass, the theft is *single* although some of the articles may have belonged to friends of the owner of the house.

(*b*) A thief goes to a threshing-floor, where the grain of four cultivators is stored and steals a little from every heap. Unless it is shown that he had distinct designs against the several owners, it is plain that there was but one act of thieving accomplished through one and the same trespass.

(*c*) A thief snatches from a man's hand a bag containing articles belonging to several persons. The theft thus achieved by a single enterprise is not made multiple by the fact that the things snatched had different owners

(*d*) A cattle-lifter drives off a herd of six heads, being the bullocks of half a dozen separate cultivators, which were in charge of a boy This is a single act of theft, the enterprise being single, and is not six thefts, because there were six owners.

(*e*) In a crowded public place, a thief picks the pockets of A, B and C in succession. Three thefts have been committed.[1]

Restoration of stolen property.—The property stolen may be returned to the person from whom it was stolen under s. 517, Criminal Procedure Code, and an innocent purchaser may be compensated for the price paid under s. 519, if any money is found in the possession of the thief. But the property restored should be in existence at the time of theft. R's cow, having been stolen, the thief after a lapse of a year and a half was convicted. Six months after the theft V innocently purchased the cow, which, while in his possession, had a calf. The Magistrate ordered that the cow and the calf should be delivered up by V to R. It was held that as the calf was not even in embryo at the date of the theft the order to deliver up the calf was illegal.[2]

A difference, however, should be noted when the thing stolen is (*a*) a negotiable instrument, or (*b*) a bank note.

(*a*) When an instrument, such as a promissory note, has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but also as against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he had obtained it *bona fide* for value without notice of theft.[3]

(*b*) A currency note being in legal view money, the property in it passes by mere delivery, and in the interests of commerce and the security of human dealing

[illegible] it from an honest purchaser.

[illegible]

[2] [illegible]

[3] *Bank of Bengal* v. *Mendes*, (1880) 5 Cal. 654.

nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon the rule.[1] A currency note is a 'legal tender' for the amount expressed therein.[2] Property in it passes by mere delivery.[3]

Title to money which is current coin of the realm passes by mere delivery to a person who receives it in satisfaction of a lawful debt even though the money was obtained by committing the offence of cheating.[4]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed the theft of (*specify the thing*), by taking it out of the possession of *AB*, and thereby committed an offence punishable under s. 379 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.[5]

Punishment.—Imprisonment only is a legal punishment: fine need not necessarily be inflicted in addition.[6] Nor can fine be substituted in lieu of imprisonment.[7] The law does not contemplate that a thief should be more severely punished because he renders the recovery of the stolen property impossible.[8] A sentence should never be heavier than is necessary to deter the criminal from committing the offence again.[9]

Railway thefts.—In cases of thefts from a railway train, where the Magistrate is once satisfied that the accused has committed the offence, the sentence should be of a deterrent nature.[10]

As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2).

Whipping.—An attempt to commit theft is not punishable with whipping and a conviction first of an attempt to commit theft, and then of an effected theft, will not justify a double sentence of imprisonment and whipping.[11]

Sections 379 and 215.—"Though the ulterior object of a thief in committing theft [illegible] in s. 215,... still [illegible] fence under s. 215,...; but as the fact that the thief has restored the property may well be taken into consideration in punishing him for the theft under s. 379,...it is only in very exceptional cases that the punishment for both the theft under s. 379 and the taking an illegal gratification under s. 215....should be allowed to exceed the punishment which could be inflicted for the theft alone, even though s. 71...be taken as inapplicable."[12]

Where a person offers to take any gratification on account of helping a person to recover property stolen from him and, on receipt of the gratification, points out where the stolen property is concealed, he may properly be convicted of theft in the absence of any evidence to show that anyone else had committed theft. If he fails to point out or restore the stolen property, he may properly be convicted of an offence under s. 215.[13]

[1] *Goodman* v. *Harvey*, (1836) 4 Ad. & El. 870, followed in *The Collector of Salem*, (1873) 7 M. H. C. 233.

[2] *Michell* v. *Joggesrur Mochi*, (1878) 3 Cal. 379.

[3] [illegible] (1915) 17 [illegible] 31. [illegible] No. 165 of 19[illegible] [illegible] 97, Unrep. Cr. C. 893.

[7] *Sheikh Dulloo* v. *Zainab Bibee*, (1871) 16 W. R. (Cr.) 17.

[8] *Nga Aung So*, (1899) P. J. L. B. 637.

[9] *Po Nyein*, (1917) 9 L. B. R. 167.

[10] *Ananda Laxman Babaji*, (1912) 14 Bom. L. R. 501, 1 Bom. Cr. C. 149.

[11] *Abdul Majid*, (1883) S. J. L. B. 338.

[12] Per Aston, J. C., in *Nga Tun Bya*, (1906) P. J. L. B. 231.

[13] *Nga Ok Gyi*, (1889) S. J. L. B. 419.

380. Whoever commits theft in any building,[1] tent or vessel,[2] which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Theft in dwelling house, etc.

COMMENT.

Object.—The object of the section is to give greater security only to property deposited in a house so as to be under the protection of the house and not to property about the person of the party from whom it is stolen. Theft from a person in a dwelling house is, therefore, simple theft under s. 379.[1]

Scope.—There is nothing in the section which prevents a person from being convicted under this section for a theft committed by him in his own house. It might at first seem that it was the intention of the legislature to protect property by this section, not from the owner of the house but from others. The section is nearly identical with s. 60 of 24 & 25 Vic., c. 96, and it has been repeatedly held in England that the essential point in the offence of theft in a building is that the property should be under the protection of the building, and that the offence may be committed by the owner of the building or other person who has lawful access to the building.[2]

1. 'In any building'.—The term 'building' means a permanent edifice of some kind. Theft should, under this section, have been committed in any such building.[3]

Theft from a verandah,[4] or the roof of a house,[5] or a brakevan,[6] or a railway carriage,[7] is not theft in a building. But, where the accused stole some luggage and cash from a railway carriage, when it was at a railway station, it was held that though the railway carriage was not a building, the railway station was, and that the accused had committed an offence under this section.[8] An entrance half surrounded by a wall in which there were two door-ways but without doors, which was used for custody of property, is held to be a building.[9] A courtyard[10] is, but a compound[11] is not, a building.

Where the accused entered the dwelling house of the complainant and in his presence dishonestly took away certain property, in spite of his remonstrances, it was held that he had committed an offence under this section.[12]

Theft by constables of property from the house they were employed to guard was held to be punishable under this section and not under s 409.[13]

Where a carter removed from the godown of a railway company a bag filled with pilferings from a number of bags consigned to others, it was held that the bag being in the possession of the railway as bailees, the taking it out of the godown amounted to theft.[14]

Where a person while inspecting the record of a case removed from it a document with the intention of substituting another fabricated by him in its place and

1 [illegible]

[illegible]

7 *Ali Husain*, (1901) 23 All. 306; (1880) 1 Weir 436.

8 *Sheikh Saheb*, (1886) Cr. R. No. 36 of 1886, Unrep. Cr. C. 293.

9 *Dad*, (1878) P. R. No. 10 of 1879.

10 *Shera*, (1879) P. R. No. 35 of 1879; *Ghulam Jelani*, (1889) P. R. No. 16 of 1889; *Surja*, (1882) 2 A. W. N. 224.

11 *Rama*, (1889) Unrep. Cr. C. 481.

12 *Kashinath Bhaushet*, sup.

13 *Boidnath Singh*, (1865) 3 W. R. (Cr.) 29.

14 *Soukhi Chand Sao*, (1917) 3 P. L. J. 354.

was caught before he was able to substitute the one fabricated by him, it was held that he was guilty of an offence under this section.[1] A person cannot be convicted under s. 474 when the document fabricated by him does not fall within the description given in s. 466 or 467. Nor can he be convicted of forgery when he does not make it with any of the intents mentioned in s. 463. In the absence of a complaint by the Court the offence of attempting to fabricate evidence cannot be proceeded with when the offence is committed in relation to a proceeding in Court.[2]

English " " " " " " under the protection of the dwelling hou man to his room, and then stole his goods to the value of forty shillings, when not about his person, he was held guilty of stealing in a dwelling house.[3] A man went to bed with a prostitute, having put his watch in his hat on a table; and she stole the watch while he was asleep. It was held that the offence was that of stealing in a dwelling house.[4]

2. 'Vessel'.—See s. 48, *supra*.

PRACTICE.

Evidence.—Prove the same points as for s. 379; and further—

(7) That such property was at the time of the theft in a building, tent, or vessel. All that is necessary is that the property should be under the protection of the building; it is not necessary to show unlawful entrance into the building.[5]

(8) That such building, tent, or vessel, was then being used as a human dwelling, or for the custody of property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate—Triable summarily if property not worth more than Rs. 50.

Whipping.—So far as the punishment of whipping is concerned, the offence under this section is held to be a distinct offence from that of theft under s. 378, and is not included under it.[6]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, committed, in a building (*or* tent, *or* vessel) used as a human dwelling (*or* for the custody of property), the theft of (*specify the thing*), belonging to AB, and thereby committed an offence punishable under s. 380 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.[7]

Theft by clerk or servant of property in possession of master.

381. Whoever being a clerk or servant,[1] or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section provides for a severe punishment when a clerk or a servant has committed theft because he has greater opportunities of committing this offence owing to the confidence reposed in him. When the possession is with the master this section applies; when it is with the servant, s. 408 comes into operation.

[1] *Radha Kishan*, (1925) 7 L. L. J. 118, 26 P. L. R. 95.
[2] *Ibid.*
[3] *John Taylor*, (1820) R. & R. 418.
[4] *Agnes Hamilton*, (1837) 8 C. & P. 49.
[5] *Ishree Persaud*, (1875) 24 W. R. (Cr.) 49.
[6] *Changia*, (1870) 7 B. H. C. (Cr. C.) 68; contra, *Jeewun v. Boodha*, (1867) P. R. No. 51 of 1867.
[7] (1866) 5 W. R. (Cr. L.) 80.

1. 'Clerk or servant.'—A clerk or servant is a person bound either by an express contract of service, or by conduct implying such a contract, to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to transact.[1] "What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the orders of his employer so as to be under his employer's control... It is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent,—for it may be only occasional, or in a single instance—if, at the time, the prisoner is engaged as servant."[2] "The test is very much this, viz., whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control."[3] The allowance of a portion of the profits or goods does not destroy the relation of master and servant.[4] It is necessary that the objects of the service of a 'clerk or servant' should not be criminal, but a man may be such a clerk or servant although the objects of his service are in part illegal as being contrary to public policy.[5]

CASES.

Clerk.—Where the clerk of a toll-contractor illegally levied toll on carts laden when leaving a town, and prevented the carts from passing through the toll gate unless the toll demanded was paid, he was held guilty of this offence.[6]

Servant.—Where some policemen stole a sum of money shut up in a box, and placed it in the Police Treasury building, over which they were mounting guard as sentinels, they were held to have committed an offence under this section and not one under s. 409.[7] Where a person engaged to cart tamarind fruits from a forest abstracted a portion of it, it was held that he was not the less a servant because his employment was temporary.[8] But a hired boatman was held to be not a servant.[9]

An unpaid apprentice is held to be a 'servant' within the meaning of this section.[10]

English cases.—The following are held to come within the expression 'clerk or servant.'—An apprentice under the age of eighteen[11]; a person paid for his services by a commission or share in the profits[12]; a person who is occasionally employed[13]; a person who is not a general servant but employed for a particular purpose[14]; a person employed by different persons at the same time for different purposes[15]; a person who acted as a clerk or servant though not expressly appointed as such[16] and a director of a company.[17]

The prisoner, a servant of B, a horse-dealer, was sent by him to the prosecutor to deliver a horse. The prosecutor asked the prisoner to sell a pony for him to C for £ 5 and not less. The prisoner took the pony to another person, sold it for £ 3 and absconded with the money. It was held that the pony was in the

[1] Stephen's Dig. of Crim. L., Art. 335; *Sohan Lal*, (1905) P. R. No. 50 of 1905

[2] [illegible]

[3] [illegible]

[4] [illegible]

[5] [illegible]

[6] [illegible]

[7] [illegible]

[8] [illegible]

[9] *Bawool Mamjee*, (1867) 8 W. R. (Cr.) 32.

[10] *Sohan Lal*, sup.

[11] [illegible]

[12] [illegible]

[13] [illegible]

[14] *Thomas*, (1853) 6 Cox 403.

[14] *Henry Hughes*, (1832) 1 Mood. 370; *Winnall*, sup.

[15] *William Batty*, (1842) 2 Mood. 257; [illegible]

custody of the prisoner in the character of a servant to the prosecutor, and that it was not in his possession as bailee, and that he was therefore guilty of larceny.[1]

The following persons are held not to fall under the expression 'clerk or servant.'—The driver of a coach hired for the day of the party hiring[2]; the person employed to collect the sacrament money from the communicants of the minister of church wardens[3]; a person requested to receive money in a single instance only[4]; a person employed to solicit orders for a particular person only but at liberty to apply for orders whenever he thought most convenient and to be paid by commission[5]; a person employed to get the orders for goods, and to receive payment for them, but who was at liberty to get the orders and receive the money where and when he thought proper and was to be paid by a commission on the goods sold[6]; the treasurer of a friendly society who received no payment for filling the office[7]; an accountant and a debt-collector engaged by the complainant to collect debts on terms of receiving five per cent. on the amount collected[8] and a member of a committee appointed to conduct an excursion and who received no remuneration for his services.[9]

PRACTICE.

Evidence.—Prove the same points as for s. 379; and further—

(7) That the accused was at the time a clerk, or servant and was employed in such capacity by the person in whose possession the stolen property was.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily if the property is not worth more than Rs. 50.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, being a servant [*or* clerk *or* employed in the capacity of a clerk *or* servant] of AB, committed theft by stealing property, to wit——, in the possession of the said AB, and thereby committed an offence punishable under s. 381 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.[10]

Theft after preparation made for causing death, hurt or restraint, in order to the committing of the theft.

382. Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

ILLUSTRATIONS.

(*a*) A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment, having provided this pistol

[1] *Stanbury*, (1847) 2 Cox 272.
[2] *Hoyland*, (1836) 7 C. & P. 445.
[3] *John Burton*, (1829) 1 Mood. 237.
[4] *William Nettleton*, (1830) 1 Mood. 259.
[5] *Negus*, (1873) L. R. 2 C. C. R. 34.
[6] *Bowers*, (1866) L. R. 1 C. C. R. 41. See *Bailey*, (1871) 12 Cox 56, where the accused was to get remuneration by commission but was bound to give the whole of his time and it was held that he was a servant.
[7] *Tyree*, (1869) L. R. 1 C. C. R. 177.
[8] *James Hall*, (1875) 13 Cox 49
[9] *Bren*, (1863) 9 Cox 398.
[10] (1863) 2 W. R. (Cr. L.) 15.

for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(*b*) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

COMMENT.

"The possession by a thief at the time of his committing a theft of a knife or other weapon, which, if used on a human being, might cause death or hurt, would not of itself justify a conviction under the section. There must be something to show or from which it may properly be inferred, that the offender made preparation for causing one or more of the results mentioned in the section."[1]

If hurt is actually caused when a theft is committed, the offence is punishable as robbery, and not under this section.[2] In robbery there is always injury. In offences under this section the thief is full of preparation to cause hurt, but he may not cause it. A stole some rice from a house. While carrying it away he was seized by B He thereupon dropped the rice and then stabbed B with a knife. He was convicted of causing hurt while committing robbery under s. 394. It was held that as A dropped the rice before stabbing B, he could not have caused the hurt for the purpose of carrying away the rice, and the offence was therefore not robbery, but one under this section and s. 324.[3]

PRACTICE.

Evidence.—Prove the same points as for s. 379; and further—

(7) That the accused, when committing such theft, made preparation for causing death, hurt, or restraint or fear of death, hurt, or restraint.

(8) That he did as above in order (*a*) to the committing of such theft; or (*b*) to effect his escape after having committed such theft; or (*c*) to retain property taken by such theft.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed theft of (*specify the article*) the property of AB, after having made preparation for causing death [*or* hurt *or* restraint] by (*specify the mode of preparation made*) in order to the committing of the said theft and thereby committed an offence punishable under s 382 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As to crimes on the Frontier, see the Frontier Crimes Regulation (III of 1901). As to enhanced punishment in the case of a criminal tribe, gang, or class, see the Criminal Tribes Act, 1897, s. 6. As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II.

Of Extortion.

Extortion.

383. Whoever intentionally puts any person in fear of any injury to that person, or to any other,[1] and thereby dishonestly induces the person so put in fear to

[1] Per Fox, J., in *Nga Shan Gale*, (1903) 10 Burma L. R. 87, 89.

[2] *Hushrut Sheikh*, (1866) 6 W. R. (Cr.) 85.

[3] *Nga Paing*, (1907) 4 L. B. R. 147.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable-able by Court of Session, Presidency Magistrate, or Magistrate of the first or se class.

Where it is doubtful whether property is obtained by fraudulent induce or by putting in fear of injury, the accused can be punished either for extorti for cheating.[1]

Place of trial.—See ill. (c) to s. 179, Criminal Procedure Code.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*nai the accused*) as follows :—

That you, on or about the——day of——, at——, committed extortion putting AB in fear of a certain injury, to wit——, and thereby dishonestly indu the said AB to deliver to you a certain property, to wit——; and that you the committed an offence punishable under s. 383 of the Indian Penal Code and wi my cognizance [*or* the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried Magistrate omit these words*)] on the said charge.

Punishment.—For enhanced punishment in the case of members of a tr gang, *or class, see the Criminal Tribes Act (II of 1897), s. 6.*

Putting person in fear of injury in order to commit extortion.

385. Whoever, in order to the committing of extortion, pu any person in fear, or attempts to put any pers in fear, of any injury,[1] shall be punished wi imprisonment of either description for a ter which may extend to two years, or with fine, with both.

COMMENT.

By this section a distinction between the inchoate and the consummat offence is recognised. The attempt to commit extortion has proceeded so far t wards completion that a person has been put in fear of injury, or that there h been an attempt to excite such fear ; but the offence is incomplete because the has been no delivery of property, etc. The Court must be satisfied that the putti in fear is with the intention of extorting a delivery of property.[2]

1. 'Injury'.—See s. 44, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused put the complainant in fear, or attempte to put him in fear.

(2) That the fear was regarding some injury.

(3) That the accused did as above to commit extortion.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Tr able by Court of Session, Presidency Magistrate, or Magistrate of the first c second class.

Extortion by putting a person in fear of death or grievous hurt.

386. Whoever commits extortion by putting any perso in fear of death or of grievous hurt to that perso or to any other, shall be punished with imprison ment of either description for a term which ma extend to ten years, and shall also be liable to fine

[1] *Ramnarain Chowkeedar,* (1865) 3 W. R. (Cr.) 32.

[2] M. & M. 347.

COMMENT.

If the fear caused is that of death or of grievous hurt it naturally causes great alarm. The section, therefore, provides for severe penalty in such cases.

PRACTICE.

Evidence.—Prove the same points as those required for s. 384, but prove in the point (1) that the fear was of death or of grievous hurt.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Putting person in fear of death or of grievous hurt, in order to commit extortion.

387. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt[1] to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The relation between this section and s. 386 is the same as that between s. 385 and s. 384.

1. **'In fear of death or of grievous hurt'.**—It is not necessary that the fear of death or of grievous hurt should be instantaneous.[1]

See s. 46 as to the meaning of 'death' and s. 320 as to 'grievous hurt.'

The feigning of an attempt to commit suicide in order to extort money is an offence under this section.[2]

PRACTICE.

Evidence.—Prove that the accused put or attempted to put the complainant in fear of death or of grievous hurt to him or to some other person in order to commit extortion.[3]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Separate convictions.—Separate convictions cannot be passed under both s. 365 and this section.[4]

Charge.—See s. 385. For the expression "in fear of injury" substitute "in fear of death or grievous hurt."

Punishment.—As to crimes on the Frontier, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*); 12 (2). As to Burma, see the Burma Laws Act (XIII of 1898), s. 4 (3) (*b*) and Sch. II.

Extortion by threat of accusation of an offence punishable with death or transportation, etc.

388. Whoever commits extortion by putting any person in fear of an accusation[1] against that person or any other, of having committed or attempted to commit any offence[2] punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and

[1] *Tun Baw*, (1912) 6 L. B. R. 100, F. B.
[2] *Gregory*, (1866) 1 Ind. Jur. N. S. 423.
[3] *Vide* s. 384, *sup.*
[4] *Po Lan*, (1912) 6 L. B. R. 160.

shall also be liable to fine; and, if the offence be one punishable under section 377 of this Code, may be punished with transportation for life.

COMMENT.

The aggravating circumstance under this section is the threat of an accusation of an offence punishable with death, transportation for life or with imprisonment for ten years. If the accusation is of unnatural offence (s. 377) then the penalty provided is severer.

1. *'Fear of an accusation'.*—It is immaterial whether the person against whom the accusation is threatened be innocent or guilty if the prisoner intended to extort money.[1]

2. *'Offence'.*—The word 'offence' means a thing punishable under the Code or any special or local law (s. 40.)

PRACTICE.

Evidence.—Prove the same points as those required for s. 384, showing that the fear was occasioned by a threat of an accusation of having committed, or having attempted to commit, or induced some one else to commit, an offence punishable with death, or with transportation for life, or ten years' imprisonment, or unnatural offence (s. 377).

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

CHARGE.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed extortion by putting AB in fear [illegible] (*or* attempted to c[illegible]) [illegible] for life, or with imprisonment, etc.], to [illegible] *offence*), and thereby dishonestly induc[illegible] *the thing or property*); and that you [illegible] under s. 388 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court.)

And I hereby direct that you be tried by the said Court on the said charge.[2]

Putting person in fear of accusation of offence in order to commit extortion.

389. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed or attempted to commit an offence punishable with death or with transportation for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be punishable under section 377 of this Code, may be punished with transportation for life.

COMMENT.

This section bears the same relation to s. 388 as s. 385 bears to s. 384.

1. *'Offence'.*—The word 'offence' here denotes a thing punishable under the Code or any special or local law (s. 40).

[1] *James Gardner*, (1824) 1 C. & P. 479; *Richards*, (1868) 11 Cox 43.

[2] *Vide* (1866) 6 W. R. (Cr. L.) 4.

PRACTICE.

Evidence.—Prove (1) that the accused put, or attempted to put, a person in fear.

(2) That the fear was of an accusation of an offence, or an attempt to commit it.

(3) That such offence was punishable with death, transportation for life, or imprisonment for at least ten years.

(4) That he did so in order to commit extortion (see s. 384).

For the last provision, prove further that the accusation was of an unnatural offence (s. 377).

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—See s. 385.

Punishment.—As to crimes on the Frontier, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2). As to Burma, see the Burma Laws Act (XIII of 1898), s. 4 (3) (*b*) and Sch. II.

Of Robbery and Dacoity.

Robbery.

390. In all robbery there is either theft or extortion.

When theft is robbery.

Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away[1] or attempting to carry away property obtained by the theft, the offender, for that end,[2] voluntarily causes[3] or attempts to cause to any person[4] death or hurt or wrongful restraint, or fear of instant death[5] or of instant hurt,[6] or of instant wrongful restraint.[7]

When extortion is robbery.

Extortion is robbery if the offender, at the time of committing the extortion, is in the presence[8] of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person,[9] and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

ILLUSTRATIONS.

(*a*) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(*b*) A meets Z on the high-road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(*c*) A meets Z and Z's child on the high-road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of

instant hurt to the child who is there present. A has therefore committed robbery on Z.

(*d*) A obtains property from Z by saying: "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees." This is extortion, and punishable as such: but it is not robbery, unless Z is put in fear of the instant death of his child.

COMMENT.

Robbery is a special and aggravated form of either theft or extortion.

The authors of the Code say: "In one single class of cases, theft and extortion are in practice confounded together so inextricably, that no judge, however sagacious, could discriminate between them. This class of cases therefore has, in all systems of jurisprudence. .,been treated as a perfectly distinct class...We have therefore made robbery a separate crime.

"There can be no case of robbery which does not fall within the definition either of theft or of extortion; but in practice it will perpetually be matter of doubt whether a particular act of robbery was a theft or an extortion. A large proportion of robberies will be half theft, half extortion. A seizes Z, threatens to murder him, unless he delivers all his property, and begins to pull off Z's ornaments. Z in terror begs that A will take all he has, and spare his life, assists in taking off his ornaments, and delivers them to A. Here, such ornaments as A took without Z's consent are taken by theft. Those which Z delivered up from fear of death are acquired by extortion. It is by no means improbable that Z's right-arm bracelet may have been obtained by theft, and left-arm bracelet by extortion; that the rupees in Z's girdle may have been obtained by theft, and those in his turban by extortion. Probably in nine-tenths of the robberies which are committed, something like this actually takes place, and it is probable that a few minutes later neither the robber nor the person robbed would be able to recollect in what proportions theft and extortion were mixed in the crime; nor is it at all necessary for the ends of justice that this should be ascertained. For though, in general, the consent of a sufferer is a circumstance which very materially modifies the character of the offence, and which ought, therefore, to be made known to the Courts, yet the consent which a person gives to the taking of his property by a ruffian who holds a pistol to his breast is a circumstance altogether immaterial".[1]

The chief distinguishing element in robbery is the presence of imminent fear or violence.

The Explanation and illustrations (*c*) and (*d*) mark the distinction between simple extortion and extortion which is robbery.

1. **'Carrying away.'**—Even if death, hurt, or wrongful restraint, or fear of any of these, is caused after committing the theft in order to carry away the property obtained by theft, this offence would be committed. According to English law the force which converts theft into robbery must be used before or at the time of taking, and must be of such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen. Thus, if a man walking after a woman in the street were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.[2]

2. **'For that end.'**—Death, hurt, or wrongful restraint, must be caused in committing theft, or in carrying away property obtained by theft.[3] The use of violence will not convert the offence of theft into robbery unless the violence be

[1] Note N, p. 162.
[2] *Thomas Gnosil*, (1824) 1 C. & P. 304.
[3] *Rahman Khan*, (1865) 3 W. R. (Cr.) 14; *Kalio Kerio*, (1872) Cr. R., 27th June 1872, Unrep. Cr. C. 65.

committed for one of the ends specified in this section. Where the accused abandoned the property obtained by theft and threw stones at his pursuer to deter him from continuing the pursuit, it was held that the accused was guilty of theft and not of robbery[1]. The essence of the offence consists in the offender voluntarily causing or attempting to cause any person death or hurt, etc., for the purpose of committing theft or carrying away or attempting to carry away properties obtained by theft.

Hurt independent of theft does not amount to robbery.—Where hurt or fear of instant hurt was caused by five or more persons for the purpose of dispossessing persons already in possession of some premises and had no relation to the commission of theft, although the theft might have been committed at the same time as a perfectly independent act, it was held that this did not amount to robbery[2].

Where a child of four years of age was stripped of its ornaments and when the child threatened to tell his mother it was beaten, it was held that the offence committed was one of theft and not robbery[3].

A had set wires in which game was caught. B, a game-keeper, found them and took the game and wires for the use of the lord of the manor. A demanded them with menaces, and B gave them up. The jury found that A acted under a *bona fide* impression that the game and wires were his property. It was held that A had not committed robbery[4].

3. **'Voluntarily causes.'**—These words denote that an accidental infliction of injury by a thief will not covert his offence into robbery. Thus, where a person while cutting a string, by which a basket was tied, with intent to steal it, accidentally cut the wrist of the owner, who at the moment tried to seize and keep the basket, and ran away with it, it was held that the offence committed was theft and not robbery[5]. But, where, in committing theft, there is indubitably an intention, seconded by an attempt, to cause hurt, the offence is robbery[6].

'Voluntarily'—See s 39, *supra*.

4. **'To any person.'**—The person need not be the one from whose possession the thing is taken.

5. **'Death.'**—See s 46, *supra*.

6. **'Hurt.'**—See s. 319, *supra*. Where A and B were stealing mangoes from a tree, C surprised them, on which A knocked him down senseless with a stick[7]; and where a person, in snatching a nose-ring, wounded the woman in the nostril, and caused her blood to flow[8], this offence was held to have been committed.

7. **'Wrongful restraint.'**—See s. 339, *supra*. The accused stopped the complainant's boat in the stream representing themselves to be persons in authority and saying that the boat was required by a Magistrate to carry treasure, and then they plundered it. It was held that they were guilty of robbery[9]. If a bailiff handcuff a prisoner under pretence of carrying him to prison with greater safety, and by means of this violence extort money, he is guilty of robbery[10].

Where a police-officer obtained Rs. 7 from two prisoners on a promise of releasing them and threatened them that unless they gave him Rs. 200, he would confine them in the lock-up and keep them there for months while a charge of bribery against them, in respect of Rs. 7, was being investigated, and on his threat he was allowed to take certain ornaments, it was held that the offence committed was that of robbery[11].

[1] (1865) 1 Weir 442; *Kalio Kerio*, (1872) Unrep. Cr C. 65; Cr. R., 27th June, 1872.
[2] *Ôtaruddin Manjhi* v. *Kafiluddi Manjhi*, (1900) 5 C. W. N. 372.
[3] *Padam Sing*, (1892) 6 C. P. L. R. (Cr.) 36.
[4] *Hall*, (1828) 3 C. & P. 409.
[5] *Edwards*, (1843) 1 Cox 32.
[6] *Teekai Bheer*, (1866) 5 W. R. (Cr.) 95.
[7] *Hushrut Sheikh*, (1866) 6 W. R. (Cr.) 85.
[8] *Teekai Bheer*, sup.
[9] *Dulelooden Sheik*, (1866) 5 W. R. (Cr.) 19.
[10] *Samuel Gascoigne*, (1783) 1 Leach 230.
[11] *Basant Kai*, (1896) P. R. No. 12 of 1896.

8. 'Presence.'—The Explanation says that the offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

9. 'Fear of instant death,...to some other person.'—Imminent fear of death, hurt, etc., is necessary to bring the section into operation. If a man holds another's child over a river and threatens to throw it in unless the other gives him money, this will amount to robbery[1]. The principle of robbery is violence; where the money is delivered through fear, that is constructive violence.

CASES:

Where the accused forced an earring from the ear of a lady[2]; where the accused tore some hair from a lady's head in snatching a diamond pin from it[3]; where the accused took goods from the prosecutrix of the value of eight shillings, and by threats compelled her to take thirteen pence as payment for them[4]; where the accused, while the complainant was proceeding in a street, caught hold of the seals and chain of the complainant's gold watch and pulled the watch out of his *fob* and by giving two or three jerks broke the steel chain with which it was attached and then made off with it[5]; and where a person ran up against another for the purpose of diverting his attention while he picked his pocket[6], it was held that the force was sufficient to constitute the offence of robbery.

Dacoity.

391. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity."

COMMENT.

Dacoity is robbery committed by five or more persons. Abettors who are present and aiding when the crime is committed are counted in the number.

The essentials of the offence of dacoity are that the theft should be perpetrated by means either of actual violence or of threatened violence. The threatened violence may be implied in the conduct and character of the mob. It is not necessary that the force or menace should be displayed by any overt act. It cannot avail the accused to say, or reduce the gravity of their offence, that no actual hurt was caused as no one dared to resist the overwhelming show of force, which was sufficient to terrify, and did in fact terrify, those whose business it was to protect the property[7].

The authors of the Code say: "We have provided punishment of exemplary severity for that atrocious crime which is designated in the Regulations of Bengal and Madras by the name of dacoity. This name we have thought it convenient to retain for the purpose of denoting, not only actual gang-robbery, but the attempting to rob when such an attempt is made or aided by a gang."[8] The popular notion of dacoity was that of an outrage committed, at the very dead of night, by a band of ruffians, whose heads were covered and whose faces were disguised by chalk or some other mixture, and who had no private enmity with the peaceable and unfortunate house-holder, whom some one of the gang had previously, by secret enquiries, marked out for a prey.

[1] 2 East P. C. 735, 736.
[2] *James Lapier*, (1784) 1 Leach 320.
[3] *Robert Moore*, (1784) 1 Leach 335.
[4] *Simons*, (1773) 2 East P. C. 712.
[5] *George Mason*, (1820) R. & R. 419.
[6] *Anon.*, (1825) 1 Lewin 300.
[7] *Chandra Krishna*, (1908) 10 Bom. L. R. 632.
[8] Note N., p. 163.

Under this section the number of persons committing robbery must be five or more. Where the evidence showed that there were six robbers but at the trial three were acquitted, it was held that a conviction under this section was not sustainable, and that the accused should be convicted under s. 392[1].

Dacoity is either theft or extortion.—If no property is carried off, there is no dacoity but an offence under s. 402.[2] Where several Hindus acting in concert forcibly removed an ox and two cows from the possession of a Mahomedan, not [illegible] selves or wrongful loss to the owner [illegible] the killing of the cows, it was held [illegible] but only of riot[3]. But in a subsequent case the principle of this decision has been held to be limited to the parti- [illegible] of subsequently restoring the cattle to the Mahomedans, it was held that they were guilty of dacoity. The Court said: "The Indian Penal Code is a statute of the Legislature applicable to Muhammadans, Hindus, Christians and all other sects alike. It is necessary in every civilized state that in order to protect the lives and property of the members of the community penal laws should exist and be enforced, and should be enforced no matter whether the person who commits an offence against them is a Christian, or a Muhammadan, or a Hindu or member of any other religious denomination. Penal laws are made for the protection of all classes alike, and they do not recognize any exception in the case of any particular denomination. A theft or a dacoity would not be any the less a theft or a dacoity if committed by members of one denomination upon the members of another; for example, no Christian or Muhammadan could plead in a Court of justice that he was not liable to be punished for theft because he acted under the incentive of some religious motive, if the facts showed that theft had in reality been committed. There must, in all states in which law and order are to abide, be penal laws equally enforceable against every denomination; and it is further necessary, unless we are to return to barbarous times, that persons who choose to wage a species of civil war on their neighbours should be adequately punished, not only as a punishment to themselves, but as a warning to det- [illegible] A cow is an animal which in this count [illegible] property and over which he is entitled [illegible] and so long as that Muhammadan in [illegible] Indian Penal [illegible] Similarly the [illegible] the exercise of his rights of property. If a Muhammadan, a Hindu or a Christian or a member of any other denomination commits an offence against the Penal Code, the law can be put in force against him by the process of the Criminal Code and by that process only. If he does not commit an offence in exercising his rights of property the law does not allow any one to interfere with him in the exercise of those rights, and people who take upon themselves either to take the law into their own hands, or to override or exceed the law, must expect the punishment which the law awards for criminal acts"[4].

Good faith.—When all that is done under a claim of right in good faith entertained by the accused, however erroneously, the charge cannot be sustained.[5]

[1] *Pidda Enumanduçaru*, (1910) 7 M. L. T. 340. See *Ikram-ud-din*, (1917) 39 All. 348.
[2] (1868) 9 W. R. (Cr. L.) 5.
[3] *Ragunath Rai*, (1892) 15 All. 22.
[4] *Ram Baran*, (1893) 15 All. 299, 301.
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Where the accused forced an earring from the ear of a lady[2]; where the accused tore some hair from a lady's head in snatching a diamond pin from it[3]; where the accused took goods from the prosecutrix of the value of eight shillings, and by threats compelled her to take thirteen pence as payment for them[4]; where the accused, while the complainant was proceeding in a street, caught hold of the seals and chain of the complainant's gold watch and pulled the watch out of his *fob* and by giving two or three jerks broke the steel chain with which it was attached and then made off with it[5]; and where a person ran up against another for the purpose of diverting his attention while he picked his pocket[6], it was held that the force was sufficient to constitute the offence of robbery.

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[3] *Bagunath Rai*, (1892) 15 All. 22.

[4] *Ram Baran*, (1893) 15 All. 299, 301.

[5] *Karaka Nachiar*, (1866) 3 M. H. C. 254.

Abetment.—Knowing of a design to commit a dacoity, and voluntarily concealing the existence of that design, with the knowledge that such concealment will facilitate the commission of dacoity, does not amount to an abetment of the dacoity.[1]

Fear of instant death, or of hurt or of wrongful restraint—Imminent fear of death, hurt, etc., will be sufficient to bring the section into operation. Where several persons attacked a house and took away property, but the inmates obtaining information beforehand had fled before the attack, it was held that the fact of the inmates running away was sufficient proof of the fear of hurt or of wrongful restraint and the accused were guilty of dacoity.[2]

Punishment for robbery.

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

COMMENT.

This section specifies the punishment which can be inflicted in case of simple robbery. The next section punishes attempt to commit robbery.

If hurt is caused in committing robbery, s. 394 applies; if there is an attempt to cause death or grievous gurt, s. 397 applies; and if the offender is armed with a deadly weapon, s. 398 applies.

PRACTICE.

Evidence.—Prove (1) that the accused committed theft (*vide* s. 379 for the points to be proved).

(2) That he caused or attempted to cause to some person (*a*) death, hurt, or wrongful restraint; or (*b*) fear of instant death, of instant hurt, or of instant wrongful restraint.

(3) That he did as above (*a*) in committing such theft; or (*b*) in order to commit such theft; or (*c*) in carrying away, or attempting to carry away, the property obtained by such theft.

(4) That he acted as in (2) voluntarily.

Or Prove—

(1) That the accused committed extortion (*vide* ss. 384 for the points to be proved).

(2) That he was, at the time of committing it, in the presence of the person so put in fear.

(3) That he committed it by putting that person or some other person in fear of instant death, or of instant hurt, or of instant wrongful restraint.

(4) That he thereby induced the person so put in fear to deliver up then and there the thing extorted.

As an example of relevant facts, see ill. (*a*) to s. 7, and ills. (*f*) and (*k*) to s. 8 of the Indian Evidence Act.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

[1] *Jhagroo*, (1865) 4 W. R. (Cr.) 2.

[2] *Kisoree Pater*, (1867) 7 W. R. (Cr.) 25, (33).

[illegible] may be [illegible] three sep[illegible]ent houses, they must be tried separately on each of the three charges.[2]

It is not open to a Magistrate to split up a graver offence into a number of smaller offences which, when combined, constitute that offence, in order to give himself jurisdiction.[3]

Punishment.—In robbery, the legislature has provided three different degrees of punishment which may be inflicted. Under s. 392, the punishment may be extended to fourteen years' imprisonment. It is not permissible to award a sentence of fine only without imprisonment for the offence of robbery.[4] Under s. 394, it may be extended to transportation for life, and under s. 397, it cannot be less than seven years. Section 392 is the general section, and the two other sections specify the same offence under aggravated circumstances. See the Whipping Act (IV of 1909), s. 4. A sentence of whipping may be imposed where, in the commission of a robbery, hurt is caused. As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6 and 11 (3) (*d*) and 12 (2). As to members of a criminal tribe or gang, see the Criminal Tribes Act, 1897, s. 6, Schedule.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused,*) as follows :—

That you, on or about the——day of——, at——, robbed (*state the name*) and, thereby committed an offence punishable under s. 392 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.[5]

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Attempt to commit robbery.

COMMENT.

This is a specific section for punishing attempt to commit robbery. A present intent to rob combined with an act in execution of such intention which falls short of the offence intended, is an attempt to rob.

PRACTICE.

Evidence.—Prove that the accused attempted to commit robbery.

As to what constitutes an attempt, see s. 511, *infra*.

As to the points requiring to be proved for robbery, see s. 392.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*), Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11, (3) (*d*), and 12 (2).

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused person*) as follows :—

That you, on or about the——day of——at——, did an act, to wit——, and which amounted to an attempt to rob AB and thereby committed an offence

[1] Illustration (*m*), s. 235, Criminal Procedure Code.

[2] *Ituaree Dome,* (1866) 6 W. R. (Cr.) 83.

[3] *Otaruddi Manjhi* v. *Kafiluddi Manjhi,* (1900) 5 C. W. N. 372.

[4] *Badri Prasad,* (1922) 44 All. 538.

[5] Criminal Procedure Code, Sch. V, XXVIII (9).

punishable under s. 393 of the Indian Penal Code and within my cognizance (or the cognizance of the Court of Session, or the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Voluntarily causing hurt in committing robbery.

394. If any person, in committing or in attempting to commit robbery, voluntarily[1] causes hurt,[2] such person, and any other person jointly concerned[3] in committing or attempting to commit such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The offence of voluntarily causing hurt of either description in committing, or attempting to commit, robbery, is punishable under this section. Section 397 is merely a rider to this section with reference to cases in which the hurt committed is grievous.[1]

1. **'Voluntarily.'**—See s. 39, *supra*.

2. **'Hurt.'**—See s. 319, *supra*.

3. **'Jointly concerned.'**—The guilty act of one is imputed to all who are joint with him, provided the act is done in committing the offence of robbery. Violence or hurt entirely unconnected with that offence or used to gratify a personal spite or passion is not contemplated.

This section, and not s. 397, will apply to the case of a robber who does not himself cause grievous hurt or use any deadly weapon.[2]

PRACTICE.

Evidence.—Prove (1) that the accused, or someone jointly concerned with him, committed or attempted to commit robbery.[3]

(2) That the accused, or such other person, voluntarily caused hurt[4] in doing so.

[illegible]—Not compoundable—[illegible] Magistrate of the first class. [illegible]arily includes the offence punishable under s.392, an accused person who is convicted under both these sections can legally be punished only under this section and in such a case it would be sufficient to convict him under this section alone.[5] But see ill. (*m*) to s. 235 of the Code of Criminal Procedure which says: "A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under ss. 323, 392 and 394 of the Indian Penal Code."

Separate convictions are, according to this illustration, justifiable.

In cases where the offender attempts to cause hurt, or causes wrongful restraint, or fear of death, hu[illegible] against him [illegible] when the under this section. [illegible] rt, then, fact which transm[illegible] while s. 392 still applies, in so much that a charge under that section should be framed, a Magistrate is not justified in disregarding the application of this section: a charge of voluntarily causing hurt in committing robbery should be added under

[1] *Mokna alias Kohara*, (1901) P. R. No. 16 of 1901.

[2] *Arunachella Thevan*, (1911) 22 M. L. J. 186.

[3] *Vide* s. 392, sup.

[4] *Vide* s. 323, sup.

[5] *Durga*, (1890) Cr. R. No. 31 of 1890, Unrep. Cr. C. 511; *Mootlee Kora*, (1895) 2 W. R. (Cr.) 1.

that section. That section imposes a specific penalty for a specified act ; and if there is *prima facie* ground for believing that the accused has committed that act, he should be charged with it.[1]

Where hurt is caused in the commission of a theft, the causing of hurt changes the theft into robbery, and the charge should be laid under this section for causing hurt in the commission of robbery.[2]

[illegible]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed [*or* attempted to commit (*or* were jointly with XY concerned in committing)] (*or* attempting to commit) robbery of the property of AB, and that as such you (*or* XY) voluntarily caused hurt to AB (*or*——), and that you thereby committed an offence punishable under s. 394 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.[4]

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*) and 12 (2).

Punishment for dacoity.

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section prescribes punishment for simple dacoity ; s. 396, for dacoity accompanied with murder ; s. 397, for dacoity with attempt to cause death or grievous hurt ; s. 398, for attempt to commit dacoity when the offender is armed with a deadly weapon ; s. 399, for making preparation to commit a dacoity ; s. 400, for belonging to a gang of dacoits ; and s. 402, for assembling for the purpose of committing dacoity.

PRACTICE.

Evidence.—Prove (1) that robbery was committed or attempted.[5]

(2) That five or more persons committed or attempted to commit robbery ; or that the whole number of persons committing or attempting to commit robbery was five or more.[6]

(3) That such persons were acting conjointly.

As to the nature of evidence requisite to be taken in a case of dacoity, see the cases of *Modhoo Manjee,*[7] *Ram Sagor*[8] and *Kamal Fukeer.*[9]

Presumption.—When a prisoner is apprehended eight days after a dacoity with part of the plunder in his possession, there is a good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he ought to be charged in the alternative form.[10] When persons are found,

[1] *Nga Po Lon,* (1902) 1 L. B. R. 232.
[2] (1865) 2 W. R. (Cr. L.) 6.
[3] *Jobania,* (1889) Unrep. Cr. C. 476, Cr. R. No. 36 of 1889. But see *Surji Doss,* (1888) 1 Weir 449.
[4] 2 W. R. (Cr. L.) 6.
[5] *Vide* s. 392, sup.
[6] [illegible]
[7] [illegible]
[8] [illegible]
[9] [illegible]
[10] [illegible]) 66.

within six hours of the commission of a dacoity, with portions of the plundered property in their possession, the presumption of law is, that they are participators in the dacoity.[1]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

A person convicted of dacoity under s. 395 cannot be convicted also of dishonestly receiving stolen property under s. 411, or of receiving property transferred by commission of dacoity under s. 412, when there is no evidence of the commission of more than one offence.[2]

Direction to jury.—In a case of dacoity the Judge should direct the jury to convict only if they find that all the prisoners had the intention of causing wrongful gain or loss to the prosecutor.[3] The jury must be distinctly instructed that unless they are satisfied that there were five or more persons committing the robbery or that the persons present and aiding in the commission of the robbery numbered five or more persons, there could be no dacoity.[4]

Attempt.—Section 511 of the Indian Penal Code does not apply to a case of dacoity. An attempt to commit dacoity should be charged under this section as the definition of 'dacoity' includes attempt.[5]

Abetment.—An abettor of dacoity is punishable under this section and s. 109 without any reference to s. 397 which is applicable only to persons actually committing a dacoity in which one of the acts specified in it is done.[6]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, committed dacoity, an offence punishable under s. 395 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.[7]

Punishment.—A sentence of fine only is illegal.[8] Sentence of transportation under this section must be either for life or for a period not exceeding ten years if given in lieu of imprisonment.[9]

Where a person, notwithstanding a previous conviction of dacoity and consequent punishment and after having a *locus penitentiæ* afforded him, again, after completing a previous term of sentence, commits the same offence, he shall be liable to whipping in addition to any sentence of imprisonment awarded. He has, that is to say, been undeterred by imprisonment, and therefore may be punished on the second occasion with stripes in addition.[10]

As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) and (*d*) 12 (2).

Dacoity with murder.

396. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity,[1] every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

[1] *Cassy Mul*, (1863) 3 W. R. (Cr.) 10.
[2] *Shahabut Sheikh*, (1870) 13 W. R. (Cr.) 42.
[3] *Binomally Ghose*, (1864) W. R. (Gap. No.) Cr. 8.
[4] *Mookhands*, (1903) 1 Weir 446.
[5] *Koonee*, (1867) 7 W. R. (Cr.) 48.
[6] *Chatar Singh*, (1901) P. R. No. 15 of 1901.
[7] Criminal Procedure Code, Sch. v, xxviii (1) (10).
[8] *Bhoja*, (1866) 6 W. R. (Cr.) 54.
[9] *Arura*, (1903) 1 Cr. L. J. R. 89, P. R. No 31 of 1903.
[10] *Udai Patnaik*, (1869) 4 Beng. L. R. (A. Cr. J.) 5; *La Saing*, (1907) 14 Burma L. R. 156.

COMMENT.

Object.—In providing this section the object of the legislature seems to be that the extreme penalty of death may be inflicted on a person convicted of taking part in a dacoity in the course of which a murder is committed, even though there is nothing to show that he himself committed the murder or that he abetted it.

Ingredients.—The first essential of an offence under this section is that the dacoity is the joint act of the persons concerned; and the second essential of the offence is that the murder is committed in the course of the commission of the dacoity in question.[1]

1. **'Conjointly committing dacoity, commits murder, etc.'**—The Allahabad High Court once ruled that in order to support a conviction under this section it was necessary to establish, not only that the accused had committed dacoity conjointly with others, but it must also be shown that the murder had been committed in his presence.[2] But it has subsequently held that when, in the commission of a dacoity, a murder is committed, it matters not whether the particular dacoit was inside the house where the dacoity is committed, or outside the house (as in the above case of *Umrao Singh*), or whether the murder was committed inside or [illegible] s the murder was committed in the commission of [illegible] been followed by the Bombay High Court[4] and [illegible] Punjab.[5] If a dacoit in the progress of, and in pursuance of, the commission of a dacoity, commits a murder, all of his companions, who are participating in the commission of the same dacoity, may be convicted under this section, although they may have no participation in the murder beyond the fact of participation in dacoity.[6] The common object of an [illegible] and there was a general purpose to resist all [illegible] point of death. This unlawful assembly did [illegible] while retreating on the advent of villagers in superior force, one of its members shot and killed one of the villagers. It was held that as the murder was committed in effecting a safe retreat it should be ascertained whether the retreat was so separated by time or space from the offence which formed the common object of the assembly as not to form part of it; but as there was no such separation in that particular case and the retreat was an essential part of the common criminal purpose, it was a continuation of the actual [illegible]

Where, after the commission of a dacoity, in which the dacoits, being interrupted by villagers, did not get any plunder, the dacoits while attempting to escape, and one or more of them in order to facilitate the escape, attacked and killed one of the pursuing party, it was held that this section did not apply, but only the person or persons actually taking part in the killing were liable therefor.[9] This case does not lay down sound law in view of the above-mentioned decisions.

If a person concerned in a dacoity unintentionally commits murder he is liable to punishment under this section, but he cannot be separately convicted of murder under s. 302 and of dacoity under s. 395.[10]

PRACTICE.

Evidence.—Prove (1) the commission of dacoity.[11]

[1] *Mathura Thakur*, (1901) 6 C. W. N. 72.
[2] *Umrao Singh*, (1894) 16 All. 437.
[3] *Teja*, (1895) 17 All. 86.
[4] *Girya Laxmappa*, (1904) 6 Bom. L. R. 248.
[5] *Chittu*, (1900) P. R. No. 4 of 1900.
[6] *Ibid.*
[7] *Sakharam Khandu*, (1900) 2 Bom. L. R. 325; *Sitaram*, (1925) 2 O. W. N. 550.
[8] *Vitti Thevan* v. *Vitti Thevan*, (1906) 17 M. L. [illegible]
[9] [illegible]
[10] [illegible] 30.
[11] [illegible] Bujh.

If this was not the object of the accused there would be no conviction under this section.[1]

(2) That one of the accused committed murder.[2]

(3) That the murder was committed during the commission of dacoity.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

If, when a dacoity is planned, murder is contemplated from the first and is committed in the dacoity, any person, who joins in the conspiracy, is liable under s. 302 read with s. 109 to transportation for life, even if he does not eventually join in the commission of the dacoity with the other conspirators.[3]

"If an accused takes part in any dacoity accompanied with murder, the proper section of the Penal Code to apply to him is s. 396 in addition to s. 400, and he is liable to be sentenced to death, or transportation for life, or ten years' rigorous imprisonment and fine. If he has not rendered himself liable to this extent, a distinction must still be made between those dacoits who, though belonging to an organized band, have only recently joined it, and have perhaps not taken part in more than one or two dacoities at the utmost, and those who have belonged to a gang for years and have taken part in many dacoities; between those who have belonged to the worst gangs, who go about armed defying the authorities and inflicting grievous hurt upon the people, and those smaller and less dangerous gangs who dacoit only because driven to do so by want and starvation, and because they are afraid to surrender, and who inflict no injury upon the people beyond that of depriving them of a few fowls and baskets of paddy, the food they are in search of."[4]

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed dacoity, and that, in the commission of such dacoity, murder was committed by one of your number, and that you thereby committed an offence punishable under s. 396 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried by the said Court on the said charge.[5]

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*b*) and 12 (2).

Robbery or dacoity, with attempt to cause death or grievous hurt.

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt[1] to any person,[2] or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

COMMENT.

Object.—This section is merely a rider to s. 394. It does not create any substantive offence. It is complementary to ss. 392 and 395 which create the substantive offences. It merely regulates the punishment already provided for dacoity, by fixing a minimum term of imprisonment when its commission has been attended with certain aggravating circumstances, *viz.*, (1) use of a deadly weapon, or (2) causing of grievous hurt, or (3) attempting to cause death or grievous hurt. The

[1] *Mathura Thakur*, (1901) 6 C. W. N. 72; *Arshed Molla*, (1919) 29 C. L. J. 325.

[2] *Vide*, s. 300, [illegible] *ultra* [illegible] 10 C. P. L. R. (Cr.) 20.

[4] Per Ward, J. C., in *Nga Lu Nge Gyi*, (1889) S. J. L. B. 441, 442.

[5] Vide *Muttirulappan*, (1878) 1 Weir 417

provisions of this section are obligatory as "the imprisonment with which such offender shall be punished shall not be less than seven years."[1]

1. **'The offender uses any deadly weapon, or causes grievous hurt.'**—A very wide interpretation was put upon the expression 'uses a deadly weapon' by the former Chief Court of Lower Burma. It held that this expression must include the carrying of a weapon for the purpose of overawing the person robbed. "It may be argued," observed Twomey, J., "that to 'use' a stabbing weapon is to stab some person with it, to 'use' a cutting weapon is to cut some person with it, and to 'use' a gun is to shoot at some person with it. According to this narrow interpretation, brandishing a dagger or levelling a gun at a man might be regarded as merely *threatening* to use or *preparing* to use it, not as actually using it. But it is not clear that the word 'uses' in s. 397 should be interpreted with such strictness. The very next s. 398 imposes a minimum punishment of seven years' imprisonment on persons convicted of merely carrying a deadly weapon when attempting to rob. It seems probable that the Legislature intended to impose the same minimum where the robbery is actually completed. I am inclined to think therefore that the word 'uses' in s. 397 should be construed in a wide sense so as to include not merely cutting, stabbing, shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed. It is no doubt at first sight remarkable that wider language is employed in s. 397 ('uses any deadly weapon') than in s. 398 ('is armed with any deadly weapon'). The explanation is apparently that in attempted robberies it is often difficult to prove any 'use' of the deadly weapon except the mere fact that the accused carried it, whereas in a case of completed robbery it generally happens that the accused not only carries the deadly weapon but also overawes the person robbed or even stabs, cuts or shoots at him. The wider view of s. 397 is supported by a passage in Maxwell's Interpretation of Statutes[2].—'If he [a man] walks with a gun with intent to kill game, he 'uses' the gun for that purpose without firing, within the statute which makes using a gun with that intent penal.' English and American authorities are given for this interpretation. . If the accused had merely attempted to take the complainant's property by overawing him with a dagger but (owing to infirmity of purpose on his own part or resistance on the part of the complainant) had not carried out his design, he would undoubtedly be liable to the minimum punishment provided in s. 398. The Legislature cannot have intended that if the criminal goes a step farther and actually accomplishes his purpose he should thereby establish a claim to more lenient treatment. It cannot have been intended that a criminal should be urged to complete his criminal purpose by the reflection that if he stops short at an attempt he must get seven years, while if he completes the offence he may get off with imprisonment for two or three years."[3]

According to the Bombay,[4] Madras,[5] and Calcutta High Courts[6] the liability to an enhanced punishment is limited to the offender who actually causes grievous hurt or uses a deadly weapon, and not to the case of persons associated with such offender in the commission of the offence. The words "offender" and "*such* offender" refer only to the persons who are proved to have actually 'used' deadly weapons and not to the others who in combination with such persons have committed robbery or dacoity. Section 34 has no application in the construction of this section though it may be read with ss. 392 and 395 to determine the substantive offence which is created.[7] In one case the Allahabad High Court held that the words "such offender" include any person taking part in the dacoity

[1] (1867) 7 W. R. (Cr L.) 2
[2] 6th Edition, p 492.
[3] *Nya I*, (1911) 6 L. B. R 41.
[4] *Deoji Keru*, (1872) Unrep. Cr. C 65, Cr. R., 1st August 1872 ; *Nga Sein*, (1905) 3 L. B. R. 121 ; *Po Win*, (1913) 7 L. B. R. 26 ; *Po Myaing*, (1920) 10 L. B. R 269 ; *Bhagwant*, (1900) 3 O. C. 263 ; *Bhura Ahir*, (1903) 16 C. P. L. R. 97.
[5] *Arunachella Thevan*, (1911) 22 M. L. J 186 ; *Komali Viswasam*, (1886) 1 Weir 450
[6] *Ali Mirza*, (1923) 51 Cal. 265
[7] *Ibid.*

who, though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of s. 34.[1] But, subsequently, in the same year, another Division Bench of the same High Court dissented from this view and laid down that the punishment provided for by this section applies only to those persons taking part in a dacoity who themselves used deadly weapons or themselves caused grievous hurt. It does not apply to such persons taking part in a dacoity as may be liable for grievous hurt, committed by one of the party only in virtue of s. 34. This latter decision has been subsequently followed by the same High Court in preference to the former.[3] The former Chief Court of the Punjab[4] adopted the view expressed in *Mahabir Tiwari's case.*[5] The Lahore High Court in one case[6] has followed in the footsteps of the former Chief Court of the Punjab and in another case[7] has given up the old path and adopted the later view of the Allahabad High Court.

'Deadly weapon.'—See s. 448, *infra.* A *lathi* is not a deadly weapon within the meaning of this section.[8]

'Grievous hurt'.—See s 319, *supra.*

'Person'.—See s. 11, *supra.*

Violence should have been used in committing robbery or dacoity.—The accused fractured one of the arms of a woman by striking one or two blows with a stick, and thereby causing her to fall to the ground, his object being to steal the pony on which she was riding. He then attempted to mount and ride off on the pony but was prevented from doing so by the girth of the pony's saddle breaking. It was held that this section was applicable.[9]

The accused and another attacked a man and beat him with clubs. There was no evidence as to which of them it was who struck the blow which broke his finger. It was held that the accused were not liable to enhanced punishment under this section.[10]

Where several persons were found endeavouring to break into a house, and some of them, being armed, used violence, but only in attempting to escape being arrested, it was held that they could not properly be convicted under this section read with s. 511.[11]

PRACTICE.

Evidence.—Prove (1) the commission of robbery;[12] or dacoity.[13]

In the case of robbery a conviction under this section is equally good, whether the number of the accused be five or under.[14]

(2) That the accused used a deadly weapon; or caused grievous hurt; or attempted to cause death or grievous hurt.

(3) That the above acts were done during the commission of robbery or dacoity.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Where, in a case of robbery, there is no intention of causing death or such bodily injury as is likely to cause death, the conviction must be under this section of "voluntarily causing grievous hurt in committing robbery."[15]

Charge.—To justify a conviction under this section there must be a charge framed of the offence in which the carrying of arms is distinctly alleged. Where

[1] *Mahabir Tiwari*, (1899) 21 All. 263.
[2] *Sonia*, (1899) 19 A. W. N. 186.
[3] *Nageshwar*, (1906) 28 All. 404.
[4] *Mohna*, (1901) P. R. No. 16 of 1901 and *Chatar Singh*, (1901) P. R. No. 15 of 1901.
[5] (1899) 21 All. 261
[6] *Dungar Khan*, (1922) 5 L. L. J. 224.
[7] *Mohar Singh*, (1923) 2 L. C. 5, 26 P. L. R. 398.
[8] *Lad Khan*, (1912) P. R. No. 117 of 1912.
[9] *Harnaman*, (1900) P. R. No. 6 of 1901
[10] *Bhagwant*, (1900) 3 O. C. 263.
[11] *Beni*, (1900) 23 All. 78.
[12] *Vide* s. 392, *sup.*
[13] *Vide* s. 395 *sup.*
[14] *Dwarka Aheer*, (1865) 2 W. R. (Cr.) 49.
[15] *Chatur Haree*, (1866) 6 W. R. (Cr.) 16.

the accused are charged with, and convicted for, an offence punishable under s. 395, they cannot be punished under s. 398 of the Code.[1] This section does not create a substantive offence and a Court, therefore, should not frame a charge under it but under s. 392 read with s. 397, or s. 395 read with s. 397, as the case may be.[2]

The charge should be for the substantive offence of robbery or dacoity, and the following clause should be added to the charge.

And that at the time of committing the said robbery (*or* dacoity) you used a deadly weapon, to wit——(*mention the deadly weapon*), [*or* caused grievous hurt to AB, or attempted to cause death or grievous hurt to AB], and thereby committed an offence punishable under s. 397 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

Punishment.—The maximum term of imprisonment that can be passed under this section cannot exceed ten years (see s. 396).[3]

Attempt to commit robbery or dacoity when armed with deadly weapon.

398. If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.'

COMMENT.

To such of the offenders as are armed with deadly weapons, though they do not use them in the attempt to rob or commit dacoity, an imprisonment of not less than seven years must be awarded It is the terror which the possession of a deadly weapon naturally creates that has led the legislature to provide for a severe sentence where the offender has such a weapon.

It is necessary to show that at the time of committing robbery the accused was armed with a deadly weapon and not merely that one of the robbers who was with the accused at that time carried one.[4] The words "offender" and "*such* offender" refer only to the persons who are proved to have actually been "armed with" deadly weapons and not to the others who in combination with such persons have committed robbery or dacoity. Section 34 has no application in the construction of this section, though it may be read with ss. 392 and 395 to determine the substantive offence which is created.[5]

PRACTICE.

Evidence.—Prove (1) the attempt to commit robbery or dacoity.
(2) That the accused was armed with a deadly weapon.
(3) That he was so armed when the robbery or dacoity was committed.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Charge.—See the last section.

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*), and 12 (2).

[1] *Punya Sakharam*, (1897) Cr. R. No. 25 of 1897, Unrep. Cr. C. 921.

[2] *Bhagwani*, (1900) 3 O. C. 263; *Dangar Khan*, (1922) 5 L. L. J. 224; *Po Myaing*, (1920) 10 L. B. R. 269.

[3] *Nama Dulab*, (1908) Criminal Revisional Application No. 223 of 1908. Unreported. (Bombay) Decided on the [illegible]

[4] [illegible]

[5] *Ali Mirza*, (1923) 51 Cal. 265.

Making preparation to commit dacoity.

399. Whoever makes any preparation[1] for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Under the Code, mere preparation to commit an offence is punishable in three cases: (1) preparation to wage war against the King (s. 122); (2) preparation to commit depredation on territories of a power at peace with the King (s. 126); and (3) preparation to commit dacoity. Preparation to commit any other offence such as house-breaking or robbery, is not an offence.[1]

1. '*Makes any preparation.*'—These words point to acts done prior to a commencement of the execution of the guilty purpose and it may be before any particular dacoity is planned. It will be enough if there is a general design to commit dacoity, or to engage in an expedition for this purpose, though the plans of the dacoits are not yet matured. The making 'preparation' should be shown to the satisfaction of the Court by some act, such as the collection of men, arms, provisions, etc., which, coupled with other circumstances, plainly manifest the intention to commit dacoity.[2] A mere assembling without further preparation is not a preparation within the meaning of this section. Mere assembling without proof of other preparation is punishable under s. 402. A person may be not guilty of dacoity, yet guilty of preparation, and not guilty of preparation yet guilty of assembling.[3] In order to constitute preparation it is not necessary that an overt act towards the commission of dacoity should have been done. The law requires that the accused should have done some act to get ready for committing dacoity. Where it is found that the members of a gang had taken in their possession instruments for house-breaking and arms for the purpose of offence and defence and had actually proceeded to a place near the scene of the contemplated dacoity, the Court is justified in holding that there was not a mere assemblage but that the members of the assemblage had got ready for the actual commission of a dacoity.[4]

As to the distinction between preparation and attempt, see s. 511, *infra*.

PRACTICE.

Evidence.—Prove (1) that the act of the accused amounted to preparation.

(2) That it was preparation to commit dacoity.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, made preparation, to wit ——, for committing dacoity, an[illegible] punishable under s. 399 of the Indian Penal Code, ar[illegible]

And I hereby direct that you [illegible]

Punishment.—As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II. As to the Frontier District, see the Frontier Crimes Regulation (*III of* 1901), ss. 6, 11 (3) (*d*) and 12 (2).

Punishment for belonging to gang of dacoits.

400. Whoever, at any time after the passing of this Act, shall belong[1] to a gang of persons associated for the purpose of habitually committing dacoity[2], shall be punished with transportation for life, or with

[1] *Shera*, (1868) P. R. No. 18 of 1868.
[2] M. & M. 357.
[3] *Ramesh Chandra Banerjee*, (1913) 41 Cal. 350.
[4] *Karmun*, (1915) P. W. R. (Cr.) No. 37 of 1916.

rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Object.—This section was intended by the legislature to provide for the punishment of those who belong to a gang of persons who make it their business to commit dacoity; and it is not essential for the purpose of conviction that the evidence should show the same degree of particularity as to the commission of each individual dacoity as is required to support a simple and substantive charge of that crime. It is sufficient to establish that the person accused belongs to a gang whose business is the habitual commission of dacoity, or, in other words, that he was associated with others for the habitual pursuit of that offence.[1] It is not necessary that the person belonging to a gang must have taken part in any one dacoity. But actus[illegible] evidence both of hi[illegible] offence under this section.[2] The offence is of a very special character.

1. **'Belong.'**—The word 'belong' implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity.[3] Where at the trial of a gang of habitual dacoits who were charged with the commission of ten dacoities, the evidence against an individual was no more than that he had joined them in the commission of one dacoity and that he must have known that they were a gang of habitual dacoits, it was held that it was not established that he belonged to the gang, within the meaning of this section.[4] The mere fact that women lived as wives or mistresses with men who were dacoits is not sufficient for a Court to hold that they belonged to a gang of persons associated for the purpose of habitually committing dacoity within the meaning of this section, unless it be proved that the women themselves were associated with the husbands or protectors for the purpose of themselves habitually committing dacoities.[5] [illegible] abetment of dacoity though they might be punishable under s. 216-A.[6] Generally speaking, only those persons can be convicted under this section, who have either taken active part in the crime or been employed for the purpose of scouting or in other ways facilitating the commission of the crime.[7]

2. **'Associated for the purpose of habitually committing dacoity.'**—The word 'habitual' means constant.[8] The element of the offence under this section is association with the knowledge that the gang is formed for the purpose of committing dacoities habitually and conviction can be had under this section even where no actual commission of dacoity by a particular accused person is proved.[9]

PRACTICE.

Evidence.—Prove (1) that the accused belonged to the gang in question.

(2) That such gang was associated for the purpose of habitually committing dacoity.[10]

[1] *Kure*, (1886) 6 A. W. N. 65, 66; *Kader Sundar*, (1911) 16 C. W. N. 69; *Murli Brahman*, (1924) 27 O. C. 385.
[2] *Kader Sundar*, sup.
[3] *Hira Lal*, (1910) 13 O. C. 243; *Bhabuti*, (1921) 19 A. L. J. R. 725.
[4] *Bhabuti*, sup.
[5] *Yelli kom Yella*, (1896) Cr. R. No. 26 of 1896, Unrep. Cr. C. 863
[6] *Gaya Din*, (1908) 13 O. C. 235.
[7] *Nidhi*, (1924) 1 O. W. N. 660.
[8] See *Baburam Kansari*, (1891) 19 Cal. 190.
[9] [illegible] *ure*, sup.

One of the chief points to establish in a case of gang dacoity is association in the crime, and if it can be proved that certain persons have joined together to commit burglaries as well as dacoities, the former fact is strong evidence of criminal association and is relevant to show that they are members of the gang. If a gang can be shown to have been associated for the habitual commission of dacoities, evidence as to other crimes committed by the gang, *e.g.*, burglaries, may very well be relevant against the accused.[1]

The associating and the purpose of the association may be proved by direct evidence or by proof of facts from which they can be reasonably inferred. Evidence that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time may be sufficient evidence of such association.[2] It is not sufficient to prove simply that the accused gave shelter and assistance to dacoits.[3] The special conspiracy must be proved.[4]

The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under this section, and the fact that members of the tribe generally were alleged to have been implicated in several dacoities within a period of ten years preceding the trial was not sufficient proof against the persons under trial when it appeared that the tribe contained within it thousands of human beings.[5]

Where association for the purpose of habitually committing dacoity had not been made out, the mere fact that some of the accused had been previously convicted of dacoity or theft or had been bound down to be of good behaviour under s. 110 of the Criminal Procedure Code, was of no consequence.[6] The accused were charged, under this section, with belonging to a gang of persons associated for the purpose of habitually committing dacoity. The prosecution sought to prove against some of the accused that they had been previously convicted of theft or had been ordered to give security for good behaviour on the ground of being habitual thieves. It was held that evidence regarding previous conviction or bad livelihood was not admissible under s. 14 of the Indian Evidence Act, because the offence for which the accused were being tried was the particular one of belonging to a gang of dacoits and simple theft or bad livelihood, in which the order for giving security was based on evidence that the accused habitually committed thefts, was not evidence indicating an intention to commit the particular crime of which the accused were charged.[7]

But whe[illegible] there is sufficient evidence to establish association for the purpose of habitually [illegible] property and [illegible] convictions of bad livelihood are more cogent than those of isolated thefts.[8]

Previous conviction of the accused for dacoity along with other dacoities is relevant against him under Explanation 2 to s. 14 of the Evidence Act. But the propriety of the conviction of the accused must be judged exclusively by reference to the evidence adduced by the prosecution at the trial.[9] The fact that some of the persons undergoing trial for an offence under this section had once been sent up on a charge of dacoity of which they were acquitted could not be relied on to prove that they were habitual dacoits. No adverse inference can be drawn against accused persons after their acquittal.[10]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

[1] *Nidhi*, (1924) 1 O. W. N. 660.
[2] *Bonigiri Pottigadu*, (1908) 32 Mad. 179.
[3] [illegible] 1 Bom. L. R. 156, Cr. [illegible]
[4] [illegible] Mad. 523, 540.
[5] [illegible] N. 69.
[6] Ibid.
[7] *Haji Sher Mahomed*, (1921) 25 Bom. L. R. 214, 7 Bom. Cr. C. 48.
[8] *Bhona*, (1911) 38 Cal. 408; *Ledu Molla*, (1925) 52 Cal. 595.
[9] *Walia*, (1910) P. L. R. No. 18 of 1910.
[10] *Kader Sundar*, sup.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, belonged to a gang of persons associated for the purpose of habitually committing dacoity, and thereby committed an offence punishable under s. 400 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—"There are...many points which have to be considered...in determining what is an adequate sentence to pass upon an accused convicted of an offence fa[illegible] the following :—

(1) [illegible]

(2) [illegible] gang since the accused joined it ?

(3) In how many of these dacoities did the accused actually take part ? (If the accused are being separately prosecuted for every dacoity in which they have been concerned as members of the gang, this point must be left out of consideration).

(4) What was the character of the dacoities in which the accused actually took part ? Were they accompanied with murder, culpable homicide, grievous hurt, torture, or with any acts of a specially brutal character, or were they only dacoities of the ordinary character?"[1]

In the case of a gang consisting of desperate men prepared to proceed to all lengths in carrying out their crimes, the heaviest possible sentences should be passed. In awarding sentences the Court ought to consider not so much whether particular offenders were concerned in only one or more of the dacoities committed by the gang, as whether it was clearly established that they did in fact join a recognized gang.[2]

Separate sentences can be passed on an accused person, who has been proved to have taken part in a particular dacoity and also to have been a member of a gang of dacoits. The limit of punishment prescribed by s. 71 does not apply to such a case. The provisions of s 397 of the Code of Criminal Procedure will apply to such a case and then it will be at the discretion of the criminal Court whether the two sentences should run concurrently or not.[3]

As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (*d*) and 12 (2). As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II.

Punishment for belonging to gang of thieves.

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually[1] committing theft or robbery, and not being a gang of thugs, or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The principle enunciated in the last section is extended by this section to a gang of thieves or robbers The gist of an offence under this section is association for the purpose of habitually committing theft or robbery.

[1] Per Ward, J. C., in *Nga Lu Nge Gyi*, (1889) S. J. L. B. 441.

[2] *Ghulam Mustafa*, (1911 P W R. (Cr.) No. 45 of 1911, P. L. R. No. 68 of 1911.

[3] *Murli Brahman*, (1921) 27 O. C. 385.

The 'association' referred to in the section must be a conscious association with the primary object of committing the offences mentioned therein.[1]

Scope.—This section "no doubt has excellent objects and uses; but it ought not to be resorted to when the persons sought to be brought within its four corners, might have been made responsible for distinct and individual offences; nor is it intended to affect them, unless an association for the habitual commission of theft or robbery is clearly made out."[2]

1. 'Habitually.'—Habit is to be proved by the aggregate of acts, and though the charge is a charge of a single offence, the period over which the association extends is often very long; and the longer the period the better it is to establish habit.[3]

CASES.

Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one another and were in the habit of visiting *melas* together, that one of them was arrested in the act of picking a pocket, and that when they were arrested many of them gave false names and false addresses, it was held that they could not be convicted under this section, there being no proof that t[illegible] [illegible] of persons associated for the purpose of habitually committ[illegible] to a gang of persons associated for [illegible] evidence against the accused was of three kinds: *viz.*, (1) that they were seen together at midnight in a certain place with implements of house-breaking on a certain night; (2) that some of them were seen together in different places where house-breaking and theft were immediately afterwards committed; and (3) that they had been each convicted at different times of theft, etc. It was held that the above circumstances were not sufficient proof of the association and of the association being for the habitual committing of theft which are required to be established to support a charge under this section.[5]

PRACTICE.

Evidence.—Prove (1) that there existed a gang of persons.

(2) That those persons were associated for the purpose of committing theft or robbery.

(3) That theft or robbery was to be committed habitually.[6]

(4) That the accused was a member of such gang.

[illegible] of acts will prove the habit.[7] It is not necessary to prove that [illegible] committ[illegible] [illegible] a gang, however small, wa[illegible] all persons who thereafter [illegible] within the purview of this section.[8] Any person who knowing of the [illegible] such a gang joins that gang for the purpose of committing even one theft is guilty under this section. At the same time a person may have taken part in a theft with one or more members of a gang without himself becoming a member of that gang.[9] Merely being seen getting on board a boat with four persons, who have on

[1] *Ajita*, (1912) 9 A. L. J. R. 565.

[2] Per Straight, J., in *Jehangira*, (1886) 6 A. W. N 16.

[3] *Kasem Ali*, (1919) 47 Cal. 154, 159.

[4] H. C. *Kumar Dwarka Bania*, (1899) 3 C. W. N. ccccxxxviii (338n); *Ajita*, sup.; *Peera*, (1869) P. R. No. 37 of 1869; *Afridi*, (1879) P. R. No. 9 of 1880; *Ishar Das*, (1912) P. W. R. (Cr.) No. 36 of 1912.

[5] *Savaldas*, (1888) Unrep. Cr. C. 418.

[6] *Beja*, (1913) P. R. No. 13 of 1914.

[7] *Wassawa Singh*, (1916) P. L. R. No. 110 of 1916.

their own admission been convicted of belonging to a gang of dacoits, is held not sufficient evidence against those so seen.[1]

Evidence of the commission of several thefts, of meeting together at different places, before and after the commission of thefts and burglaries in bazaars, boats [illegible] to support a conviction under this section.[2]

The possession of stolen property by the gang, and the fact that the country through which the gang passed was free from petty crimes when they were not about, are admissible facts.[3] Similarly, evidence of previous convictions of some of the accused for theft, house-breaking, receiving or concealing stolen property both prior and subsequent to the year when the gang was found to have been first formed is admissible.[4]

Evidence of character of the accused.—The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, evidence of bad character or reputation of the accused is inadmissible.[5] This case has been doubted in a subsequent case where it is held that where other evidence establishes association for the purpose of habitually committing theft, evidence of previous convictions of offences against property and of bad livelihood is admissible to prove habit; and for this purpose convictions of bad livelihood are more cogent than those of isolated thefts.[6] For the purpose of determining whether a party of accused persons constituted a gang of persons associated for the purpose of habitual theft, the evidence that each individual of that party is a convicted thief is relevant Such evidence can be tendered before or after the prosecution have established the association.[7]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge to jury.—The Judge should put clearly to the jury—(1) the necessity of proof of association; and (2) the need of proving that that association was for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts.[8]

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, belonged to a (wandering) gang of persons associated for the purpose of habitually committing theft (*or* robbery), and that you thereby committed an offence punishable under s. 401 of the Indian Penal Code, and within my cognizance [*or* the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2). As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II.

"If an accused takes part in any dacoity accompanied with murder, the proper section of the Penal Code to apply to him is s 396 in addition to s. 400, and he is liable to be sentenced to death, or transportation for life, or ten years' rigorous

[1] *Kamal Fukeer*, (1872) 17 W. R. (Cr.) 50.

[2] [illegible]

[3] [illegible]

[4] *Bhona*, (1911) 38 Cal. 403

[5] *Tularam Malhari*, (1912) 14 Bom. L. R. 373, 1 Bom. Cr. C. 136.

[6] *Shriram Venkatasami*, (1871) 6 M. H. C. 120.

[7] [illegible]

[8] *Mankura Pasi*, (1899) 27 Cal. 139.

imprisonment and fine. If he has not rendered *himself* liable to this extent, a distinction must still be made between those dacoits who, though belonging to an organized band, have only recently joined it, and have perhaps not taken part in more than one or two dacoities at the utmost, and those who have belonged to a gang for years and have taken part in many dacoities; between those who have belonged to the worst gangs, who go about armed defying the authorities and inflicting grievous hurt upon the people, and those smaller and less dangerous gangs who dacoit only because driven to do so by want and starvation, and because they are afraid to surrender, and who inflict no injury upon the people beyond that of depriving them of a few fowls and baskets of paddy, the food they are in search of."[1]

Assembling for purpose of committing dacoity.

402. Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section applies to mere assembling without proof of other preparation. Where there is preparation s. 399 applies.[2]

Five or more persons (which makes an unlawful assembly) meeting for a common purpose to commit dacoity are subject to the severe punishment provided in this section, even though the persons assembled may not have proceeded one step towards the accomplishment of their object

CASES.

Where the accused knew that the assembly, of which they formed a part, was an assembly for the purpose of committing dacoity, and that all the persons of the assembly lived on the proceeds of dacoity and had no other means of living, they were held guilty of this offence.[3] Several persons were found at eleven o'clock at night on a road just outside the City of Agra, all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none of them could give any reasonable explanation of his presence at the spot under the particular circumstances. It was held that they were guilty under this section.[4]

PRACTICE.

Evidence.—Prove (1) that five or more persons were assembled.

(2) That they were assembled for the purpose of committing dacoity.

(3) That the accused was one of such persons.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows —

That you, on or about the——day of——, at——, were one of five (*or more*) persons assembled for the purpose of committing dacoity, and that you thereby committed an offence punishable under s. 402 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

[1] Per Ward, J.C., in *Nga Lu Ngo Gyi*, (1899) S. J. L. B. 441, 442.

[2] *Ramesh Chandra Banerjee*, (1913) 41 Cal. 350.

[3] *Kendra Kumar*, (1867) 7 W. R. (Cr.) 61.

[4] *Bholu*, (1900) 23 All. 124 This decision is somewhat startling as from the facts given in the report it does not appear that it was the object of the accused to commit dacoity and not any other offence. It has been referred to with approval in *Bhola*, (1924) 22 A. L. J.R. 1028

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 11 (3) (*d*) and 12 (2). As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*).

Of Criminal Misappropriation of Property.

Dishonest misappropriation of property.

403. Whoever dishonestly misappropriates or converts to his own use[1] any moveable property,[2] shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

ILLUSTRATIONS.

(*a*) A takes property belonging to Z out of Z's possession, in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(*b*) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft But if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

[illegible] of B's posses- [illegible] e does not dis- [illegible] ates the whole [illegible]

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

ILLUSTRATION.

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

ILLUSTRATIONS.

(*a*) A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

(*b*) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(*c*) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(*d*) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(*e*) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(*f*) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

COMMENT.

"Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent."[1] The offence consists in the dishonest misappropriation or conversion, either permanently or for a time, of property which is already without wrong in the possession of the offender.[2] See illustra- [illegible]

according to which the intention of the accused at the time of [illegible] sion of property is only taken into account. If the intention was not dishonest [illegible] does not convert [illegible] ence between [illegible]

"Section 403 requires that the property [illegible] ive been misappropriated or converted to his own use by the accused. The mere possession [illegible] something to indi- [illegible]

of any other overt act indicating conversion or appropriation [illegible] did any interval of time worth considering elapse between the taking and the arrest to raise any presumption, from the mere act of detention, of an intention to misappropriate or convert. Explanation (2) to s. 403...makes the necessity of some positive proof of this sort quite clear. Illustration (*a*) shows that the picking up of a rupee, whose owner is not known, is not an offence. Similarly, illustration (*e*) [illegible] an unknown owner is not [illegible] own use is necessary to complete it."

According to the English law innocent taking followed by conversion, owing to subsequent change of intention, is a civil wrong but not an offence.

[1] Per Norris and Ghose, JJ., in *Bhagiram Dome* v. *Abar Dome*, (1888) 15 Cal. 388, 400.

[2] Per Chatterji, J., in *Phanan*, (1907) P. R. No. 11 of 1908.

[3] *Ramakrishna*, (1888) 12 Mad. 49, 50.

Theft and Criminal misappropriation.—In theft the object of the offender always is to take property which is in the possession of a person out of that person's possession; and the offence is complete as soon as the offender has moved the property in order to a dishonest taking of it. In criminal misappropriation, there is not necessarily an invasion of the possession of another person by an attempt to take from him that which he possesses. The offender is already in possession of the property; and is either lawfully in possession of it, because either he has found it or is a joint owner of it, or his possession, if not strictly lawful, is not punishable as an offence because he has acquired it under some mistaken notion of right in himself or of consent given by another.

Ingredients.—The section requires—

1. Dishonest misappropriation or conversion of property for a person's own use.
2. Such property must be movable.

1. **'Dishonestly misappropriates or converts to his own use.'**—In order to be dishonest the property must be misappropriated or converted 'with the intention of causing wrongful gain to one person, or wrongful loss to another,' that is, with the intention to cause gain by unlawful means of property to which the person gaining it is not lawfully entitled, or the loss by unlawful means of property to which the person losing it is lawfully entitled. The gain or loss of property, and the gain or loss of the possession of property are not necessarily identical things, and the distinction is especially clear when the loss of possession is only temporary, and is intended by the person who causes such loss to be temporary only. When there is no intention to cause wrongful gain or wrongful loss of property, and merely an intention to deprive the owner temporarily of the use of property, dishonesty is not made out.[1] The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender, irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued, but only on the act which has been done.[2] A wrong opinion that the accused was justified in keeping the thing does not constitute this offence.[3]

'Dishonestly misappropriates.'—The verb 'to appropriate' in this connection means setting apart for, or assuming to, a particular person or use; and to 'misappropriate' means to set apart for or assume to the wrong person or a wrong use, and this act must be done dishonestly.[4] The word 'misappropriation' in the illustrations and in the explanations to the section, explained by the expression "appropriation to his own use," which seems equivalent to "setting apart for his own use to the exclusion of others." It does not, of course, follow from this that setting apart by one person for the use of some person other than himself and the true owner, is not a misappropriation. A Hindu and having picked up a gold necklet and made it over to a younger girl, the accused, the brother of the finder, represented to the latter that the necklet belonged to a part of his acquaintance and thus got possession of it from her. On enquiry by a Police Constable a few hours later, he repeated the representations but afterwards gave up the necklet. These representations were found to be untrue to the knowledge of the accused. It was held that the accused had committed this offence.[5]

'Converts to his own use.'—There must be actual conversion of the thing appropriated to the use of some person other than the person entitled thereto. Where the accused found a thing and merely retained it in his possession, it was held that he could not be convicted of criminal misappropriation.[6] Similarly,

[1] *Per Phillips, J., in Harris*, (1867) P. R. No. 27 of 1867.
[2] *Subramanian v. Ex. Fenn Lake*, (1917) 41 C. W. R. 272.
[3] *Khandoo*, (1884) Cr. R. No. 27 of 1884.
[4] *Dwarka Chandra*, (1917) 12 A. L. J. R. 1117.
[5] *Sharda*, ibid.
[6] *Mohit*, (1916) 17 C. W. R. (Cr.) 22.

ILLUSTRATIONS.

(*a*) A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

(*b*) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(*c*) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(*d*) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(*e*) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(*f*) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

COMMENT.

"Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent."[1] The offence consists in the dishonest misappropriation or conversion, either permanently or for a time, of property which is already without wrong in the possession of the offender.[2] See illustra- [illegible] amounts to crimi- [illegible] lish law according to which the intention of the accused at the time of obtaining the possession of property is only taken into account. If the intention was not dishonest when the possession was obtained, subsequent change of intention does not convert [illegible] Explanation 2 emphasizes the difference between [illegible] the property should be shown to have been misappropriated or converted to his own use by the accused. The mere possession of the property is not sufficient for proving the charge without something to indicate the appropriation or conversion, though long possession without any attempt [illegible] there is no proof to find t [illegible] of any c [illegible] did any [illegible] to raise [illegible] appropr [illegible] positive proof of this sort quite clear. Illustration (*a*) shows that the picking up of a rupee, whose owner is not known, is not an offence. Similarly, illustration (*e*) shows that the finding of a purse with money belonging to an unknown owner is not an offence, but the appropriation of it to the finder's own use is necessary to complete it."[3]

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[1] Per Plowden, J., in *Jhandu*, (1886) P. R. No. 27 of 1886.

[2] *Simhachalam* v. *Rati Kanta Laha*, (1917) 21 C. W. N. 573.

[3] *Khanderao*, (1894) Cr. R. No. 30 of 1894, Unrep. Cr. C. 700.

[4] *Sohan Lal*, (1915) 13 A. L. J. R. 1131.

[5] *Jhandu*, sup.

[6] *Abdool*, (1868) 10 W. R. (Cr.) 23-A.

where the accused found a purse on the pavement of a temple in a crowded gathering [illegible]

caught a strayed sheep intended for sacrifice and on his transfer, from the *thana* to which he was attached, to another *thana* he took it with him there, it was held that it was sufficient evidence of dishonesty.[2]

2. **'Any moveable property.'**—The misappropriation must be of 'moveable property.' As to the meaning of this expression, see s. 22, *supra*.

There cannot be any criminal misappropriation with regard to immoveable property.

A bull set at large in accordance with a Hindu religious usage is not 'property' of any one, and not the subject of ownership by any person, as the original owner [illegible] the beast its freedom [illegible] subject of criminal mis- [illegible] attention from the cow- [illegible] him by direction of his employers, and is not used for breeding purposes without their permission being asked, is not inconsistent with a total surrender by those who set it at liberty of all their rights as proprietors.[4]

The offence of criminal misappropriation is committed, either permanently or for a time, of property which is already without wrong in the possession of the offender. The dishonest intention to appropriate the property of another is common to theft and to criminal misappropriation. But this intention, which in theft is sufficiently manifested by a moving of the property, must in the other offence be carried into action by an actual misappropriation or conversion.[5]

Temple property.—The property of an idol or a temple must be used for the purposes of that idol or temple: any other use will be a malversation of that property, and, if dishonest, will amount to criminal misappropriation.[6]

Retention of money paid by mistake.—Where money is paid to a person by mistake, and such person, either at the time of receipt or at any time subsequently, discovers the mistake, and determines to appropriate the money, that person is guilty of criminal misappropriation.[7] In England, the law is doubtful on this point.[8]

Joint property.—Where the accused is interested in the property jointly with others, he is not necessarily guilty of a criminal act if he takes possession of it, and disposes of it.[9] But joint property might be criminally misappropriated.[10] No co-parcener in a joint Hindu family having before division a right in or to any specified share in any p[illegible] prosecution for dishonest misappropriation [illegible] ily until the accounts have be[illegible] ing member may be liable to a charge of misappropriation, if, after a division of property has taken place, and the share of each member of the family has been ascertained, it is found that the manager has wrongfully applied to his own use the share that

[1] *Phuman*, (1907) P. R. No. 11 of 1908.
[2] *Sarju Mallah*, (1918) 17 A. L. J. R. 145; 1 U. P. L. R. 88.
[3] *Bandhu*, (1885) 8 All. 51; *Nihal*, (1887) 9 All. 348.
[4] *Romesh Chunder Sannyal* v. *Hiru Mondal*, (1890) 17 Cal. 852.
[5] M. & M. 359
[6] *Gadgayya* v. *Guru Siddheshvar*, (1897) Unrep. Cr. C. 919.
[illegible] N. W. P. 475.
[illegible] C. C. R. [illegible] *Flowers* [illegible] 7] 2 I.R. 709.
[9] *Parbutty Churn Chuckerbutty*, (1870) 14 W. R. (Cr.) 13.
[10] *Pania*, (1881) 1 A. W. N. 89.
[11] (1880) 1 Weir 453.

belongs to one of the other co-parceners; but so long as no account of produce or money has been taken, or the shares ascertained, no member of an undivided Hindu family has the right to claim any particular share or property as his separate property, and no prosecution against the manager for misappropriation would lie. The mere fact that there has been a general agreement to divide does not entitle one of the co-parceners to claim any defined portion of the estate, nor does it even enable him to say that he is entitled to any particular *quantum* in an isolated item of the property; until division, the law entrusts the property to the manager."[1]

Explanation 1.—"This explanation refers only to cases in which there is a 'dishonest misappropriation,' and explains that the section includes temporary as well as permanent misappropriation of that description. It does not extend the section so as to include not only cases of wrongful gain or loss of property, but also cases of wrongful gain or loss of the possession of property, as distinct from gain or loss of the property itself."[2]

A servant, who misappropriates his master's property with the intention of restoring it after a time, ought to be punished. He has no more right to steal his master's property for a time than for ever. It is no answer for a trustee who misappropriates his trust property to say that he intended to put it back again. The fact is that when once a man makes away with property in this way, it generally happens that he never has the means of making restitution. So with regard to the thief, the probability is that when he steals another's property he will never change his mind about restoring the same to the owner.[3]

Explanation 2.—There can be no criminal misappropriation of things which have actually been abandoned.[4] The property must have its owner to render a person guilty of misappropriating it.

Where property is cast away or abandoned, any one finding and taking it acquires a right to it which will be good even as against the former owner, if the latter should be minded to resume it, but that, when a thing is accidentally lost, the property is not divested, but remains in the owner who loses it.[5]

Property found drifting in a river.—The accused found two logs of wood drifting in a river during a high flood and took possession of them. The logs were left by the accused in front of his house unused and exposed for several months. It was held that a conviction under this section could not be upheld.[6]

Lost property.—Where the accused found a gold *mohur* on an open plain, and sold it the next day to a shroff for the full value and appropriated the sale-proceeds, it was held that, in the absence of any information as to the circumstances under which the coin was lost, and as it was not impossible that the property in the coin had been abandoned by the original owner, the accused could not be convicted of criminal misappropriation.[7] A person who takes possession of property which the rightful owner has lost is guilty of criminal misappropriation if he appropriates or converts such property to his own use.[8]

Treasure trove.—A person who found money from a piece of land purchased by him and appropriated it to his own use was held not to have committed this offence.[9]

In England the law seems to be this: "If a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he take them

[1] *Anon*, (1880) 1 Weir 453 (454).

[2] Per Plowden, J., in *Bhandu*, (1886) P. R. No. 27 of 1886.

[3] P. L. C. 1861, p. 1270.

[4] *Bandhu*, (1885) 8 All. 51; *Nihal*, (1887) 9 All. 348; *Ramesh Chunder Sannyal v. Hara Mondal*, (1890) 17 Cal. 852; *Sita*, (1893) 18 Bom. 212.

[5] *Glyde*, (1868) L. R. 1 C. C. R. 139.

[6] *Murugan*, (1883) 1 Weir 455.

[7] *Sita*, supra. See *Phuman*, (1907) P. R. No. 11 of 1908.

[8] *Nga Shwe Zan*, (1916) 10 B. L. T. 261.

[9] *Chedipa*, (1868) Unrep. Cr. C. 8.

with the like intent though lost, or reasonably supposed to be lost but reasonably believing that the owner can be found, it is larceny."[1]

The law with regard to the finder of the lost property does not apply to the case of property of a passenger accidentally left in a railway carriage, and found there by a servant of the company.[2]

The possessor of land is generally entitled, as against the finder, to chattels found in the land.[3]

CASES.

Dishonest intention necessary.—The accused was found riding on a mare which had strayed away from the possession of its owner. The day after he was found riding he confessed that he had found the mare hobbled, had unfastened the rope and used it as a bridle, had mounted the mare intending to ride her to his house and to loose her when he reached his house. Subsequently he stated before the Magistrate that his intention was to [illegible] He was convicted under this section. It [illegible] for it could not be assumed that the int[illegible] subsequent statement being attributable to fear did not affect the question of the accused's guilt.[4] The accused, who had lost his buffalo some time back, found a buffalo very much resembling his own entering into his house and tied her in on an open verandah which overlooked a public road and refused to permit the complainant, who claimed the buffalo as his, to remove the same. It was held that the essential element of a dishonest intention to make up the offence was wanting.[5] Where the accused removed posts and shutters for firewood from a house which they believed was deserted, it was held that they did not commit criminal misappropriation for there was no dishonesty in the act.[6] Where the accused took certain hides from the prosecutrix, but refused to pay for them on the ground that she owed a sum to him, it was held that he had not committed this offence.[7]

Claim of right.—A servant, who retained in his hands money which he was authorised to collect and which he did collect from the debtor of his master, because money was due to him as wages, was held guilty of criminal misappropriation.[8]

Servant misappropriating money received on behalf of his master.—Where the accused, a Government servant, whose duty it was to receive certain monies and to pay them into the treasury on receipt, admitted that he had retained two sums of money in his possession for several months, but on fearing detection he paid them [illegible] the time in his books with a view to avert [illegible] village *karnam*, received money from the [illegible] remitting it to the Public Treasury, but omitted to do so until after an inquiry had been held into arrears due by the villagers[10] it was held that this offence was committed.

Secreting letters.—The accused, a servant in the Postal Department, while [illegible] with the intention of handing [illegible] certain moneys payable upon [illegible] attempt to commit dishonest misappropriation of property and of theft.[11]

A letter addressed to W was handed by a postman to W, who was at the time in a room in the occupation of H. W read the letter, and put it on a table in the

[1] Per Park, B., in *Thurborn*, (1849) 18 L. J. (M. C.) N. S. 140, 144.

[2] [illegible] v. *Sharman*, [illegible] R. No. 28 of 1906.

[3] *Dwaria Doss* v. *Narasimhalu Naidu*, (1922) 44 M. L. J. 128.

[4] *Nawtara Singh*, (1904) 10 Burma L. R. 356.

[5] *Boystum Moochee*, (1872) 17 W. R. (Cr.) 11.

[6] *Bissessur Roy*, (1869) 11 W. R. (Cr.) 51.

[7] [illegible] (1889) 12 Mad. 49; *Ka*[illegible]

[8] [illegible] Veit 455.

room and left it there. H took the letter, and subsequently attempted to file it as an exhibit attached to an affidavit made by him in a suit for judicial separation between W and his wife, for the purpose, as he afterwards stated, "of strengthening Mrs. W's case and of improving his own position." The Court, however, refused to receive the letter. It was held that in the circumstances H could not be convicted of dishonest misappropriation of property with respect to his retention of the letter.[1]

Harvesting crops under an attachment.—A judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force. It was held that he had committed this offence.[2]

Exchanging of railway tickets.—A and B were about to travel by the same train from Benares City. A had a ticket for Ajudhia. B had two tickets for Benares Cantonment. A voluntarily handed over her ticket to B in order that he might tell her if it was right. B, under the pretence of returning A's ticket substituted therefor one of his own, and kept A's ticket. It was held that the offence committed by B was that of criminal misappropriation rather than that of cheating.[3]

English cases.—A person purchased, at a public auction, a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained anything whatever. It was held that if the buyer had express notice that the bureau alone, and not its contents, if any, was sold to him; or if he had no [illegible] was sold, the abstrac- [illegible]

b [illegible]

a [illegible]

discovered money in a secret drawer of it, which he, unnecessarily as to its repair, breaks open, and converts the money to his own use, it is a felonious taking of the property, unless it appear that he did it with intention to restore it to its right owner.[5] A servant indicted for stealing bank-notes, the property of her master, in his dwelling-house, set up, as her defence, that she found them in the passage, and not knowing to whom they belonged, kept them to see if they were advertised. It was held that she ought to have inquired of her master whether they were his notes or not, and that not having done so, but having taken them away from the house, she was guilty of stealing them.[6] The prisoner stole some iron from a canal, in which it was found when the canal was in process of being cleaned. In an indictment against him for stealing the iron, it was held that the proprietors of the canal had a sufficient property in the iron to justify alleging of the property to be in them.[7]

PRACTICE.

Evidence.—Prove (1) that the property in question is moveable property.

(2) That the accused misappropriated it or converted it to his own use.

(3) That he did so dishonestly.[8]

See the Indian Evidence Act, s. 14, ill. (*b*).

When a case comes under the second Explanation it should be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear, only after examination. It would probably

1 [illegible]

2 [illegible]

3 [illegible]

4 [illegible]

5 [illegible] to Burma II. R. 170.

6 [illegible]

be presumed that the taker would examine the chattel as an honest man ought to do at the time of taking it, and if he did not restore it to the owner the jury might conclude that he took it, when he took complete possession of it.[1]

The mere fact that the prosecutor gave the prisoner time to make out his accounts and pay the balance due does not vitiate a conviction for dishonest misappropriation, or show that the matter is one for civil Courts only.[2]

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by any Magistrate.

In a case of complaint under this section, it is open to a Magistrate in case of doubt to hold an inquiry under s. 202 of the Criminal Procedure Code before summoning the accused in order to find out whether a *prima facie* case was made out or whether the accused should be summoned or not.[3]

Venue.—The offence of criminal misappropriation may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.[4]

Separate offences.—The appropriation of each separate item of money with which a person is entrusted is a separate offence, and the facts connected with it should form the subject of a separate enquiry. The duty of a committing officer in such a case is to select certain distinct items, to frame his charges upon them, and to adduce evidence specially upon those items.[5]

Joinder of charges.—When two persons are implicated in a case of criminal [illegible] sum of money, the charges against [illegible] and of abetment in the other because [illegible] be guilty of misappropriation of the same sum of money. It is also open to the Court to frame charges against each of them in the alternative, *i.e.*, of misappropriation or of abetment.[6]

Charge.—When the accused is charged with criminal breach of trust or dis- [illegible] sum in [illegible] ing particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of s. 234: Provided that the time included between the first and last of such dates shall not exceed one year.[7]

The charge should run as follows :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, dishonestly misappropriated [*or* converted to your own use] certain property, to wit——, belonging to AB, and thereby committed an offence punishable under s. 403 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.[8]

[1] *Thurborn*, (1849) 18 L. J. (M. C.) N. C. 140

[2] *Sreekant Biswas*, (1866) 5 W. R. (Cr.) 56.

[3] *Bachman Lal v. Sarjoo Saw*, (1920) 3 U. P. L. R. (P.) 9.

[4] Criminal Procedure Code, s. 181 (2).

[5] *Chetter*, (1871) 15 W. R. (Cr.) 5.

[6] *Gurwar Narain*, (1912) 16 C. W. N. 600.

[7] Criminal Procedure Code, s. 222 (2).

[8] Vide *Parbutty Churn Chuckerbutty*, (1870) 14 W. R. (Cr.) 13.

Dishonest misappropriation of property possessed by deceased person at the time of his death.

404. Whoever dishonestly misappropriates[1] or converts to his own use property,[2] knowing that such property was in the possession[3] of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and, if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

ILLUSTRATION.

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

COMMENT.

This section relates to a description of property peculiarly needing protection. The offence consists in the pillaging of moveable property during the interval which elapses between the time when the possessor of the property dies, and the time when it comes into the possession of some person or officer authorized to take charge of it.[1]

The section is intended only to punish servants and strangers who could possibly have no right to, or interest in, the effects of a dead man and who misappropriated such effects but not to punish near relations who take possession of and deal with the deceased's effects under a claim of independent ownership or a claim to succeed as heir to the deceased.[2]

1. **'Dishonestly misappropriates.'**—A person may commit the offence of dishonest misappropriation of property possessed by a deceased person at the time of his death by dishonestly misappropriating the money entrusted to him although he does not bring such money to his own use.[3] As to the meaning of 'dishonestly,' see s. 24, *supra*.

2. **'Property.'**—The word 'property' in this section does not refer to immoveable property, but only to moveable property. Hence, where a person was convicted of misappropriating the house of a deceased person the conviction was annulled.[4] See s. 22, *supra*, as to the meaning of 'moveable property'

3. **'Possession.'**—See s. 27, *supra*.

PRACTICE.

Evidence.—Under this section all the elements required to constitute the offence of criminal misappropriation in respect of a person who is alive will be necessary.[5] Prove (1) that the property in question is moveable property.

(2) That it was in the possession of a deceased person at the time of his death.

(3) That it was not thereafter in the possession of any person legally entitled to its possession.

(4) That the accused misappropriated it or converted it to his own use.

(5) That he did so dishonestly.[6]

[1] M. & M. 364.

[2] *Karrs Mangadu*, (1914) M. W. N. 791.

[3] *Enayet Hossein*, (1869) 11 W. R. (Cr.) 1; *Nobin Chunder Sircar*, (1869) 12 W. R. (Cr.) 39.

[4] *Girdhar Dharumdas*, (1869) 6 B. H. C. (Cr. C.) 33; *Jugdown Sinha*, (1895) 23 Cal. 372.

[5] *Nobin Chunder Sircar*, sup.

[6] *Vide* s. 24, sup.

(6) That he knew the circumstances mentioned in (2) and (3).

For the second clause prove further that the accused was, at the time of the owner's death, employed by him as a clerk or servant.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable[1]—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly misappropriated [*or* converted to your own use] certain property, to wit——, knowing that such property was in the possession of AB, a deceased person, at the time of the said AB's decease, and had not since been in the possession of any person legally entitled to such possession; and that you thereby committed an offence punishable under s. 404 of the Indian Penal Code and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Of Criminal Breach of Trust.

Criminal breach of trust.

405. Whoever, being in any manner entrusted with property, or with any dominion over property,[1] dishonestly misappropriates or converts to his own use that property,[2a] or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust,[2b] or wilfully suffers any other person so to do, commits "criminal breach of trust."

ILLUSTRATIONS.

(*a*) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(*b*) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(*c*) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits a lakh of rupees to A, with direction to A to invest the same in Company's paper. A dishonestly disobeys the directions, and employs the money in his own business. A has committed

[illegible] good faith, believing [illegible] Bengal, disobeys [illegible] instead of buying [illegible] entitled to bring [illegible] ted dishonestly, [illegible] Company's paper, here, though [illegible] a civil action against A on account of that loss, yet A, not [illegible] has not committed criminal breach of trust.

(*e*) A, a Revenue-officer, is entrusted with public money, and is either directed by law, or bound by a contract, express or implied, with the Government, to pay

[1] (1874) 7 M. H. C. App. 34.

into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(*f*) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

Punishment for criminal breach of trust.

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

To constitute the offence of criminal breach of trust, there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged.[1] The offence of criminal breach of trust closely resembles the offence of embezzlement under the English law.

Scope.—The terms of the section are very wide. It applies to one who is in any manner entrusted with property or dominion over property. The section does not require that the trust should be in furtherance of any lawful object. The section then provides, *inter alia*, that if such a person dishonestly misappropriates or converts to his own use the property entrusted to him, he commits criminal breach of trust. This part of the definition is complete in itself. It has no reference to the provisions as to disposal in violation of a direction of law, or of a legal contract. There are separate ways in which criminal breach of trust may be committed.[2] The section embraces the cases of all those offenders not specifically provided for in ss. 407, 408 and 409. Offences committed by trustees with regard to trust property fall within the purview of this section.

Criminal Misappropriation and Criminal Breach of Trust.—In criminal misappropriation the property comes into the possession of the offender by some casualty or otherwise, and he afterwards misappropriates it. In the case of criminal breach of trust the offender is lawfully entrusted with the property and he dishonestly misappropriates the same, or wilfully suffers any other person to do so, instead of discharging the trust attached to it.

Ingredients.—The section requires—

1. Entrusting any person with property or with any dominion over property.

2. The person entrusted (*a*) [illegible] or converting to his own use that property; or (*b*) [illegible] of that property or wilfully suffering any other pers[illegible]

(i) of any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust.

1. 'Entrusted with property, or dominion over property.'—It is an essential condition under this section that the property which is the subject-matter of the section must have been entrusted to a person. A 'trust' of some kind is necessary.

A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner.[3] Hence, where there is no original confidence, there is no trust, and a misappropriation, if punishable at all, will be under s. 403

[1] *Isser Chunder Ghose* v. *Peary Mohun Palit*, (1871) 16 W. R. (Cr.) 39; *Ko Set Shwe*, (1903) 10 Burma L. R. 110, (1903) 1 U. B. R. (P. C.) 9.

[2] *Nga Te*, (1904) 2 L. B. R. 216, p. 8.

[3] Indian Trusts Act, II of 1882, s. 3.

It is clear that the terms used are wide enough to include trustees of every kind; that is, those who are such, not only by reason of some employment for which they receive remuneration, but by reason of some trust constituted by express deed, or even by mere implication of law, though the office may be gratuitous. It also includes the case of a person who commits this offence by misappropriation of property to the advantage of a third person.[1]

Where the complainant entrusted the accused with his property in order to prevent it from being taken in execution of a decree that might be passed against him, it was held that that was not a legal defence to a charge under this section, when the accused had misappropriated the property for his own use.[2]

The trust may not be legal or in furtherance of a lawful object. But if there is no trust there will be no offence under this section. Thus, a person who takes a sum of money by way of a loan is not entrusted with any property.[3] But a servant who obtains money by false pretences from his master for using it in a particular way may be guilty of criminal breach of trust. Where the accused, a servant of a company, misappropriated a large sum of money made up of amounts which he received from the manager at various times on the false pretence that they were required for paying coolies, it was held that he was guilty of criminal breach of trust. When he received the money he did so as the servant of the company f[illegible] for his master's benefit in a particular way. He [illegible] self amou[illegible] present at the time of the receipt of the money was immaterial.[4]

Mere breach of contract is not made synonymous with criminal breach of trust. In all cases given in the illustration to s. 305 in which the person is said to have committed the offence, the property in respect of which it is said to have been committed is property of another person, or property of which the offender was not the beneficial owner, although in one case, that of the executor, he had the legal title. The property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or that the beneficial interest in or ownership of it, must be in some other person and the offender must hold such property on trust for such other person or in some way for his benefit.[5] Moneys advanced to a broker for the specified purpose of purchase and supply of paddy with the agreement that the broker is to suffer the loss or get the profit by a fall or rise in market price cannot be said to be entrusted to him within the meaning of this section, although by the agreement the company bound itself to take delivery of the paddy purchased and an express trust was declared in regard to the amounts advanced. The accused entered into an agreement with the complainant company under which he received Rs. 4,500 by way of advance and undertook to employ the money in the purchase and transport of paddy to it. There were stipulations in the agreement [illegible] that he was to hold the money in trust for the company and that t[illegible] he paddy purchased therewith was to remain with [illegible] ons were, however, inconsistent with other clauses of the agreement which inter alia [illegible] for any loss of either paddy or money, what- [illegible] re was no real trust and that the accused was [illegible] in failing to devote the money to the purchase and transport of paddy.[6]

The complainant owed money to the accused on a mortgage bond and on a certain day went to their house and paid the amount settled as due in full satis-

[1] *Nobin Chunder Sircar*, (1869) 12 W. R. (Cr.) 39.

[2] *Chinna Karuppa Muppan*, (1889) 1 Weir 463.

[3] *Wong Yone Main*, (1911) 6 L. B. R. 46.

[4] *Theophilus Ramappa*, (1911) 22 M. L. J. 112, 10 M. L. T. 517.

[5] *Po Seit*, (1912) 6 L. B. R. 62, F. B., followed in *Hok Chong & Co.* v. *Tha Ka Do*, (1913) 7 L. B. R. 16, F. B.

[6] *Po Yweet*, (1914) 7 L. B. R. 273.

faction of the bond. An endorsement of payment was made on the back of the bond by one of the witnesses for the prosecution and the accused went inside their house with the bond and money saying that they would keep the money and return the bond, but they did not come back that day and afterwards denied the receipt of the money. It was held that on the facts there was no trust which could bring the case within the terms of this section.[1]

'Property' referred to in this section must be moveable property. Criminal breach of trust cannot be committed in respect of immoveable property. The accused was a Jemadar of an indigo factory and in such capacity was entrusted with dominion over certain plots of *zerait* land. His duty was to see that the plots were cultivated with indigo, but he knowingly allowed them to be cultivated with other crops. It was held that the accused was not guilty of criminal breach of trust.[2]

This section does not cover misappropriation by a person of the sale-proceeds of the property entrusted to him.[3]

A cancelled cheque falls within the term 'property'. The question of the value of the property in respect of which the breach of trust is committed is, except so far as s. 95 of the Code is concerned, quite immaterial.[4]

An association not expressly sanctioned by law, yet not criminal, is not incapable of holding any property at all.[5]

'Dominion over property.'—The property regarding which the offence is alleged to have been committed must have been 'entrusted' to the accused or he must have 'dominion over' it. Where it is the duty of a Municipal Water Works Inspector to supervise and cheque the distribution of water from the Municipal water-works, he has dominion over the water belonging to his employers. If he deliberately misappropriates such water for his own use or for the use of his tenants for which he pays no tax and gives no information to his employers he is guilty of criminal breach of trust.[6]

If a mortgagor in possession, who is entrusted with the dominion over the mortgaged property by the mortgagee in whom the property is in a mortgage in the English form, wilfully defaults and causes the property to be sold for arrears of Government revenue for the purpose of defrauding the mortgagee, and purchases it *benami*, he is liable to be punished for this offence.[7] The accused hypothecated to the complainant by a written contract all his claims as a contractor against Government in respect of work done and materials supplied to the Executive Engineer, and undertook regularly and without fail to convey and make over to the complainant all cheques drawn by the Executive Engineer in his favour, and, subsequently, in violation of the said contract, cashed two such cheques and, appropriated the proceeds. It was held that the accused had committed criminal breach of trust.[8]

Partner.—The words of the section are wide enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with a dominion over it, and had dishonestly misappropriated it or converted it to his own use.[9] A partner is entitled to be called upon for an account of the expenditure of the money, which he has received, and it is open to him to spend

[1] *Golam Hossain*, (1917) 22 C. W. N 1005.
[2] *Judgowa Sinha*, (1895) 23 Cal. 372; *Bhagu, Vishnu*, (1897) Cr. R. No. 36 of 1897, Unrep. Cr. C. 928; Cr. Rev. Case No. 779 of 1924, [illegible]

[8] *Shuduthroy Bisseshurdas* v. *Agama Mistry*, [illegible]

Bhudarmull Marwari v. *Ramchander Marwari*, (1920) 1 P. L. T. 127; *Edmund Balls*, (1871) L. R. 1 C. C. R. 328; *Tankard*, sup.

If, instead of denying the appropriation of property, the accused, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, this offence will not be committed.[1] Bare refusal by the accused to allow the removal of a box left in his house by the complainant, unless some debt due to him by the complainant was paid, is held not to amount to a criminal breach of trust[2].

'Misappropriates.'—"There may be appropriation by a mental act without any actual expenditure of the money thus appropriated. The fact that the money has not been expended is a circumstance to be taken into account as evidence in favour of the view that there has been no mental appropriation, but the circumstance is not conclusive that there has been no such appropriation. Again, the mental appropriation must be established by some overt and visible act, but actual expenditure of the money is not the only proof of it."[3]

Dishonest conversion.—Where a Magistrate made over a pony, which had been condemned by the Municipal authorities as unfit for work, to a person professing to be the Secretary of a Society for the maintenance of incurable animals, and as such Secretary agreed to take charge of the pony, but afterwards sold it to an *eka* driver,[4] this offence was held to have been committed.

A lady wishing to get a railway ticket, finding a crowd at the pay-place at the station, asked the accused, who was nearer into the pay-place to get a ticket for her, and handed him a sovereign to pay for it. The price of the ticket was 10*s*. He took it, intending to steal it, and instead of getting the ticket immediately ran away with the money. It was held that he was guilty of larceny at common law, as the lady being present retained the dominion and possession, in point of law, after she had handed it to him for the intended purpose.[5]

Where the accused asked for a gold Mohar from the complainant in order that he might play with the child who was weeping, using the Mohar as a play thing, and subsequently misappropriated it, it was held that he was guilty of criminal breach of trust.[6]

Where a municipal board undertakes house scavenging by means of "customary sweepers," the rubbish and night-soil collected by the sweepers is the property of the board. Hence, where a sanitary inspector, having induced the sweepers to deposit the matter collected by them in a place other than that prescribed by the board, thereafter sold it for his own benefit, it was held that he was guilty of criminal breach of trust.[7]

Stake-holder.—A stake-holder, who misappropriates to his own use the stakes deposited with him for a wager, is guilty of criminal breach of trust.[8]

2-b. 'Dishonestly uses or disposes of that property in violation of any direction of law...or of any legal contract...touching the discharge of such trust.'—A user of property comes within this definition when such user causes substantial or appreciable loss to the owner of the property or gain to the accused. The use by a printer of certain blocks entrusted to him to print the complainant's catalogue for the purpose of printing a rival firm's catalogue amounts to criminal breach of trust.[9] But the Madras High Court has held that for either wrongful loss or gain the property must be lost to the owner or the owner must be wrongfully kept out of it. The deterioration of an article, such as a turban, by use, is, according to its

[1] *John Norman*, (1842) Car. & M. 501.

[2] *Adinarayana Iyer*, (1907) 17 M. L. J. 413.

[3] Per Plowden, J., in *Kesho Ram*, (1889) P. R. No. 36 of 1889.

[4] *Gauri Shankar*, (1894) 14 A. W. N. 197.

[5] *George Thompson*, (1882) 32 L. J. (M. C.) 53.

[6] *Raghbir Kurmi*, (1919) 1 U. P. L. R. 69.

[7] *Hori Lal*, (1922) 45 All. 281.

[8] *Nga Te*, (1904) 2 L. B. R. 216, 10 Burma L. R. 249, r. s., overruling *Nga Po Tee*, (1881) S. J. L. B. 130.

[9] *Keshab Chandra Doral v. Nityananda Biswas*, (1904) 8 C. W. N. 207

opinion, not such a loss of property to its owner, and the wrongful beneficial use of property by the accused is not such a gain to him.[1]

Wilful omission to account.—If a person receives money which he is bound to account for and does not do so, he commits this offence, although no precise time can be fixed at which it was his duty to pay over the money.[2] "Where money is entrusted for a particular purpose, the owner cannot know that it has been misappropriated until the person to whom it has been entrusted fails to account for it. On the other hand, when the latter fails to account for the money entrusted to him, the owner naturally comes to the conclusion that he has dishonestly misappropriated it. Whether a civil suit for account does or does not lie, and whether the complainant or informant has or has not been led to institute criminal proceedings, merely because he has not got an account, are immaterial. The question is whether the facts constitute the offence defined in this section."[3]

If a servant immediately on receiving a sum for his master, enters a smaller sum in his master's books and ultimately accounts to his master for the smaller sum, he may be considered as embezzling the difference at the time he makes the entry. It will make no difference though he received other sums for his master the same day, and in paying those and the smaller sum to his master together, he might give his master every piece of money or note he received at the time he made the false entry.[4]

It is not necessary to prove that any particular sum or sums were received from any particular person. Where a prisoner had debited himself with an amount, forming the balance of a large number of receipts and payments, this was held sufficient.[5]

The position of a shroff of a Battery with reference to the custody of the Government moneys entrusted to him being that of a cashier, his failure to produce the entire amount of the balance of cash entrusted to him amounts to criminal breach of trust.[6]

It was the duty of a servant, authorized to receive money for his employer, to account to his employer on the evening of every day for the money received during the day by him for his employer, and to pay over the amount. He received three sums for his employer on three different days, and neither accounted for those sums nor paid them over. He never denied the receipt of them, nor rendered any written account in which they were omitted. It was held that, if the servant wilfully omitted to account for these sums, and pay them over on the respective days on which he received them, they were embezzlements, and that such wilful omissions to account and pay over were equivalent to a denial of the receipt of them.[7]

False accounting.—The accused had received a cheque which he was to get cashed, and lay out the proceeds in the market He did cash it, but did not lay out the proceeds as he ought to have done, and in the prosecutor's books gave a wrong account of the manner in which the money had been expended. It was held that this offence had been committed.[8]

'In violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract touching the discharge of such trust.'—The misappropriation, conversion, etc., must be in violation of a legal direction prescribing the mode in which the person entrusted with the property is to carry out the trust or the contract. Where the accused were entrusted with some silver for

[1] (1866) 3 M. H. C. App. 6.

[2] [illegible]

[3] [illegible]

[4] [illegible]

[5] [illegible]

[6] *Hira Lal*, (1907) P. R. No. 19 of 1908.

[7] *Jackson*, (1844) 1 C. & K. 384; *Charles Lister*, (1856) 26 L. J. (M. C.) 26.

[8] *Goodenough*, (1853) 6 Cox 206; see also *Guelder*, (1860) 8 Cox 372.

the [illegible] ntroduced copper into the *ornaments*, it [illegible] breach of trust.[1]

[illegible] al under an agreement that property therein was to pass only if he exercised his option to take them and paid cash in *full for certain articles* and in part for others, the trust continues till the option is exercised and cash payments made, and he commits criminal breach of trust if he sells them without such payments.[2]

The servant of a liquor contractor was entrusted with liquor by his master to sell. For selling it, he was to receive a certain quantity himself, and he was to account for the remainder to his master, with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that contract he mixed water with the liquor, and having thus increased its amount, sold it at the same rate per gallon as was chargeable for unadulterated liquor, and appropriated the profit thus made to his own use. It was held that having thus gained by unlawful means money to which he was not legally entitled, he acted dishonestly within the meaning of the Code, and was guilty of criminal breach of trust.[3] In both the cases the accused were entrusted with property for a particular purpose and there was a contract with them which they violated. But where an Assistant Station Master whose duty it was to issue tickets to the passengers and to charge fares as fixed by the railway made an over-charge over some of the tickets and did not credit the excess so realized to the railway, it was held that he was not guilty of criminal breach of trust as he was not a trustee within the meaning of this section. The Court observed: "A trustee is a person in whom is invested the legal or formal interest in property, the equitable or beneficial interest vesting in and belonging to some other person. In the present case it is beyond doubt that [illegible] dishonestly recovered and in fact in direct contravention of their own instructions.[4]

No breach of trust if there is no dishonest use or disposal.—Where a cloth was entrusted to the accused, a washerman, on the understanding that it was not to be washed by men of certain class. [illegible] to be worn by the prohibited class, the article [illegible] to have been [illegible] for the purpose for which it was [illegible] vaccinated accepted two annas from a vaccinator under a promise to take the child to another village where the vaccinator wanted to take lymph out of the baby and she subsequently refused to take the child there[6]; where a Sub-Inspector of Police purchased a pony which had been impounded[9]; and where the accused failed to deliver the full quantity of hides entrusted to him as the tindal of a cargo boat to be carried on a steamer[10], this offence was held not to have been committed. Where the accused were entrusted by a Court officer with certain moveable property attached in execution of a decree, but at the time of sale they did not produce the property and evaded the service of notice, it was held that they could not be held guilty of criminal breach of trust inasmuch as they did not misappropriate the property or convert it to their own use or dispose of it in any manner contrary to the terms of the trust.[11]

[1] *Babaji bin Bhau*, (1867) 4 B. H. C. (Cr. C.) 18.

[2] *Khilish Chandra Deb Roy*, (1924) 51 Cal. 796.

[3] *Jameetji*, (1888) Cr. R. No. 53 of 1888, Unrep. Cr. C. 395.

[4] *Kudrat Nath*, (1922) 6 L. L. J. 125.

[5] (1880) Weir (3rd Edn.) 289.

[6] *Jaffir Naik*, (1884) 2 B. H. C. 127.

[7] *Ardeshir Merwanjee*, (1889) Cr. R. No. 56 of 1889, Unrep. Cr. C. 434.

[8] *Satawa*, (1891) Unrep. Cr. C. 557.

[9] *Rajkristo Bowar*, (1871) 16 W. R. (Cr.) 52.

[10] *Ramaya*, (1904) 10 Burma L. R. 170.

[11] *Harnam Singh*, (1919) 16 A. L. J. R. 806.

PRACTICE.

Evidence.—Prove (1) that the accused was entrusted with property or with dominion over it.[1]

(2) That he (*a*) misappropriated it, or (*b*) converted it to his own use, or (*c*) used it, or (*d*) disposed of it.

(3) That he did so in violation of (*a*) any direction of law prescribing the mode in which such trust was to be discharged, or (*b*) any legal contract, express or implied, which he had made touching the discharge of such trust; or that he wilfully suffered some other persons to do as above.

To make out a case of criminal breach of trust it is not sufficient to show that money has been retained. It must also be shown that the accused disposed of it in some way other than that in which he was bound to apply it and that he did so dishonestly. The mere fact that the accused did not at once apply the money to the purpose for which it was intended does not amount to criminal breach of trust. There must be some dishonest use of money to constitute the offence.[2] Mere retention of money does not necessarily raise a presumption of dishonest misappropriation to one's own use, but dishonest misappropriation may sometimes be inferred from the circumstances without direct evidence.[3]

(4) That he acted as in (2) dishonestly.[4]

Where at the trial for an offence under this section, the accused admits having received the money alleged to have been misappropriated by him, but defends himself by saying that he made it over to the proper person, the onus does not lie on him to prove payment, but on the prosecution to prove non-payment; for it is only when the latter is proved that a presumption will arise of misappropriation or breach of trust.[5]

Evidence given of acts of embezzlement other than those charged in the indictment.—An indictment charged the prisoner with having embezzled three sums of £2, the money of his employers, he being a clerk or servant. Evidence was given of the embezzlement of these sums, and it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled, to show that if it should be contended the sums charged in the indictment were subjects [illegible] inaccount- [illegible] determining [illegible] evidence was admissible.[6]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

In a case of criminal breach of trust arising out of the misappropriation of a number of sums, the proper course is for the prosecutor to select three items on which to proceed in the first instance and to give some general evidence as to the amount believed to have been misappropriated.[7] In view of s. 222 (2) of the Criminal Procedure Code this is not necessary, but if it is done the accused cannot complain of multifariousness. Where a person receives money for the express purpose of using it for his master's benefit in a particular way, he is entrusted with money, and his misappropriation of it to himself amounts to criminal breach of trust; and consequently a conviction for criminal breach of trust committed by

[1] *Gouri Narayan Barua* v. *Tilbiram Chetri*, (1921) 25 C. W. N. 838.

[2] *Nga Hmu* (1901) 1 U. B. R. (1897-1901) 345.

[3] *Ngo Tha Zan*, (1905) U. B. R. (P. C.) 19

[4] *Nagappa Mallappa*, (1907) 9 Bom. L. R. J. 120.

[5] *Hari Dagdu*, (1896) Cr. R. No. 47 of 1896, Unrep. Cr. C. 872; *Ramchandra Ganesh*, (1896) Cr. R. No. 27 of 1896, Unrep. Cr. C. 860.

[6] *Richardson*, (1861) 8 Cox 448; *William Proud*, (1861) 9 Cox 22.

[7] *Vilhikini Govinda Menon*, (1883) Weir (3rd Edn.) 270.

misappropriation of a large sum of money made up of various items (more than three in number) on false pretences is not illegal.[1]

The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is. There must, therefore, be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction.[2]

Agreement to refund will not bar prosecution.—An agreement between the prosecutor and the prisoner that the money embezzled shall be refunded cannot be pleaded in bar of the prosecution.[3]

Venue.—*The offence of criminal breach of trust may be inquired into or tried* by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.[4]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, being entrusted with certain property, to wit——, committed criminal breach of trust ; and that you thereby committed an offence punishable under s. 406 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

When the accused is charged with criminal breach of trust, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence: Provided that the time included between the first and last of such dates shall not exceed one year.[5] Prior to the enacting of this clause there was a difference of opinion between the various High Courts as to the legality of charging a person for a general deficiency without specifying particular items or exact dates. This clause is in accordance with the present English law. Where an accused person is charged with having misappropriated or committed criminal breach of trust in respect of an aggregate sum of money, the whole sum being alleged to have been wrongfully dealt with by the accused within a period not exceeding one year, the mere fact that the items composing such aggregate sum are specified and may be more than three in number will not render the charge obnoxious to the prohibition implied by s. 234 of the Code of Criminal Procedure.[6] In a charge of criminal misappropriation there were three counts. Each count specified the sum of money alleged to have been misappropriated by the accused on a particular day; but in two out of the three cases the total sum consisted of three separate items in each instance. It was *hold* that a charge so framed did not offend against s. 234 of the Code of Criminal Procedure.[7] An accused person was tried for criminal breach of trust in respect of three distinct sums, and one charge was drawn up specifying all the three sums and the persons

[1] *Theophilus Ramappa*, (1912) 22 M. L. J. 112, 12 M. L. T. 203.

[2] *Khirode Kumar*, (1924) 29 C. W. N. 54, 40 C. L. J. 555.

[3] *Mayandi Pillai*, (1886) 1 Weir 462 ; *Ramasamy Nadan*, (1883) 1 Weir 465.

[4] Criminal Procedure Code, s. 181.

[5] *Ibid*, s. 222 (3). The cases of *Ramchandra Govind Harshe*, (1895) 19 Bom. 749 ; *Luchminaraun*, (1886) 14 Cal. 123 ; *Pursotam Dass Morarjee*, (1896) 24 Cal. 193 ; *Chetter*, (1871) 15 W. R. (Cr.) 5 ; *Ekram Ally*, (1898) 2 C. W. N. 341, are no longer of any authority. See *Kellie*, (1895) 17 All. 153 ; *Budhu v. Babu Lal*, (1895) 18 All. 116.

[6] *Gulzari Lal*, (1902) 24 All. 254.

[7] *Ishtiaq Ahmad*, (1904) 27 All. 69.

from whom he collected them. He was not charged with three offences, but with one offence under s. 409 and was convicted and sentenced to one term of imprisonment. It was held that the charge as framed was not contrary to law, it being in accordance with s. 222, sub-s. (2) and s. 234 of the Code of Criminal Procedure.[1]

Where the charge against the accused was to the effect that he on or before the 21st June 1907 committed breach of trust in respect of some deeds which he took from the complainant and was thereby guilty of an offence punishable *under this section, but at the trial he was convicted of embezzling not the deeds* but amounts obtained by dealing with those deeds, it was held that the conviction was bad.[2]

Punishment.—A case of embezzlement of money is not a case contemplated by s. 62 ; and hence, in a sentence under this section, the Court is not competent to order that the rents and profits of the property of the accused should be forfeited to Government during the period of his imprisonment.[3]

Criminal breach of trust by carrier, etc.

407. Whoever, being entrusted with property as a carrier,[1] wharfinger[2] or warehouse-keeper,[3] commits criminal breach of trust in respect of such property shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Those who receive property under a contract, express or implied, to carry it or keep it in safe custody are punishable under this section for a criminal breach of duty with respect to such property The persons specified in this section are alike in being entrusted with the custody of property for which they are remunerated, their employment being not continuous, but intermittent, and in relation to specific goods.

1. **'Carrier.'**—A 'carrier' is a person who undertakes to transport the goods of other persons from one place to another for hire[4] Any one who undertakes to carry the goods of all persons indifferently, for hire, is a common carrier.[5] Railway companies are carriers.[6]

2. **'Wharfinger.'**—The term 'wharfinger' means a person who owns or keeps a wharf, which is 'a broad plain place, near some creek or haven, to lay goods and wares on that are brought to or from the water'[7]

3. **'Warehouse-keeper.'**—One who keeps a warehouse, which is a house to deposit or keep wares in. Ware is an article of merchandise, fabric, especially in the plural, goods, commodities, merchandise.

PRACTICE.

Evidence.—Prove (1) that the accused is a carrier, wharfinger, or warehouse-keeper.

(2) That he was as such entrusted with the property in question.

(3) That he committed criminal breach of trust in respect of it.[8]

See the Indian Evidence Act, s. 15 (*b*).

[1] *Sat Narain Tewari*, (1905) 32 Cal. 1085.

[2] *Bipra Das Giri* v. *Niradamoni Bewa*, (1908) 12 C. W. N. 577 ; *Balthasar*, (1914) 41 Cal. 844.

[3] *Amrit Lal*, (1906) 29 All. 25.

[4] Wharton, 13th Edn., p. 143.

[5] *Gisbourn* v. *Hurst*, (1710) 1 Salk. 249.

[6] Indian Railways Act, IX of 1890 Their civil liability is restricted by ss. 72-82.

[7] Wharton, 13th Edn., p. 168.

[8] *Vide* s. 406, sup.

To establish the essential elements of this offence it is necessary to show at least that some of the property entrusted to the accused cannot be accounted for by him.[1]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, being entrusted with property, to wit——, as a carrier [*or* wharfinger, *or* warehouse-keeper] committed criminal breach of trust in respect of such property ; and that you thereby committed an offence punishable under s. 407 of the Indian Penal Code and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Criminal breach of trust by clerk or servant.

408. Whoever, being a clerk[1] or servant[2] or employed as a clerk or servant,[3] and being in any manner entrusted in such capacity with property,[4] or with any dominion over property,[5] commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Section 381 punishes theft by a clerk or a servant. This section inflicts enhanced punishment on such a person for criminal breach of trust.

Scope.—The offence is committed even where the act of the accused is to cause wrongful loss to his master for a time only.[2]

1. **'Clerk.'**—In modern usage this word means a writer in an office, public or private, either for keeping accounts or entering minutes. *See s. 381, supra.*

2. **'Servant.'**—Master and servant, a relation whereby a person calls in the assistance of others, where his own skill and labour are not sufficient to carry out his own business or purpose.[3] See s. 381, *supra*. A person hired by a market gardener to do a day's work and sent by him to sell vegetables at market and bring back the proceeds is a servant to his employer in respect of such employment.[4] A person engaged by a trading firm on commission to make purchases under instructions from the firm is a servant of the firm.[5]

3. **'Employed as a clerk or servant.'**—If a person acts as a clerk or servant although there is no contract binding on him to work, yet so long as he does the duties he will come under the category of clerk or servant.[6]

If a servant receives money on his employer's account, and embezzles it he is guilty of a felony, though his employers had no right to it, and were wrong-doers in receiving it.[7]

4. **'Entrusted in such capacity with property.'**—The property must have been entrusted to the accused in his capacity of a clerk or a servant.[8] If it is not

[1] *Parabhu Ghatgeappa*, (1907) 9 Bom. L. R. 229.
[2] *Tulsidas Chhagandal*, (1906) 8 Bom. L. R. 951.
[3] Wharton, 13th Edn., p. 550
[4] *Winnall*, (1851) 5 Cox 326. See *Pyo Gyi*, (1919) 10 L. B. R. 31, 12 B. L. T. 31, *infra*.
[5] *Pyo Gyi*, sup
[6] *Foulkes*, (1875) L. R. 2 C. C. R. 150. See *Karim-ud-din*, (1918) 40 All. 565.
[7] *Richard Beacall*, (1824) 1 C. & P. 454.
[8] (1865) 3 W. R. (Cr. L.) 12.

entrusted in such capacity the clerk or servant will be liable under s. 406 and not under this section.

If a servant secrete moneys which his master has marked and sent by a friend to make a purchase at his shop, with a view to try the honesty of the servant, it is a felonious breach of trust.[1]

Accused was engaged by the complainant as a tonga driver on a monthly salary of Rs. 15 to drive the tonga on hire within the limits of the Ludhiana Municipality. He was to bring the tonga back each evening and pay over his earnings to the complainant. [illegible] was pursued and arrested at [illegible] nga rapidly. The accused wa[illegible] agistrate but acquitted on appeal to the Sessions Judge who found that there had been no criminal breach of trust as the accused had not disposed of the tonga. It was held that there was no doubt that the accused intended to deprive his master of the tonga and that his intent or mental act of his was the gist of the offence of criminal breach of trust and the accused was therefore guilty of an offence punishable under this section.[2]

5. **'Or with dominion over property.'**—If a clerk or servant who has dominion over the property of his master in some way or other misappropriates or converts to his own use such property he commits criminal breach of trust. For instance, where it is the duty of a Municipal Water-works Inspector to supervise and check the distribution of water from the Municipal Water-works, he has dominion over the water belonging to his employers. If he deliberately misappropriates such water for his own use or for the use of his tenants for which he pays no tax and gives no information to his employers he is guilty of criminal breach of trust.[3] Where a Municipal Water-works Inspector, being the lessor of a house within municipal limits which he had sub-let, had such house connected with a municipal water main and accepted a yearly payment as water tax from his tenants, but neither informed the municipal board that the connection had been made nor credited to the board the money which he received as water tax from his tenants, it was held that he was properly convicted under this section.[4]

Commission obtained by a servant.—The principle applying to cases where a servant employed to pay a bill for his master, obtains a commission or a reduction of a price for his own benefit, has been thus laid down. "If the account is an *open* one, that is, an account of which the items have never been checked or settled, and if the transaction amounts to a taxation of the bill and a reduction of the price by the servant, it is obvious that the servant obtains the reduction for his master; that the money in his hands always remains the master's property, and that if he appropriates it, he steals it. But if the master himself has *settled* the account with the tradesman for a specific sum, and he sends the servant with the money, and the servant after making the payment, asks the tradesman for a present, then if the servant takes the present and keeps it, he is not guilty of stealing, because he has no intention to steal; the money is given to him by a person whom he believes to have a right to give it. It may be that, according to the strict equitable doctrines of the Court of Chancery, the servant is bound to account to his master for the money. But, however this may be, his act is a very different matter from a criminal offence, and I do not think he can be convicted of criminal breach of trust merely because, by a mere equitable doctrine of the Court of Chancery, it was obligatory upon him to render an account."[5]

[1] *William Headge*, (1809) 2 Leach 1033

[2] *Dina*, (1923) 6 Lah. 257.

[3] *Bimala Charan Roy*, (1913) 35 All. 361.

[4] *Ibid.*

[5] Per Petheram, C. J., in *Imdad Khan*, (1885) 8 All. 120, 138.

CASES.

Conversion by a servant under a special trust.—Where a Court Inspector improperly delegated to a constable the custody, etc., of Government moneys taking from him private security to save himself from loss in case of defalcation, and the constable dishonestly converted the money to his own use, although he afterwards restored it, it was held that his offence fell under this section and not under s. 409, the money having been entrusted to him in his private and not public capacity.[1] A servant who received money for a specific purpose, and did not use it for that purpose, and, on being called on to account for the money, falsely said that he used it for that purpose, was held to have committed this offence.[2]

If a servant immediately on receiving a sum for his master enters a smaller sum in his master's books, and ultimately accounts to his master for the smaller sum, he may be considered as embezzling the difference at the time he makes the entry. It will make no difference though he received other sums for his master the same day, and in paying those and the smaller sum to his master together, he might give his master every piece of money or note he received at the time he made the false entry.[3] The accused was given money by complainant company to purchase specified paddy at specified prices. He was to be paid all expenses incurred in purchasing the paddy and bringing it to the mill, and was to receive a commission of rupee one per hundred baskets. This commission was his only form of remuneration, and he could not suffer any loss by the transaction. It was held that the accused was a servant of the company in this transaction, that the money was entrusted to him for a specific purpose, and that the accused was guilty of criminal breach of trust under this section.[4]

Property must have been entrusted to a person as a clerk or servant.—A Station Master on the East Indian Railway, under an arrangement with the Company, received a fixed allowance in respect of the marking, loading and unloading work at his station and used to engage his own men for that purpose. One of such men, engaged as a marksman, was first allowed to keep certain registers, which it was the duty of the Station Master to maintain, and next allowed to receive cash payments and make entries in the cash register. Whilst so employed, he received a sum of Rs. 5-10-0 as an overcharge or demurrage in respect of certain goods which passed through his hands, and appropriated the same. To this sum, however, the Railway Company made no claim. He was also alleged to have received and appropriated to his own use two other sums of money under somewhat similar circumstances. In respect of these three sums he was tried and convicted on three counts under s. 408. It was held that the offence, if any, committed with regard to the sum of Rs. 5-10-0 did not fall within this section at all, and, this being so, the joinder of the three charges in one trial was illegal.[5]

Using the property entrusted for the benefit of another person.—Where a person entrusted another with some blocks of wood-engraving to print his catalogue, and that other person used the blocks or allowed other persons to use the blocks to print a rival firm's catalogue, it was held that such dealing with the blocks was a violation of an implied contract and caused wrongful gain to the accused, for he obtained a catalogue at a less expense, and wrongful loss to the owner, inasmuch

[1] *Banee Madhub Ghose*, (1867) 8 W. R. (Cr.) 1. This case has been modified by *Ram Dhun Dey*, (1870) 13 W R (Cr.) 77, in which a conviction under s 409 was maintained.

[2] *Watson & Co v Golab Khan*, (1868) 10 W. R. (Cr.) 28. See also *Lolit Mohan Sarkar*, (1894) 22 Cal. 313.

[3] *John Hall*, (1821) R. & R. 463.

[4] *Pyo Gyi*, (1919) 10 L. B. R. 31, 12 B. L. T. 31.

[5] *Karim-ud-din*, (1918) 40 All. 565.

as his property deteriorated in value, and therefore constituted criminal breach of trust.[1]

Appropriation by a servant of property ordered to be destroyed.—The accused, a servant, was ordered by his employers to take certain bags of papers and forms belonging to them to their yard and there to burn and destroy them. Instead of doing this, the accused carried the papers away to a certain place. It was held that the act of the accused did not amount to this offence [2]

PRACTICE.

Evidence.—Prove (1) that the accused was the clerk or servant of the person reposing trust.

(2) That he was in such capacity entrusted with the property in question or with dominion over it.

(3) That he committed criminal breach of trust in respect of it.[3]

Actual conversion need not be proved. A mental act of fraudulent appropriation may be inferred from conduct.[4]

To support a conviction for abetment of criminal breach of trust by a servant it must be proved that the transaction was a dishonest transaction, that the accused knew that, in respect of such transaction, the servant was acting dishonestly and was committing a breach of trust, and that he abetted the servant in effecting it.[5]

Excessive delay in remitting revenue collections to the Treasury is held to be evidence of a dishonest misappropriation on the part of a village officer.[6]

Where property is entrusted to a servant and such servant fails to return or to account or gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use In such cases the Courts are entitled to draw hostile inferences and presumptions from the action and statements of the servant.[7]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class

Jurisdiction—The Court, within whose jurisdiction the consequence of an accused's act occurs, can inquire into the charge [8]

Charge.—Where an accused person was charged under this section with having committed criminal breach of trust in respect of a gross sum of money misappropriated by him within the period of one year and the charge specified not only the gross sum taken and the dates between which it was taken, but also set out the items, twenty-two in number, composing such gross sum, giving the dates and the amount alleged to have been misappropriated on each date, it was held that the charge came within s. 222 (2) of the Criminal Procedure Code, and that by specifying the items composing the gross sum the charge went beyond what was necessary and was to that extent favourable to the accused.[9]

The charge should run thus:

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, being a servant in the employment of AB, and in such capacity entrusted with [*or* with dominion over] certain property, to wit——, committed criminal breach of trust with respect to

[1] *Keshab Chandra Boral* v. *Nityanund Biswas*, (1901) 6 C. W. N. 203

[2] *Preo Nath Chowdhry*, (1902) 29 Cal. 489

[3] *Vide* s. 406., sup.

[4] *Kesho Ram*, (1889) P. R. No. 36 of 1889.

[5] *Bal Gobind Shaha*, (1900) 4 C. W. N. 309

[6] (1880) 1 Weir 464.

[7] *Sona Meah*, (1924) 2 Rang. 476.

[8] *O'Brien*, (1896) 19 All. 111.

[9] *Samiruddin Sarkar* v. *Nibaran Chandra Ghose*, (1904) 31 Cal. 925. See *Gulzari Lal*, (1902) 24 All. 254.

the said property, and thereby committed an offence punishable under s. 408 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*) on the said charge.

Criminal breach of trust by public servant, or by banker, merchant or agent.

409. Whoever, being in any manner entrusted with property,[1] or with any dominion over property in his capacity of a public servant[2] or in the way of his business as a banker,[3] merchant,[4] factor,[5] broker,[6] attorney[7] or agent,[8] commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section classes together public servants, bankers, merchants, factors, brokers, attorneys and agents. As a rule the duties of such persons are of a highly confidential character, involving great powers of control over the property entrusted to them; and a breach of trust by such persons may often induce serious public and private calamity. "In order to bring a case within s. 409 it is...necessary to show that property was entrusted to a public servant and that he accepted the property entrusted, being in his public capacity required or authorized to accept it. Otherwise in accepting the property he acts as a mere volunteer, and is not entrusted with it in his capacity of a public servant. It is not...sufficient to show merely that a person delivered the property to him because he was a public servant. The motive which induced the person to deliver the property cannot alone determine the quality of the trust created. The mistaken belief of the person delivering the property or of the person accepting it, or of both, that the latter was authorized to receive it in his public capacity cannot alter the facts and supply the deficient and requisite authority so as to convert simple breach of trust into breach of trust by a public servant."[1]

1. **'Property.'**—Moneys paid to a Post Master for money-orders are public moneys; as soon as they are paid they cease to be the property of the remitters, and a misappropriation of such moneys will fall under this section.[2]

2. **'In his capacity of a public servant.'**—It is not necessary that the property should be that of Government, but that it should have been entrusted to a public servant in that capacity.[3] The section does not limit the mode in which a trust arises, whether by specific order or by reason of its being part of the proper duty of a public functionary.[4] A *naib nazir* is a public servant within the meaning of this section.[5]

As to the meaning of 'public servant' see s. 21, *supra*.

3. **'Banker'** is one who receives money to be drawn out again as the owner has occasion for it, the customer being lender, and the banker borrower, with the superadded obligation of honouring the customer's cheques up to the amount of the money received and still in the banker's hands.[6] The word 'banker includes a cashier or shroff.[7]

[1] Per Plowden, J., in *Bhag Singh*, (1876) P. R. No. 24 of 1876; *Banee Madhub Ghose*, (1867) 8 W. R. (Cr.) 1.
[2] *Juala Prasad*, (1884) 7 All. 174, F. B.
[3] *Ram Soonder Poddar*, (1878) 2 C. L. R. 515.
[4] *Ram Dhun Dey*, (1870) 13 W. R. (Cr.) 77.
[5] *Mahmood Hussein*, (1870) 2 N. W. P. 298.
[6] Wharton, 13th Edn. p. 94.
[7] *Hira Lal*, (1907) P. R. No. 19 of 1908.

4. **'Merchant'.**—A merchant is one who traffics to remote countries; also, any one dealing in the purchase and sale of goods.[1] But everyone that buys and sells is not, at this day under the denomination of a merchant; only those who traffic in the way of commerce, by importation or exportation, or carry on business by way of emption, vendition, barter, permutation or exchange, and which make it their living to buy and sell, by a continued assiduity, or frequent negotiation, in the mystery of merchandising, are esteemed merchants. Bankers, and such as deal by exchange, are properly called merchants.[2]

5. **'Factor'** is a substitute in mercantile affairs; an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal, for compensation commonly called factorage or commission.[3]

6. **'Broker'** is an agent employed to make bargains and contracts between other persons in matters of trade, commerce and navigation, by explaining the intentions of both parties, and negotiating in such a manner as to put those who employ him in a condition to treat together personally. More commonly he is an agent employed by one party only to make a binding contract with another.[4]

A factor is "entrusted with the possession as well as the disposal of property," a broker is "employed to contract about it, without being put in possession."[5]

7. **'Attorney'** is one who is appointed by another to do something in his absence, and who has authority to act in the place and turn of him by whom he is delegated.[6]

8. **'Agent'.**—An agent is a person employed to do any act for another; to represent another, in dealings with a third person.[7] The word 'agent' will apply only to persons whose occupation is similar to those enumerated in this section.[8]

CASES.

Guilty—Public servant.—Where a constable dishonestly misappropriated to his own use the pay of his *thana* police entrusted to him[9]; and where the Head Clerk of an office entrusted the management of stamps, with the knowledge and sanction of his superiors, to one of his assistants, and the latter stole stamps,[10] it was held that this offence had been committed. Where the accused, a cattle pound-keeper, having levied Rs. 5 for five buffaloes in his charge, gave a receipt for Rs. 4 only to the owner of the cattle, and entered only Rs. 4 in his accounts, but subsequently altered the accounts and entered the proper amount, namely, Rs. 5, it was held that the conviction should be under this section and s. 511.[11] A traveller, with a considerable property, partly in cash and partly in gold coins, put up at a *serai*, and believing himself to be dying, sent for a police-officer for protection of his property. The accused went to the *serai* and received charge of the property. It was held that the accused was entrusted with the property in his capacity of a public servant as he was empowered by s. 95, Criminal Procedure Code, to receive the property to prevent the commission of an offence, *i.e.*, theft by other persons taking advantage of the illness or death of the traveller.[12] A clerk in a record room made over a document forming part of a record in his custody to a person who was entitled to the document, but would otherwise have had to present an application on stamped paper in order to secure its return in a legal manner. It was held that the clerk was, under the above circumstances,

[1] Wharton, 13th Edn., p. 556.
[2] Jacob's Law Dictionary, as enlarged by Tomlins, Vol. II, Edn. of 1809.
[3] Wharton, 13th Edn., p. 347.
[4] Wharton, 13th Edn., p. 129
[5] Smith's Mercantile Law, (12th Edn.), p. 159, quoted in *Ex parte Dixon*, (1876) 4 Ch. D. 133, 137, and in *Stevens* v. *Biller*, (1883) 25 Ch. D. 31, 34.
[6] Wharton, 13th Edn., p. 81.
[7] The Indian Contract Act, (IX of 1872), s. 182.
[8] *Kane*, [1901] 1 K. B. 472; *Portugal*, (1885) 16 Q. B. D. 487.
[9] *Subdar Meeah*, (1865) 3 W. R. (Cr.) 44.
[10] *Ram Dhun Dey*, (1870) 13 W. R. (Cr.) 77.
[11] *Bhula*, (1893) Cr. R. No. 2 of 1893, Unrep. Cr. C. 632.
[12] *Bhag Singh*, (1876) P. R. No. 24 of 1876.

rightly convicted under this section.[1] The accused, a petty officer in the Salt Department, was empowered to sell salt at reduced prices to fish-curers. He was directed to enter the sales to such persons by departmental orders in the Government books. He really bought some salt for himself at the reduced rates, entering the sales in the Government books as if made to fish-curers and thereby appropriated to himself the difference between the reduced price and the proper price. It was held that the accused was guilty under this section and not under s. 177, as he was not 'legally bound' to obey the departmental rule.[2] A Postmaster whose duty it was to pay over to the holders of certain cash certificates the money due thereon at a certain rate, in fact paid the holders at a lower rate and appropriated the difference himself. It was held that by so doing he had committed an offence under this section.[3] Where a public servant was entrusted with money to purchase some materials for building a house and he by some private arrangement obtained the same free of cost, it was held that a trust having been reposed in the petitioner as a public servant it was his duty to account truly for all the monies received and that as he had obtained the materials free of cost, it was his duty to have refunded the unspent balance to Government and as he did not do so he was guilty of criminal breach of trust.[4]

Director.—Where the directors of a bank paid the dividends out of the deposits, when there were no profits, thereby causing gain to persons to which they were not entitled, and wrongful loss to depositors, they were held guilty under this section.[5] The mere passing of an incorrect balance sheet is held not to amount to an offence under this section.[6] The accused, the managing director of a bank, wishing the bank to make a better show than the real facts of its working would warrant, in order to maintain the confidence of the share-holders and the public and so to make possible a project for increasing largely the bank's capital, on 17th December, 1912, got his son to present a pro-note for Rs. 3,000 as a *pro tanto* addition to the profits for 1912, by reducing on paper to that extent his remuneration account from Rs. 4,050, which he had actually drawn, to Rs. 1,050, and thus deceiving the share-holders as to the real profits, induced them to declare a dividend of six per cent. instead of some three per cent. which would otherwise have been the most possible. Later, in January 1913, *i.e.*, after the close of the financial year, the whole thing was readjusted and matters returned to the *status quo ante* 17th December, 1912. It was held that the accused was guilty of an offence under this section inasmuch as by his act he caused wrongful immediate gain to himself and the other share-holders to the extent of the enhanced dividend and so acted dishonestly.[7] A debtor of a bank executed in its favour certain *hundies* for Rs. 30,000 payable after six months. The bank being in need of ready money, the accused, the managing director, asked the Co-operative Bank to discount the *hundies*. But the bank refused to do so unless the director cleared his own account with it. In order to secure ready money the accused brought forward his own son, who put in an application for a loan from the bank for the exact amount of the accused's debt to the Co-operative Bank. The accused sanctioned the loan as agent on the security of his own money in the hands of the bank and then cleared his debit balance with the Co-operative Bank. It was held that the prosecution had failed to establish the charge of criminal misappropriation inasmuch as the accused, in his anxiety to secure ready money for his bank, chose a method which could not be said to have injured it.[8]

Trustee.—Where a trustee or a manager of a temple misappropriated temple jewels, he was held guilty of the offence of criminal breach of trust under

[1] *Ganga Prasad*, (1904) 27 All. 260.
[2] *Balaya*, (1894) 1 Weir 467.
[3] *Sita Ram*, (1910) 42 All. 204.
[4] *Saiyid Mohiuddin* (1925) 4 Pat. 488.
[5] *Moss*, (1893) 16 All 88
[6] *Seddon* v. *Loane*, (1910) 9 M. L. T. 20.
[7] *Daulat Rai*, (1915) P. R. No. 28 of 1915, P. W. R. (Cr.) No. 25 of 1915, P. L. R. No. 164 of 1915.
[8] *Ibid.*

ss. 405, 408, this section, and not of offences under ss. 380, 381 and 457. The trustee or manager of a temple appointed by a *devasthanam* committee under Act XX of 1863 is not in the position of a clerk or servant removeable at the pleasure of the committee, and his possession of the temple and its properties is not possession of the committee. The property of the temple is not vested in the *devasthanam* committee, nor do they represent it. The deity is the owner of the property and the trustee is the agent of the deity subject to the committee's control. Therefore, if such trustee or manager misappropriates temple jewels, he is not guilty of theft but of the offence of criminal breach of trust by an agent punishable under this section.[1]

Not guilty—Public servant.—A certain consignment of rice lay unclaimed at the docks and was advertised for sale by auction by the Port Commissioners. But the rice was found to be in a rotten condition and was ordered to be destroyed by the Health Department of the Corporation of Calcutta. It was entrusted for the purpose of destruction to the accused, who were Inspectors in that Department; but they sold the same to a third party and retained the proceeds of such sale. It was held that they had committed no offence under the Code, though they might have been guilty of infringing a departmental rule.[2] Where the accused in his capacity of Revenue Patel received from the Government treasury small sums of money on account of certain temple allowances, and did not at once pay over the same to the persons entitled to receive them, as he was bound to do, but it appeared that such persons were willing to trust him, and had actually passed receipts which the accused forwarded to the Revenue authorities, it was held that the accused fulfilled the trust reposed in him by Government and that his mere retention of money for a time, in the absence of any evidence of dishonesty, did not amount to criminal breach of trust.[3] Where a village shroff, whose duty it was to assist in collecting the public revenue, received grains from ryots and gave receipts as if for money received by virtue of a private arrangement, it was held that he was not guilty of this offence as he was not authorized to receive the public revenue in kind and the party who delivered the grain did not thereby discharge himself from liability for the revenue.[4] The accused, a *karnam* of a Government village, received moneys from certain ryots of the village as revenue due on unassessed lands, part of which was cultivated by the ryots without leave, and as cost of boundary stones required for the said lands, and misappropriated the moneys so received to his own use. It was held that the accused was not guilty of the offence of criminal breach of trust by a public servant under this section or of cheating under s. 417.[5] The accused, the *nazir* of the Court of the Cantonment Magistrate, was convicted of having criminally misappropriated Rs. 52-6-3 out of the Government money in his charge. It appeared that he intended to restore this money to Government. It was also found that the accounts in the books were kept all right and there appeared to have been a practice of longstanding in the office among officials employed to receive advances of moneys out of the cash with the accused according to their requirements, generally out of mutual regard, and then to repay them when the salaries were drawn from the Treasury and that the accused had made advances when deficiency was found in the cash. The accused made good the deficiency when he was ordered by the Cantonment Magistrate to refund it. It was held that the accused was not guilty of this offence, as there was no dishonest misappropriation or conversion or use within the meaning of s. 405.[6]

Where an Assistant Station Master whose duty it was to issue tickets to the passengers and to charge fares as fixed by the railway made an over-charge over some of the tickets and did not credit the excess so realized to the railway, it was

[1] *Muthusami Pillai*, (1895) 1 Weir 433.
[2] *Wilkinson*, (1898) 2 C. W. N. 216.
[3] *Ganpat Tapidas*, (1885) 10 Bom. 256.
[4] (1869) 4 M. H. C. App. 32.
[5] *Rengasawmi Ayyangar*, (1888) 1 Weir 466.
[6] *Imam Din*, (1902) P. L. R. No. 39 of 1902.

held that he was not guilty of criminal breach of trust as he was not a trustee within the meaning of s. 405.[1]

PRACTICE.

Evidence.—Prove (1) that the accused was either a public servant or a banker, or a merchant, or a factor, or a broker, or an attorney, or an agent.

(2) That he was in such capacity entrusted with the property in question or with the dominion over it.

(3) That he committed criminal breach of trust in respect of it.[2]

Distinct proof of criminal misappropriation is necessary.[3] But it does not lie on the prosecution to prove the actual mode of misappropriation. Where it is proved by the prosecution that the money was not returned by accused which he was bound to do, it lies on the accused to prove his defence.[4]

All the necessary elements constituting the offence must be strictly proved, and when the charge is that something was substituted in place of another, there must be clear evidence that the thing alleged to have been extracted was actually there when it came under the dominion of the accused.[5]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge.—See s. 408.

In a charge of criminal misappropriation there were three counts. Each count specified the sum of money alleged to have been misappropriated by the accused on a particular day; but in two out of the three cases the total sum consisted of three separate items in each instance It was held that a charge so framed did not offend against s. 234, Criminal Procedure Code.[6] An accused person was tried for criminal breach of trust in respect of three distinct sums, and one charge was drawn up specifying all the three sums and the persons from whom he collected them. He was not charged with three offences, but with one offence under this section, and was convicted of one offence and sentenced to one term of imprisonment. It was held that the charge as framed was not contrary to law, it being in accordance with ss. 222, sub-s. (2), and 234 of the Code of Criminal Procedure[7] Where the accused was charged with three offences under s. 477-A and three offences under this section, and tried and convicted, it was held that the trial was void by reason of misjoinder of charges[8]

Of the Receiving of Stolen Property.

Stolen property.

410. Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property," whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India.[1] But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof,[2] it then ceases to be stolen property.

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Dishonestly receiving stolen property.

411. Whoever dishonestly receives or retains any stolen property,[1] knowing or having reason to believe the same to be stolen property,[2] shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

Section 410 explains what comes under the words 'stolen property.' Things which have been stolen, extorted, or robbed, or which have been obtained by criminal misappropriation or [illegible] tion given to these words [illegible] s. 378; of 'extortion,' s. [illegible] s. 403; of 'criminal breach of trust,' s. 405.

Under s. 410 it is immaterial whether the transfer is made or misappropriation or breach of trust has been committed within or without British India.

English law.—The description of 'stolen property' in s 410 is not so wide as that of the similar provision of the Larceny Act,[1] which enacts that whosoever [illegible] valuable security, or other property whatsoever, [illegible] obtaining, embezzling or otherwise disposing [illegible] either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, etc. This provision includes property obtained by cheating, whereas the definition of stolen property as given in s. 410 does not include it.

1. 'Whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India'.—These words were inserted by Act VIII of 1882, s 9. They have enlarged the scope of the term 'stolen property,' and the act by which property has been stolen no longer need be an act punishable under the Code. The amendment was made in consequence of *Moorga Chetty's case*[2] which decided that bills of exchange stolen in Mauritius were not 'stolen property' so as to make the receiver at Bombay liable under s. 411.

The receipt or retention must take place within British India, unless the person receiving or retaining out of British India is a British subject.[3]

Where there is a dishonest retention in British India of property stolen elsewhere, it is no defence by the accused, being a foreign subject, that the property was stolen by himself, he not being liable to be tried, convicted, or punished by the British Court for the theft.[4]

Where a Nepalese subject, having stolen cattle in Nepal, brought them into British territory, it was held that he could not be convicted of theft but that he might be convicted of an offence under s. 410.[5] Similarly, where the accused, a subject of a Native State, committed a theft at Rajkot and brought the property to Thana, it was held that he could not be tried for theft, but he might be tried under s. 411 for retaining stolen property.[6] Two persons, B, who was not a British subject, and R, who was, were committed to the Court of Session at Jhansi, it being alleged against them that they had committed a robbery in an adjoining Native State and had brought the stolen property into British territory. It was held that though neither could be tried by the Sessions Judge of Jhansi for the robbery, B because he was not a British subject, and R because the certificate

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at the time of receipt.[1] But in order to support a conviction of dishonestly retaining stolen property, it ought to be shown that the accused, being in innocent possession of the property, acquired the knowledge that it was stolen, and thereafter retained it dishonestly.[2] A person who is proved to have dishonestly misappropriated property cannot be convicted of retaining it.[3]

As to the meaning of 'dishonestly,' see s. 24, *supra*.

There must be dishonest receiving or retaining. The removal of a birth register from the possession of an official without his consent for producing it in Court to prove the date of birth of a certain person is held to be not an offence under this section or any other.[4]

Manual possession not necessary for receiving.—It is not necessary that the accused should have had manual possession of the goods; but directing a servant to dispose of them, as by pawning or otherwise, will be sufficient to support the charge. Where stolen property was brought by the thief into A's shop; A, with guilty knowledge, called her servant and directed her to take the stolen goods to the pawn office and "pawn them for the girl" (the thief), and the servant did so accordingly and brought back the money, which she handed to the thief in her mistress's presence, it was held that this amounted to a receiving by A of the stolen property, though she had never the manual possession of either the goods or the money.[5] Where the consignee presented a railway receipt for certain stolen goods to the station-master, paid the freight and received formal delivery of the package from the latter, it was held that the goods had come to be not merely in the potential possession of the consignee but actually within his power and unrestricted control, though he had not removed them from the station where they were then lying, nor made any attempt to do so, and that he had received them within the meaning of this section.[6]

If exclusive possession remain in the thief, there cannot be a conviction for receiving. A and B, two thieves, were seen to come at midnight out of a house belonging to C's father, under the following circumstances. A carried a sack containing stolen goods: B accompanied him; C preceded them, carrying a lighted candle. All three go into an adjoining stable belonging to C, and then shut the door Policemen enter the stable and find the sack lying on the floor tied at the mouth, and the three men standing round it as if they were bargaining; but no particular words were heard. It was held that on this evidence C could not be convicted of receiving stolen goods; inasmuch as although there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore C had no possession, either actual or constructive.[7]

Though manual possession is not necessary yet proof of an actual taking into some kind of possession is necessary. A stole fowls, and sent them by coach to Birmingham, in a box, not addressed to anyone; but A made a verbal statement when he sent them, that a person would call for them at Birmingham. B inquired for the box; it was shewn to her, and she claimed it but it was not delivered to her. It was held that B could not be properly convicted as a receiver.[8]

Any profit to the receiver not necessary.—It makes no difference whether a receiver receives for the purpose of profit or advantage, or whether he does it to assist the thief.[9]

[1] (1869) 4 M. H. C. App. 42.

[2] *Khona*, (1879) P. R. No. 31 of 1879.

[3] *Shwe Thi*, (1906) 3 L. B. R. 254.

[4] *Chima*, (1914) P. W. R. (Cr.) No. 19 of 1914.

[5] *Miller*, (1853) 6 Cox 353; *Thomas Smith*, (1855) 24 L. J. (M. C.) 135.

[6] *Shewdhar Sukul*, (1913) 40 Cal. 990.

[7] *John Wiley*, (1850) 4 Cox 412. See *Muhamad Ali Sket*, (1908) 10 M. L. J. 201, 4 M. L. T. 415.

[8] *Catherine Hill*, (1849) 18 L. J. (M. C.) 109.

[9] *Davis*, (1833) 6 C. & P. 177.

False claim is not receipt.—The circumstance that a person knew that the property was not his own and yet claimed it before the Magistrate in his deposition in a case, was held to be not sufficient for his conviction.[1]

Res nullius cannot be the subject of receiving.—Where a bull was let loose, as part of a religious ceremony, and was the property of no one, it was held that it could not be the subject of an offence under this section, as the original owner had surrendered all his rights as its proprietor and that it was, therefore, *nullius propriétas*.[2]

Receiver is guilty though the principal is not.—Where a child committed theft and was discharged under s. 83, this fact was held to be no bar to the conviction of the person who received the stolen property from the child under this section.[3]

Joint possession.—A person having a joint possession with the thief may be convicted as a receiver.[4]

Where property is found in a house in the possession of more than one person, mere discovery of any stolen property in that house is not in itself sufficient to prove that the possession was of any of those persons.[5]

Joint family possession.—Where stolen property is found in a house occupied by several persons, it is not enough to shew that the property was found in the house, to convict a member of the family who might have had nothing to do with bringing or keeping it there.[6] The manager of a joint Hindu family is *prima facie* [illegible] stolen property. If knowledge of the presence in the house of the stolen property is established against the managing member, he must, as the house-master, be presumed to have been in possession of it.[10]

In a house occupied by a joint family including several male and female members certain stolen property was found in a locked box, the key of which was in the possession of the wife of one of the men who, however, was not in the house. The husband was convicted under this section. It was held that it cannot be presumed that in every case of this kind the possession of the wife is *per se* the possession of the husband, and as there was nothing to connect the husband with the possession beyond the mere fact that he was the husband of the woman who had the key of the box, the conclusion that he was in possession of the property was not justified.[11]

Husband and wife—*English law.*—Upon a joint charge against husband and wife of receiving stolen goods the wife cannot properly be convicted if the husband

[illegible] 373

[4] *Thomas Smith*, (1855) 24 L. J. (M. C.) 135.

[5] *Muhammad Ali Shet*, (1908) 19 M.L.J. 301, 4 M.L.T. 415

[6] *Bashir Ahmad Khan*, (1919) 22 O. C. 256, 2 U. P. L. R. 12.

[7] *Musai Kamat*, (1920) 1 P. L. T. 431.

[8] *De Silva*, (1873) 5 N. W. P. 120. See [illegible]

[9] [illegible]

[10] *Budh Lal*, (1907) 29 All. 598; *Sangam Lal*, sup., p. 131.

[11] *Khushi Ram*, (1922) 20 A. L. J. R. 162; *Qaim Din*, (1925) 7 L. L. J. 223, 26 P. L. R. 522.

in.[1] If the wife has voluntarily committed theft, the husband can be convicted of receiving stolen property from the wife.[2] But if the wife has received stolen goods without the control or knowledge of and apart from her husband, the husband cannot be held guilty of receiving even though he afterwards adopts his wife's receipt.[3] Bare acquiescence in the receipt of stolen property is not the adoption of receipt, so as to constitute receiving.[4] A wife, in the absence of her husband, and without his knowledge, received stolen goods, and paid money on account of them. The thief and the husband afterwards met. The latter then learnt that the goods were stolen, he had agreed on the price which he was to pay for them, and paid the balance to the thief. It was held that the husband might be convicted of receiving the goods knowing them to be stolen.[5]

A husband and wife were jointly indicted for receiving stolen goods. There was evidence that the wife had received part of the stolen property from one of the thieves; there was no evidence that the husband was present at the time, and there was no evidence that the wife was acting under his compulsion. It was held that the wife was properly convicted of receiving stolen goods.[6]

A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer, receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods. The receiver, however, may be indicted for common law misdemeanour.[7]

'Stolen property.'—Property into or for which the stolen property has been converted or exchanged is not stolen property.[8] Hence, money obtained upon forged money-orders[9]; or an ingot obtained by melting stolen jewellery[10] is not stolen property.

2. **'Knowing or having reason to believe the same to be stolen property.'**—The offence made punishable is not the receiving of stolen property from any particular person, but the receiving of such property knowing it to be stolen. Mere suspicion is not enough.[11] A person is not guilty of this offence although at the time of receiving the property he erroneously believes it to be stolen[12]; or where the articles are not of an unusual character but are such as easily pass from hand to hand.[13]

"A person must be held to have 'reason to believe' property to be stolen within the meaning of s. 411 ... when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the property he was asked to deal with was stolen property, although the circumstances may fall short of carrying absolute conviction to his mind on the point."[14] See also s. 26, *supra*, as to the meaning of 'reason to believe.'

It is immaterial whether the receiver knows or not who stole them. The section does not apply to the actual thief. The class of persons against whom it is directed is a class to whom these alternative words apply, "knowing or having reason to believe the same to be stolen property."[15]

Servant receiving goods knowing them to have been stolen is guilty.—Where A, knowing that goods were stolen, directed B, his servant, to receive them into his premises, and B, in pursuance of that direction, afterwards received them in A's absence, B knowing that they had been stolen, they were jointly indicted for receiving them.[16]

[1] *Eliza Archer*, (1826) 1 Mood. 143.
[2] *M'Athey*, (1862) 9 Cox 251.
[3] *William Dring*, (1857) Dears. & B. 329.
[4] *James Orris*, (1908) 1 Cr. App. R. 199.
[5] *Woodward*, (1862) 31 L. J. (M. C.) 91.
[6] *Mary Baines*, (1900) 19 Cox 524.
[7] *Kenny*, (1877) 2 Q. B. D. 307; *Streeter*, (1900) 2 Q. B. 601.
[8] *Subha Chand*, (1881) P. R. No. 39 of 1881.
[9] *Monmohun Roy*, (1875) 24 W. R. (Cr.) 33.
[10] *Subha Chand*, sup.
[11] *Kannappa Naicker*, (1913) M. W. N. 696.
[12] *Issup*, (1888) Cr. R. No. 41 of 1888, Unrep. Cr. C. 389.
[13] *Baiaji*, (1892) Cr. R. No 13 of 1892, Unrep. Cr. C. 594.
[14] Per Rattigan, J., in *Gulbad Shah*, (1888) P. R. No. 37 of 1888.
[15] *Ibid.*
[16] *Johri*, (1901) 23 All. 266.
[17] *Parr*, (1841) 2 Mood. & Rob. 346.

Amendment.—After the expression 'in respect of which' there were the words 'the offence of.' But the word 'the' was repealed by Act XII of 1891; and the words 'offence of,' by Act VIII of 1882, s. 9, as a result of the decision in *Moorga Chetty's case.*[1]

The 'words whether the transfer, etc., British India' were, as heretofore said, inserted by Act VIII of 1882, s. 9.

PRACTICE.

Evidence.—Prove—

(1) That the property in question is stolen property.[2]

The goods received must be the identical goods which were stolen, and not something for which they had been sold or exchanged.[3] The finding must be that the accused received the very property stolen, not property like it.[4] If it is manifestly impossible to recognize stolen property no conviction could be made.[5]

[illegible] proof of proof of the fact that goods found in the house [illegible] cerea[illegible] with those found.[6]

(2) That the accused received or retained such property.

There must be some proof that some person other than the accused had possession of the property before the accused got possession of it.[7]

Where property sufficiently identified to be the property of one person is found to be in the possession of another person without leave or license or any legal permission of the owner, it is for the party in whose possession the property is found duly to account for its possession, and, unless he can do so, a jury might fairly infer in such circumstances that it was with a guilty knowledge that the prisoner took that which he knew to be not his own.[8] But possession of property which has been stolen from the owner is generally at best only evidence of theft when the date of the theft is so recent as to make it reasonable to presume, in the absence of explanation, that the person in whose possession the property is found must have obtained the possession by stealing.[9] Mere recent possession of stolen property is not alone sufficient, as such possession is in general evidence of stealing and not of receiving.[10] The possession of stolen goods by the accused must be possession soon after the theft or the stolen goods must have been 'recently' stolen.[11] Possession of stolen goods a few months after theft raises no presumption that the possessor knew or had reason to believe the goods to be stolen.[12] If the possession is not a recent possession the accused ought not to be called upon to explain how his possession was acquired. The question of what is, or what is not, recent possession is to be considered with reference to the nature of the article stolen.[13] Whether a presumption of theft or of receipt of stolen property should be drawn would depend on the circumstances, the length of time that has elapsed after the theft, how much of stolen property is found in the possession of the person in question, the circumstances which led to the recovery and other facts connected

[1] (1881) 5 Bom 338, *v. s.*

[2] *Baldeo Pershad*, (1870) 2 N. W. P. 187; *Ishan Chandra Chandra*, (1893) 21 Cal. 328; *Burke*, (1884) 6 All. 224; *Mutaya*, (1888) Unrep. Cr. C. 416.

[3] *Subha Chand*, (1881) P. R. No 39 of 1881.

[4] *Bara Chela*, (1886) Cr. R. No. of 1868, Unrep. Cr. C. 227.

[5] *Lal*, (1912) P. L. R. No. 194 of 1912. P. W. R. (Cr.) No. 35 of 1912.

[6] *Shaikh Sharafat*, (1920) 1 P. L. T. 727.

[7] *Ishan Mucki*, (1888) 15 Cal. 511; *Shirram*, (1872) Unrep. Cr. C. 98. See *Nga Kyeet*, (1900) 1 L. B. R. 39, where this rule, which is based on English precedents, is not followed.

[8] *Shurufooddeen*, (1870) 13 W. R. (Cr.) 26; *Ramjoy Kurmokar*, (1876) 25 W. R. (Cr.) 10; *Hari Ramji*, (1906) 9 Bom. L. R. 27.

[9] [illegible]

[10] [illegible] 619.

[11] *Alia*, (1924) 1 L. C. 471.

[12] *Ina Sheikh*, (1885) 11 Cal. 150; *Baraji*, (1892) Cr. R. No. 13 of 1892, Unrep. Cr. C. 594; *Oldara*, [1912] M. W. N. 529; *Nga E.*, (1885) S. J. L. B. 354.

with the discovery of the property.[1] It is a presumption of fact, and not an implication of law, from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing, or of receiving, has been committed. Where the accused was found in the recent possession of some stolen sheep, of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he did not steal them himself, it was held there was evidence for the jury that he received them knowing them to have been stolen.[2] Where a stolen horse was found in the possession of the accused six months after it was lost, and there was no other evidence against the accused, the accused was not called upon for his defence as the possession was not sufficiently recent.[3] Where ordinary keys of the value of Rs. 2-8-0 were found in the possession of a man of substance more than three months after the theft, it was held that having regard to the length of time there was no presumption that the accused knew or had reason to believe the property to be stolen. Possession of stolen goods must be possession soon after the theft or the stolen goods must have been recently stolen.[4] Where the accused was found in possession of stolen property two months after the theft was committed, and gave no account of how he became possessed of it, but denied that he was ever in possession of any of the articles stolen, it was held that the accused should be convicted under this section and not under s. 379.[5] Where valuable jewellery which was stolen or otherwise lost to the owner is found under circumstances of grave suspicion in the possession of the accused about two years after the theft or loss, and the accused refuses to disclose the name of the person from whom he received the same or to give the particulars as to the original of his possession, the Court is entitled to draw an inference of guilty knowledge on the part of the accused. And if there is no evidence as to when he first acquired such possession this section applies.[6] Where the accused, the father-in-law of one S, who was the cousin of the thief, was found in possession of the stolen property three days after the theft and he disposed of it in a somewhat suspicious manner, it was held that the circumstances, though they formed grounds for grave suspicions against the accused, did not furnish conclusive evidence against him for his conviction under this section.[7]

Recognition of things not before the eyes of deposing witnesses is not evidence against a person accused of having been in possession of those things.[8]

(3) That he did so dishonestly.[9] Where a person is found in possession of stolen property dishonest retention on his part must be proved. The mere fact that his conduct is suspicious is not sufficient to repose a conviction upon.[10]

In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused.[11]

(4) That he knew or had reason to believe that the property was stolen property.[12]

[1] *Gorle Kandungadu*, (1912) M. W. N. 97.

[2] *Langmead*, (1864) 9 Cox 464; *McMahon*, (1875) 13 Cox 275

[3] *Cooper*, (1852) 3 C. & K. 318. See to the same effect, *Ram Chundra Sahu* v. *Haji Meah Haji Abdullah*, (1913) 17 C. W. N. 1129, where the Court refused even to issue process against a shroff in whose possession a Government currency-note of the value of Rs. 1,000 was traced seven months after its loss See also *Vellai Ocha Thevan*, [1912] M. W. N. 362, 11 M. L. T. 186; *Mangaya Shah*, (1915) P. W. R. (Cr.) No. 41 of 1915, P. L. R. No. 62 of 1915.

[4] *Joeenullah Bepari*, (1918) 22 C. W. N. 597.

[5] *Madappa Tevan*, (1888) 1 Weir 471.

[6] *Ram Pershad*, (1924) 2 Rang 86.

[7] *Asvini Kumar Roy*, (1905) 10 C. W. N. 219.

[8] *Mussamut Joomnee*, (1867) 8 W. R. (Cr.) 16

[9] *Burke*, (1884) 6 All. 224.

[10] *Ghansham Das*, (1925) 26 P. L. R. 165.

[11] *Malhari*, (1882) 6 Bom. 731.

[12] *Doyal Shilpkar*, (1866) 6 W. R. (Cr.) 87; *Meer Yar Ali*, (1870) 13 W. R (Cr.) 70; *Dusorut Dass*, (1872) 18 W. R. (Cr.) 63; *Bajo Huri*, (1873) 19 W. R. (Cr) 37.

As to the proof of the receiver's guilty knowledge, from the caution necessary in this sort of traffic, it must often happen that no express disclosure is made to him and yet that he knows the property to have been stolen as well as if he had actually witnessed the theft In this, as in other cases, it is sufficient if circumstances are proved, which, to persons of ordinary understanding in the situation of the accused person, must have led to the conclusion that the property was stolen or otherwise dishonestly acquired. Thus, if it is shewn, that the accused received large quantities of money, ornaments, bundles of clothes of various kinds or moveables of any sort from persons destitute of property and without any apparent lawful means of acquiring it, and especially if it is proved that the property was brought at untimely hours and under circumstances of evident concealment, it may well be concluded that it was received with a full understanding of the guilty mode by which it has been acquired. And this will be still further confirmed, if it appears that the property was purchased for a sum far below its real value, or was concealed in places not usually employed for keeping such property, or if the marks on it are effaced, or if false or inconsistent stories are told as to the mode of its acquisition. Another circumstance from which such guilty knowledge may be inferred is that the property has been received from a notorious thief or one from whom stolen property has on previous occasions been received.[1] Where a question of value of the property stolen is to arise there must be direct evidence of value.[2]

Where the circumstances do not raise the presumption that a person received the property knowing it to be stolen, the accused cannot be convicted of this offence merely because he is in possession of the property and does not account for his possession.[3] The Court must be satisfied that the property was stolen by some other person to the knowledge of the accused and there should be some evidence to shew that such was the case [4] The stealing by the other person must be proved, otherwise the receiver must be acquitted.[5]

The mere fact that a person points out a place where stolen property is concealed, if the place is not his own, is not sufficient to entitle the Court to find that the person who pointed out had received it, or retained it, knowing it to be stolen There must be some evidence which suggests that the accused himself concealed the article in the place where it was found.[6]

A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to shew that he knew each and all of the articles, of which he was in possession, to be stolen.[7] The fact of stolen property being found concealed in a man's house would be sufficient to raise a presumption that he knew the property to be stolen property, but it would not be sufficient to shew that it had been acquired by dacoity,[8] or some such other offence.

On an indictment against A for stealing, and B for receiving stolen goods, evidence was given that on various former occasions portions of the commodity stolen had been missed, and the accused had, after such occasions, been found selling such commodity; and that on the last occasion it was part of what was stolen. It was held that this was sufficient to fix the receiver with a guilty knowledge.[9]

[1] M. & M. 373.

[2] *Mahboob*, (1920) 2 U. P. L. R. 113

[3] *Burke*, (1884) 6 All. 224; *Bharos*, (1923) 21 A. L. J. R. 836, *Yasinkhan*, (1923) 19 N. L. R. 176.

[4] [illegible]

[5] [illegible] (Cr) No 1 of 1906; *Pir Bakhsh*, (1911) P. W. R. (Cr.) No. 29 of 1912; *Mehru*, (1913) P L. R. No. 315 of 1913, P. W. R. (Cr.) No. 32 of 1913; *Barkat Ali*, (1916) P. R. No. 1 of 1917.

[7] Illustration (*a*) to s. 14, Indian Evidence Act.

[8] *Malhari*, (1882) 6 Bom. 731.

[9] *William Nicholls*, (1858) 1 F. & F. 51.

Upon the trial of a prisoner for feloniously receiving stolen property, a list of the stolen articles which the prisoner, who was a marine store-dealer, had bought, was received in evidence in order to shew that he had bought at an undervalue. The circumstances under which the list was written were as follows: A Police Constable asked the prisoner to consider when he had bought the stolen property, to which the prisoner replied that his wife should make out a list of it, and on the next day the prisoner's wife in her husband's hearing said, "this is a list of what we bought and what we gave for them." On the question whether the list was properly admitted in evidence, it was held that it was clearly admissible in evidence.[1]

A principal felon is a competent witness against an accessory for receiving stolen property.[2] An admission of his guilt, made by the thief while in custody, in the presence of the receiver, is evidence against the receiver.[3] But it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed.[4] The mere fact that stolen goods were found on the prisoner's premises is not sufficient to confirm the evidence of the thief.[5]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily if the property is not worth more than Rs. 50.

A Magistrate cannot assume jurisdiction to try an offence under this section, in a summary form, unless he satisfies himself that the property in respect of which he is trying the accused is less than Rs. 50 in value, and he must record the fact in the form prescribed in s. 263 of the Criminal Procedure Code. Where there is no such reference in the record of the case, the conviction is bad.[6]

Venue.—A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.[7]

Property belonging to different owners.—Where a person was found in possession of stolen property, identified as belonging to different owners, but it did appear that he had received such property at different times, it was held that such person could not properly be tried and convicted under this section separately in respect of the property identified by each owner.[8]

Separate trials in respect of different items of stolen property.—In the house belonging to two brothers, three items of stolen property were discovered, namely, a quantity of unused postage stamps, some carpets and some buckets and padlocks. There was no evidence to shew that the stamps and carpets had been received by the brothers on different dates. On a charge of dishonestly retaining the carpets, one brother was acquitted and the other convicted. Proceedings against them were also instituted in respect of dishonest retention of the stamps. The accused pleaded that as the stamps had been discovered at their house on the same date and at the same place as the carpets only one offence in respect of these two items of property had been committed and that as they had already been tried in respect of the carpets they could not be tried in respect of the stamps. It was held that they could not be so tried.[9]

Where the property stolen formed the contents of a single parcel, a single offence in respect of all the articles contained in the parcel and not separate offences in respect of the different articles should be treated as the basis of the conviction.[10]

[1] *Mallory*, (1884) 3 Q. B. D. 33.
[2] *William Haslam*, (1786) 1 Leach 418.
[3] *Moulton Cox*, (1858) 1 F. & F. 90.
[4] *Robinson*, (1864) 4 F. & F. 43.
[5] *Pratt*, (1865) 4 F. & F. 315.
[6] *Brij Nandan Panday*, (1922) 6 P. L. T. 114.
[7] Criminal Procedure Code, s. 180, ill. (*b*).
[8] *Makhan*, (1893) 15 All. 317; *Sheo Charan*, (1923) 45 All. 485; *Ganesh Sahu*, (1923) 50 Cal. 594; *Maiku*, O. S. C. 167.
[9] *Bishun Singh*, (1924) 3 Pat. 503.
[10] *Ram Pershad*, (1924) 2 Rang. 80.

Joinder of charges.—Where a person was tried for receiving stolen property in conjunction with others who were tried for committing theft, it was held that the joinder of charges was illegal, the transactions not being the same.[1]

Joint trial.—Different persons, charged with separately retaining different articles of stolen property, though proceeds of the same theft, cannot be tried together, as the offences charged cannot be said to have been committed in the same transaction.[2]

Where part of stolen property was found in the possession of one person and another part in the possession of another, and it was proved that both had been acting in concert and had joint control over the property, it was held that their joint trial was not illegal.[3]

A person committing theft or breach of trust is not liable as a receiver.—A person cannot be convicted under this section in respect of property for which he himself has been convicted.[4] The theft and taking and retention of stolen goods form one and the same offence, and cannot be punished separately.[5] When the chief offence charged and proved by the evidence is theft, the fact of the stolen property being found in the possession of the offender should be considered as a portion of the evidence by which the chief offence is proved; and the verdict of 'not guilty' should be entered upon the charge of dishonestly receiving or retaining such property.[6]

Direction to jury.—It is no misdirection for a Judge to tell the jury that, if the accused could not prove how he became possessed of certain articles, it was their duty to convict him, for the presumption in such a case was legally valid that he knew that the property had been unlawfully acquired.[7] The Sessions Judge should direct the jury to find (1) whether the property was stolen, (2) whether it was dishonestly retained, and (3) whether the accused knew or had reason to believe the same to be stolen property.[8]

Charge.—The charge should state that the articles found in possession of the accused were the property of a certain person, who was the owner thereof.[9] It should also set forth that the accused knew or had reason to believe that the property he received was stolen property, for without this knowledge or belief, the offence is not complete.[10]

The charge should be as follows:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly received (*or* retained) stolen property, to wit——, belonging to one AB, knowing or having reason to believe the same to be stolen property, and that you thereby committed an offence punishable under s. 411 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

[1] *Bishnu Banwar*, (1896) 1 C. W. N. 35; *Ohi Bhusan Adhikari*, (1918) 46 Cal. 741; *Singhara*, (1903) P. L. R. No. 149 of 1903.

[2] *Abdul Majid*, (1906) 33 Cal. 1256; *Ohi Bhusan Adhikary*, sup.; *Jethalal Harkchand*, (1905) 7 Bom. L. R. 527, 29 Bom. 449.

[3] *Jadunandan Prasad*, (1916) 2 P. L. W. 316; *Musai Kamat*, (1920) 1 P. L. T. 431.

[4] *Shunkur*, (1870) 2 N. W. P. 312.

[5] [illegible] 63; [illegible]

[6] [illegible]

[7] [illegible]

[8] [illegible]

[9] *Siddu bin Balnath*, (1863) 1 B. H. C. 95.

[10] (1865) 4 W. R. (Cr. L.) 11.

Punishment.—In general a sentence of fine in the case of a receiver of stolen property is an improper and a futile sentence, inasmuch as the fine is a mere temporary diminution of the receiver's illegitimate profits.[1]

Dishonestly receiving property stolen in the commission of a dacoity.

412. Whoever dishonestly[1] receives or *retains*[2] *any stolen* property[3] the possession[4] whereof he knows or has reason to believe[5] to have been transferred by the commission of dacoity,[6] or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The object of this section is to stamp out the offence of dacoity which was very common when the Code was enacted.

This section refers to persons other than the actual dacoits. It implies receipt from another person or an act by one not himself the dacoit.[2] The receiver is punishable under it as severely as those who commit dacoity.

1. **'Dishonestly.'**—See s. 24, *supra*.

2. **'Receives or retains.'**—See s. 411, *supra*. Such receipt or retention must have taken place in British India to give jurisdiction to Courts. Certain persons, who were not proved to be British subjects, were found in possession, in a Native State, of property, the subject of a dacoity committed in British India. They were not proved to have taken part in the dacoity, and there was no evidence that they had received or retained any stolen property in British India. They were convicted of offences punishable under this section. It was held that no offence was proved to have been committed within the jurisdiction of a British Court.[3]

3. **'Stolen property.'**—See s. 410, *supra*.

4. **'Possession.'**—See s. 27, *supra*.

5. **'Reason to believe.'**—See s. 26, *supra*.

6. **'Dacoity.'**—See s. 391, *supra*.

PRACTICE.

Evidence.—Prove (1) that the property in question was stolen property.[4]

(2) That the possession of such property was transferred by the commission of dacoity.

(3) . . . . . property.

(4) . . . . . .

(5) That he knew or had reason to believe the circumstances stated in (2).[6]

Or prove (1) that the property in question was stolen property.

(2) That the accused received it.

(3) That he received it from a person who belonged to or had belonged to a gang of dacoits.

[1] Per Batchelor, J., in *Isarising*, Cr. Reference No. 97 of 1915, decided on 16th November 1915.

[2] *Bahiru*, (1886) Unrep. Cr. C. 312, Cr. R. No. 65 of 1886.

[3] *Kirpal Singh*, (1887) 9 All. 523; *Muhammad Hussain*, (1920) 2 L. L. J. 348.

[4] *Vide* s. 410, sup.

[5] *Vide* s. 24, sup.

[6] *Jogeshur Bagdee*, (1867) 7 W. R. (Cr.) 73, [105]; *BishooManjee*, (1868) 9 W. R. (Cr.) 16; *Samiruddin*, (1872) 18 W. R. (Cr.) 25; *Daji Mahadhu*, (1895) Cr. R. No. 19 of 1895, Unrep. Cr. C. 766.

(4) That he did as in (3) dishonestly.

(5) That he knew or had reason to believe that the person from whom he received the property belonged to or had belonged to a gang of dacoits.

(6) That he knew or had reason to believe that the property was stolen property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Where the accused is apprehended soon after a dacoity with part of the plunder in his possession, there is a good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he ought to be charged in the alternative form.[1] But when stolen property is found in the possession of dacoits the offence of 'knowingly having it in possession' is to be considered included in the original one of dacoity, unless there are circumstances clearly separating the crime from the other, *e.g.*, length of time or distance.[2] Separate convictions and sentences under ss. 395 and 412 with respect to the same property are, therefore, obviously improper.[3]

Sentence.—A sentence of transportation under this section and 59 cannot exceed ten years.[4]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, dishonestly received [*or* retained] stolen property, to wit——, belonging to one AB, knowing or having reason to believe that the possession of the same had been transferred by the commission of dacoity; and thereby committed an offence punishable under s. 412 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Habitually dealing in stolen property.

413. Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section punishes severely the common receiver or professional dealer in stolen property. One who casually receives stolen property is punished under the two preceding sections according to the taint attaching to the property.

In order to support a conviction of being an habitual receiver of stolen property, it must be shown that the property was received on different occasions and on different dates A person cannot be said to be an habitual receiver of stolen goods who may receive the proceeds of a number of different robberies from a number of different thieves on the same day[5] Because the very essence of the offence is the habitual, that is to say, constant receipt of or dealing in goods which *the prisoner knew or had reason to believe to be stolen*

[1] *Motee Jolaha*, (1866) 5 W. R. (Cr.) 66, *Cassy Mul*, (1865) 3 W. R. (Cr.) 10.

[2] *Abool Hossein*, (1864) 1 W. R. (Cr.) 48; *Shahabut Sheikh*, (1870) 13 W. R. (Cr.) 42.

[3] *Bahiru*, (1886) Cr. R. No. 65 of 1886, Unrep. Cr. C. 312.

[4] *Mohanundo Bhundary*, (1866) 5 W R. (Cr.) 16.

[5] *Baburam Kansari*, (1891) 19 Cal. 190.

Punishment.—In general a sentence of fine in the case of a receiver of stolen property is an improper and a futile sentence, inasmuch as the fine is a mere temporary diminution of the receiver's illegitimate profits.[1]

Dishonestly receiving property stolen in the commission of a dacoity.

412. Whoever dishonestly[1] receives or retains[2] any stolen property[3] the possession[4] whereof he knows or has reason to believe[5] to have been transferred by the commission of dacoity,[6] or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The object of this section is to stamp out the offence of dacoity which was very common when the Code was enacted.

This section refers to persons other than the actual dacoits. It implies receipt from another person or an act by one not himself the dacoit.[2] The receiver is punishable under it as severely as those who commit dacoity.

1. **'Dishonestly.'**—See s. 24, *supra*.

2. **'Receives or retains.'**—See s. 411, *supra*. Such receipt or retention must have taken place in British India to give jurisdiction to Courts. Certain persons, who were not proved to be British subjects, were found in possession, in a Native State, of property, the subject of a dacoity committed in British India. They were not proved to have taken part in the dacoity, and there was no evidence that they had received or retained any stolen property in British India. They were convicted of offences punishable under this section. It was held that no offence was proved to have been committed within the jurisdiction of a British Court.[3]

3. **'Stolen property.'**—See s. 410, *supra*.

4. **'Possession.'**—See s. 27, *supra*.

5. **'Reason to believe.'**—See s. 26, *supra*.

6. **'Dacoity.'**—See s. 391, *supra*.

PRACTICE.

Evidence.—Prove (1) that the property in question was stolen property.[4]

(2) That the possession of such property was transferred by the commission of dacoity.

(3) That the accused received or retained such stolen property.

(4) That he did as in (3) dishonestly.[5]

(5) That he knew or had reason to believe the circumstances stated in (2).[6]

Or prove (1) that the property in question was stolen property.

(2) That the accused received it.

(3) That he received it from a person who belonged to or had belonged to a gang of dacoits.

[1] Per Batchelor, J., in *Isarising*, Cr. Reference No. 97 of 1915, decided on 16th November 1915.

[2] *Bahiru*, (1886) Unrep. Cr. C. 312, Cr. R. No. 65 of 1886.

[3] *Kirpal Singh*, (1887) 9 All. 523; *Muhammad Husain*, (1920) 2 L. L. J. 348.

[4] *Vide* s. 410, *sup.*

[5] *Vide* s. 24, *sup.*

[6] *Jogeshur Bagdee*, (1867) 7 W. R. (Cr.) 73, [100]; *Bishoo Manjee*, (1868) 9 W. R. (Cr.) 16; *Samiruddin*, (1872) 18 W. R. (Cr.) 25; *Daji Mahadhu*, (1895) Cr. R. No. 19 of 1895, Unrep. Cr. C. 756.

(4) That he did as in (3) dishonestly.

(5) That he knew or had reason to believe that the person from whom he received the property belonged to or had belonged to a gang of dacoits.

(6) That he knew or had reason to believe that the property was stolen property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Where the accused is apprehended soon after a dacoity with part of the plunder in his possession, there is a good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he ought to be charged in the alternative form.[1] But when stolen property is found in the possession of dacoits the offence of 'knowingly having it in possession' is to be considered included in the original one of dacoity, unless there are circumstances clearly separating the crime from the other, *e.g.*, length of time or distance.[2] Separate convictions and sentences under ss. 395 and 412 with respect to the same property are, therefore, obviously improper.[3]

Sentence.—A sentence of transportation under this section and 59 cannot exceed ten years.[4]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, dishonestly received [*or* retained] stolen property, to wit——, belonging to one AB, knowing or having reason to believe that the possession of the same had been transferred by the commission of dacoity; and thereby committed an offence punishable under s. 412 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court)

And I hereby direct that you be tried by the said Court on the said charge.

Habitually dealing in stolen property.

413. Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section punishes severely the common receiver or professional dealer in stolen property. One who casually receives stolen property is punished under the two preceding sections according to the taint attaching to the property.

In order to support a conviction of being an habitual receiver of stolen property, it must be shown that the property was received on different occasions and on different dates A person cannot be said to be an habitual receiver of stolen goods who may receive the proceeds of a number of different robberies from a number of different thieves on the same day.[5] Because the very essence of the offence is the habitual, that is to say, constant receipt of or dealing in goods which the prisoner knew or had reason to believe to be stolen.

[1] *Motee Jolaha*, (1866) 5 W. R. (Cr.) 66; *Cassy Mul*, (1865) 3 W. R. (Cr.) 10.

[2] *Abool Hossein*, (1864) 1 W. R. (Cr.) 48; *Shahabut Sheikh*, (1870) 13 W. R. (Cr.) 42.

[3] *Bahwn*, (1886) Cr. R. No. 65 of 1886, Unrep. Cr. C. 312.

[4] *Mohanundo Bhundary*, (1866) 5 W R. (Cr.) 16.

[5] *Baburam Kansari*, (1891) 19 Cal. 190.

PRACTICE.

Evidence.—Prove (1) that the property in question is stolen property.

(2) That the accused received it or dealt in it.

(3) That he did so habitually.

(4) That he did so knowing or having reason to believe it to be stolen property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Trial for an offence under ss. 411 and 413.—A prisoner cannot be tried at the same trial *for receiving or retaining (s. 411), and habitually receiving or dealing* (s. 413) in stolen property. The proper course is to try the accused first for the offence under s. 411, and, if he is convicted, to try him under s. 413, putting in evidence the previous conviction under s. 411, and proving the finding of the rest of the property in respect of which no separate charge under s. 411 could be made or tried by reason of the provisions of s. 453 of the Criminal Procedure Code.[1]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, were a habitual receiver or dealer in property, which you knew (*or* had reason to believe) to be stolen property and that you thereby committed an offence punishable under s. 413 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Assisting in concealment of stolen property.

414. Whoever voluntarily assists in concealing or disposing of or making away with property[1] which he knows or has reason to believe to be stolen property,[2] shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section punishes those acts of receiving or retaining stolen property which do not come under the purview of ss. 411, 412 and 413.

Scope.—This section is intended to apply to cases where there has not been such a possession as would support an indictment against the party, as a receiver, under s. 411. "When a person is shown to stand in such a relation to stolen property as falls short of possession by him of such property, his manner of dealing with the property [illegible] disposing of or making away with [illegible] ombay High Court in a case he [illegible] s no actual receipt of the prop[illegible] and has held that a person rece[illegible] ling or disposing of them.[4]

Ingredients.—This section requires two things—

1. Voluntary assistance in concealing or disposing of or making away with property.

2. Knowledge or reason to believe that such property is stolen property.

1. 'Voluntarily assists in concealing or disposing of... property.'—The words 'disposing of' must be interpreted in the light of the words they are associated with *viz.*, 'concealing' and 'making away with,' and cannot be taken to include restoring

[1] *Uttom Koondoo*, (1882) 8 Cal. 634.

[2] Per Plowden, J., in *Khona*, (1879) P. R. No. 31 of 1879.

[3] *Alu Kala*, (1891) Unrep. Cr. C. 553, Cr. R. No. 28 of 1891; (1868) 4 M. H. C. App. 13; *Subha Chand*, (1881) P. R. No. 39 of 1881.

[4] *Abdul Gani*, (1925) 27 Bom. L. R. 1374.

to the owners. Where the petitioner was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender, it was held that the Magistrate [illegible] shing the accused for the two separate offences of [illegible] se in a stage of a judicial proceeding under s. 19[illegible] concealing stolen property under this section.[1] Where the accused was found to have restored to the owners jewellery believed to have been stolen by his son, and then to save his son from punishment denied all knowledge of the matter, and on this ground was convicted under this section, it was held that the accused had committed no offence.[2]

As to the meaning of 'voluntarily', see s. 39, *supra*.

2. **'Knows or has reason to believe to be stolen property.'**—The person voluntarily assisting in concealing or disposing of or making away with property must have a definite knowledge that such property was stolen property.

"The word 'believe'...is a very much stronger word than 'suspect,' and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property." "It was not sufficient (in such a case) to show that the accused was careless or that he had reason to suspect that the property was stolen, or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired."[3] See also s. 26, *supra*, as to the meaning of 'reason to believe.'

It is not necessary to establish that the property was the subject-matter of any particular theft; but it must be shown that it was the subject-matter of some theft or other. The essence of this section is the concealment of stolen property which the accused knew or had reason to believe to be stolen property. If, therefore, an accused thinking that an article, which is in his possession, is stolen property, tries to conceal that property, when as a matter of fact it is not stolen property at all but property honestly come by, he does not commit an offence under this section. The fact that the property dealt with is stolen property may in some instances be inferred indirectly from circumstantial evidence as from the way in which it is dealt with by the party dealing with it, but the circumstances must be such as would justify the conclusion that the property is actually stolen property.[4]

PRACTICE.

Evidence.—Prove (1) that the property in question is stolen property.[5]

(2) That the accused assisted in concealing, or disposing of, or making away with, such property.

This section does not impose on the prosecution the requirement that it should in all cases trace the owners of the property stolen. All that is needed is to show that the accused voluntarily assisted in concealing or disposing of property which he had reason to believe to be stolen property.[6]

(3) That he did as in (2) voluntarily.

(4) That he knew or had reason to believe that the property was stolen property.[7]

When persons are charged with assisting in concealing or disposing of [illegible] taken into consideration.[8] An accused person's merely pointing out the place where some of the stolen property is recovered and his making an admission before the police of having concealed it there, which admission is not admissible in

[1] *Rameshar Rai*, (1877) 1 All. 379.

[2] [illegible] *aji*, (1880) [illegible] *anniappa* [illegible]

[3] [illegible]

[4] *Vide* s. 410.

[5] *Budhankhan Inayatkhan*, (1912) 14 Bom. L.R. 893, 1 Bom. Cr. C. 189, *Abdul Gani*, (1925) 27 Bom. L. R. 1373.

[6] *Samachari*, (1923) 45 M. L. J. 728

[7] *Rameshar Rai*, sup.

[8] *Harishankar Fakirbhat*, (1863) 2 B.H.C.120.

evidence, are not sufficient for convicting him under this section in the absence of any other independent proof connecting him with the commission of the crime.[1]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily if property is not worth more than Rs. 50.

The same person cannot be properly convicted for theft and for attempting to conceal the stolen property[2] or for theft and for dishonestly disposing of the same property.[3]

Charge.—I (*name and office of the Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, voluntarily assisted in concealing (or disposing of, or making away with) property, to wit——, which you knew (or had reason to believe) to be stolen property, and that you thereby committed an offence punishable under s. 414 of the Indian Penal Code, and within my cognizance (or the cognizance of the Court of Session or the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Sentence.—Where an accused is convicted of an offence under ss. 411 and 414, it is not permissible to pass on him separate and consecutive sentences under each head of the charges, but in such a case only one sentence must be passed on him for both offences.[4] The charges under these sections should ordinarily be made alternatively, and not cumulatively.[5]

Of Cheating.

Cheating.

415. Whoever, by deceiving any person,[1] fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property,[2a] or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property,[2b] is said to "cheat."

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

ILLUSTRATIONS.

(*a*) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(*b*) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(*c*) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(*d*) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

[1] *Kala Singh*, (1908) P. W. R. (Cr.) No. 21 of 1908.

[2] *Zinda*, (1896) P. R. No. 15 of 1896.

[3] *Nga Po Kywe*, (1885) S. J. L. B. 334.

[4] *Sakharam*, (1889) Cr. R. No. 8 of 1889, Unrep. Cr. C. 449; *Ala Kala*, (1891) Cr. R. No. 28 of 1891, Unrep. Cr. C. 553.

[5] *Yeshwant*, (1908) 10 Bom. L. R. J. 125.

(*e*) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(*f*) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(*g*) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery, A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(*h*) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(*i*) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

COMMENT.

In all the foregoing offences relating to property the offender merely got possession of the thing in question, but in the case of cheating he obtains possession plus property in it.

The authors of the Code say: "We propose to make it cheating to obtain property by deception in all cases where the property is fraudulently obtained; that is to say, in all cases where the intention of the person who has by deceit obtained the property was to cause a distribution of property which the law pronounces to be a wrongful distribution, and in no other case whatever. However immoral a deception may be, we do not consider it as an offence against the rights of property if its object is only to cause a distribution of property which the law recognizes as rightful...

"We propose to punish as guilty of cheating a man who, by false representations, obtains a loan of money, not meaning to repay it; a man who, by false representations, obtains an advance of money, not meaning to perform the service or to deliver the article for which the advance is given; a man who, by falsely pretending to have performed work for which he was hired, obtains pay to which he is not entitled.

"In all these cases there is deception. In all, the deceiver's object is fraudulent. He intends in all these cases to acquire or retain wrongful possession of that to which some other person has a better claim, and which that other person is entitled to recover by law. In all these cases, therefore, the object has been wrongful gain, attended with wrongful loss. In all, therefore, there has, according to our definition, been cheating."[1]

"In the definition of cheating...there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced to deliver any property to any person or to consent that any person shall retain any property. In order to constitute the offence of cheating the person who induces another to do this class of acts must fraudulently or dishonestly induce the person deceived to do that kind of act. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In order to constitute the offence of cheating with regard to this class of acts the person who induces another to do them must intentionally induce him to do them. In the first class of cases the

[1] Note N, pp. 164, 165.

inducing must be fraudulent or dishonest. In the second class of acts the inducing must be intentional."[1]

English law.—Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of misdemeanour.[2] There are two vital points in which the English law differs from the Code :—

(1) A promise as to future conduct not intended to be kept is not by itself a cheating.[3] Under the Code this will amount to cheating : see ills. (*f*) and (*g*).

(2) The object of the accused must be to obtain any chattel, money, or valuable security. The definition of cheating as given in this section is much wider and includes damage or harm done to a person in body, mind, reputation, or property.

Scope.—The definition of cheating contains two parts. First comes the main part "whoever, by deceiving any person..." words which obviously apply to the whole section. Then comes the first part "fraudulently, or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property." Then comes part 2, which is an alternative to sub-part 1, *viz.*, "or intentionally induces...mind, reputation or property." Then comes the closing words "is said to cheat." The words "and which act or omission...reputation or property" form a portion of part 2 and are not applicable to part I at all.[4] The definition of the offence of cheating embraces some cases in which no transfer of property is occasioned by the deception and some in which such a transfer occurs; for these cases generally a general provision is made in s. 417 of the Code. For the cases in which property is transferred a more specific provision is made by s. 420.[5] But in an earlier case it has been laid down that an offence of cheating accompanied by a delivery of property may be punished under either of the sections : but where the case appears to be of a serious nature steps must be taken to send it to the Court of Session for trial under s. 420.[6]

The offence of cheating is not committed if a third party, on whom no deception has been practised, sustains pecuniary loss in consequence of the accused's act.[7]

Cheating and Extortion.—The offence of cheating must, like that of extortion, be committed by the wrongful obtaining of a consent. The difference is, that the extortioner obtains the consent by intimidation, and the cheat by deception.[8]

Cheating and Criminal Breach of Trust and Criminal Misappropriation.—Cheating differs from the last two offences in the fact that the cheat takes possession of the property by deception. There is wrongful gain or loss in both cases and in both cases there is an inducement to deliver property.

Ingredients.—This section requires—

1. Deception of any person.
2. (*a*) Fraudulently or dishonestly inducing that person
   (i) to deliver any property to any person ; or
   (ii) to consent that any person shall retain any property, or
   (*b*) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

[1] Per Geidt, J., in *Kishori Lal Chatterji*, (1905) 9 C. W. N. 764, 767.

[2] Larceny Act, 1861 (24 & 25 Vic., c. 96), s. 88.

[3] 62 & 63 Vic., c. 22, s. 3

[4] *Ishor Das*, (1908) P. W. R. (Cr.) No. 18 of 1908.

[5] *Bavaji*, (1875) Unrep. Cr. C. 96, Cr. R., 23rd September 1875.

[6] *Bapu*, (1864) Unrep. Cr. C. 2.

[7] *Sundar Singh*, (1904) P. R. No. 25 of 1904.

[8] Note N, p. 163

1. **'Deceiving any person.'**—It means causing to believe what is false; or misleading as to a matter of fact, or leading into error.[1] The person deceived need not be a definite person to whom the false representation is made. To constitute cheating there must be a deception which must precede and induce under the first part of the section, the delivery or retention of property, or act or omission referred to in the second part. Such deception may be by words or conduct. As to what is sufficient to constitute deception must be decided in each case on its own facts.[2]

Wherever a person fraudulently represents as an existing fact that which is not an existing fact, he commits this offence. A wilful misrepresentation of a definite fact with intent to defraud, cognizable by the senses—as where a seller represents the quantity of coals to be fourteen cwt. whereas it is in fact only eight cwt., but so packed as to look more; or where the seller, by manœuvring, contrives to pass off tasters of cheese as if extracted from the cheese offered for sale, whereas it is not—is cheating.[3]

Where a charge of cheating rests upon a representation which is impugned as false and which relates not to an existing fact but to a certain future event, it must be shown that the representation was false to the accused's knowledge at the time when it was made. It is but little to the purpose to show that in fact the representation has turned out to be untrue.[4]

It is not necessary that the false pretence should be made in express words, if it can be inferred from all the circumstances attending the obtaining of the property.[5] Fraudulent intent is absolutely essential. An illegal demand if not fraudulent does not amount to cheating. The accused, who was the landlord of the complainant, sent for the latter, and on the latter appearing demanded payment of rent. The complainant left for home to fetch the money requesting the accused and his clerk to have in the meantime his dues worked out and have a receipt written. He returned soon with Rs. 90 and paid the same to the accused, who drove him away refusing to give a receipt or return the money unless and until Rs. 25 more were paid to make up the sum, the said amount having been deducted towards certain subscription. It was held that no criminal offence was committed.[6]

Where a person knows that the statements made by another are false, but still acts upon them with a view to entrap that person, it will not amount to cheating. Where, therefore, money was obtained by the accused by the false pretence that he had cut sixty-three fans of chaff when in fact he had only cut forty-five, and the prosecutor had previously seen the accused remove eighteen fans [illegible]

[illegible] taken for the recovery of the value of the notes. The Currency Office, having, upon enquiry, discovered that the amount of the notes had been paid to the holder of the other halves, and that the notes had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never

[1] Dr. Murray's New English Dictionary; *William Woolley*, (1850) 4 Cox 193.

[2] *Ramanath Kalapahar*, (1905) 2 C. L. J. 524.

[3] *Thomas Goss*, (1860) 8 Cox 262.

[4] *Ebrahimji Mulla Jeevanji*, (1912) 15 Bom. L. R. 297, 2 Bom. Cr. C. 48.

[5] *Maria Giles*, (1865) 10 Cox 44; *Khoda Bux* v. *Bakeya Mundari*, (1905) 32 Cal. 941; *Ram Chand* v. *Jai Dial*, (1912) P. L. R. No. 114 of 1912, P. W. R. (Cr.) No. 10 of 1912; on remand, (1915) P. W. R. (Cr.) No. 18 of 1915.

[6] *Kumeda Charan Ghose*, (1911) 15 C. L. J. 515. See also *Birjraj Marwari*, (1912) 17 C. W. N. 294, *Deodhari Mahto*, (1920) 2 P. L. T. 211.

[7] *Mills*, (1857) 26 L. J. (M. C.) 79, 7 Cox 263.

[8] *Hensler*, (1870) 11 Cox 570, *Umesh Chunder Mitter*, (1888) 16 Cal. 310.

inducing must be fraudulent or dishonest. In the second class of acts the inducing must be intentional."[1]

English law.—Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of misdemeanour.[2] There are two vital points in which the English law differs from the Code :—

(1) A promise as to future conduct not intended to be kept is not by itself a cheating.[3] Under the Code this will amount to cheating: see ills. (*f*) and (*g*).

(2) The object of the accused must be to obtain any chattel, money, or valuable security. The definition of cheating as given in this section is much wider and includes damage or harm done to a person in body, mind, reputation, or property.

Scope.—The definition of cheating contains two parts. First comes the main part "whoever, by deceiving any person..." words which obviously apply to the whole section. Then comes the first part "fraudulently, or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property." Then comes part 2, which is an alternative to sub-part 1, *viz*, "or intentionally induces...mind, reputation or property." Then comes the closing words "is said to cheat." The words "and which act or omission...reputation or property" form a portion of part 2 and are not applicable to part I at all.[4] The definition of the offence of cheating embraces some cases in which no transfer of property is occasioned by the deception and some in which such a transfer occurs; for these cases generally a general provision is made in s. 417 of the Code. For the cases in which property is transferred a more specific provision is made by s. 420.[5] But in an earlier case it has been laid down that an offence of cheating accompanied by a delivery of property may be punished under either of the sections: but where the case appears to be of a serious nature steps must be taken to send it to the Court of Session for trial under s. 420.[6]

The offence of cheating is not committed if a third party, on whom no deception has been practised, sustains pecuniary loss in consequence of the accused's act.[7]

Cheating and Extortion.—The offence of cheating must, like that of extortion, be committed by the wrongful obtaining of a consent. The difference is, that the extortioner obtains the consent by intimidation, and the cheat by deception.[8]

Cheating and Criminal Breach of Trust and Criminal Misappropriation.—Cheating differs from the last two offences in the fact that the cheat takes possession of the property by deception. There is wrongful gain or loss in both cases and in both cases there is an inducement to deliver property.

Ingredients.—This section requires—

1. Deception of any person.
2. (*a*) Fraudulently or dishonestly inducing that person
   (i) to deliver any property to any person; or
   (ii) to consent that any person shall retain any property, or
   (*b*) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

[1] Per Geidt, J, in *Kishori Lal Chatterji*, (1905) 9 C. W. N 764, 767.

[2] Larceny Act, 1861 (24 & 25 Vic., c. 96), s. 88.

[3] 62 & 63 Vic., c. 22, s 3

[4] *Ishar Das*, (1908) P. W. R. (Cr.) No. 18 of 1908.

[5] *Bavaji*, (1875) Unrep Cr. C. 96, Cr. R. 23rd September 1875.

[6] *Bapu*, (1884) Unrep. Cr. C. 2.

[7] *Sundar Singh*, (1904) P. R. No. 25 of 1904.

[8] Note N, p. 163.

1. 'Deceiving any person.'—It means causing to believe what is false; or misleading as to a matter of fact, or leading into error.[1] The person deceived need not be a definite person to whom the false representation is made. To constitute cheating there must be a deception which must precede and induce under the first part of the section, the delivery or retention of property, or act or omission referred to in the second part. Such deception may be by words or conduct. As to what is sufficient to constitute deception must be decided in each case on its own facts.[2]

Wherever a person fraudulently represents as an existing fact that which is not an existing fact, he commits this offence. A wilful misrepresentation of a definite fact with intent to defraud, cognizable by the senses—as where a seller represents the quantity of coals to be fourteen cwt. whereas it is in fact only eight cwt., but so packed as to look more; or where the seller, by manœuvring, contrives to pass off tasters of cheese as if extracted from the cheese offered for sale,

a representation which is impugned fact but to a certain future event, it must be shown that the representation was false to the accused's knowledge at the time when it was made. It is but little to the purpose to show that in fact the representation has turned out to be untrue.[4]

It is not necessary that the false pretence should be made in express words, if it can be inferred from all the circumstances attending the obtaining of the property.[5] Fraudulent intent is absolutely essential. An illegal demand if not fraudulent does not amount to cheating. The accused, who was the landlord of the complainant, sent for the latter, and on the latter appearing demanded payment of rent The complainant left for home to fetch the money requesting the accused and his clerk to have in the meantime his dues worked out and have a receipt written. He returned soon with Rs 90 and paid the same to the accused, who drove him away refusing to give a receipt or return the money unless and until Rs 25 more were paid to make up the sum, the said amount having been deducted towards certain subscription. It was held that no criminal offence was committed.[6]

Where a person knows that the statements made by another are false, but still acts upon them with a view to entrap that person, it will not amount to cheating. Where, therefore, money was obtained by the accused by the false pretence that he had cut sixty-three fans of chaff when in fact he had only cut forty-five, and the prosecutor had previously seen the accused remove eighteen fans from an adjoining place, and add them to the heap which he pretended he had cut, but notwithstanding this knowledge he paid the accused the amount he demanded, it was held that this offence was not committed [7] But a man may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is therefore not cheated.[8] M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, stating that the other halves were lost, and enquiring

value of the notes The Currency he amount of the notes had been at the notes had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never

[1] Dr Murray's New English Dictionary; *William Woolley*, (1850) 4 Cox 193.

[2] *Ramanath Kalapahar*, (1905) 2 C L J 524

[3] *Thomas Goss*, (1860) 8 Cox 262.

[4] *Ebrahimji Mulla Jeevanji*, (1912) 15 Bom L R 297, 2 Bom. Cr C. 48.

[5] *Maria Giles*, (1865) 10 Cox 44; *Khoda Bux v. Balaya Mandari*, (1905) 32 Cal. 941, *Ram Chand v. Jai Dial*, (1912) P. L. R. No 114 of 1912, P W. R. (Cr.) No 10 of 1912; on remand, (1915) P. W. R. (Cr.) No. 18 of 1915.

[6] *Kumeda Charan Ghose*, (1911) 15 C. L. J 515 See also *Birjraj Marwari*, (1912) 17 C. W. N. 294, *Deodhari Mahto*, (1920) 2 P. L. T. 211.

[7] *Mills*, (1857) 26 L. J. (M. C.) 79, 7 Cox 263.

[8] *Hensler*, (1870) 11 Cox 570; *Umesh Chunder Mitter*, (1888) 16 Cal. 310.

contemplated paying M in respect of the notes. The form was filled up and signed by M and returned by him to the Currency Office. *It was held that although there* was no intention on the part of the Currency Office to pay the amount of the notes, M was guilty of an attempt to cheat.[1] The accused described himself as the Principal of the 'British Health Institute,' and issued advertisements stating that arrangements had been made for testing urine, if desired, at a nominal fee of 1s. 6d. Two individuals, who suspected the genuineness of the advertisement, forwarded to the appellant a solution of water with colouring ingredients mixed with soap, and asked for an analysis of their "water." Letters were received from the accused advising a course of treatment to cost not less than one guinea in each case. It was held that the accused was guilty of attempting to obtain money by false pretences although the persons to whom the false pretence was made knew it to be false.[2]

It is immaterial whether the prosecutor has means of detecting the fraud or not.—A person who offered a £1 bank-note as a note for £5 and got it changed upon that representation was held guilty of obtaining money by false pretences, although the prosecutor might, by the exercise of reasonable caution, have detected the imposition.[3] The question in every case is, whether, in truth, the false statement did impose upon the prosecutor or not.[4]

2-a. 'Fraudulently or dishonestly induces the person so deceived to deliver any property.. or to consent that any person shall retain any property'.—The words 'fraudulently' and 'dishonestly' do not govern the whole of the definition of cheating. The section is divided into two parts. Under the first part the person deceived must have been fraudulently or dishonestly induced to deliver any property to any other person, or to consent that the said other person should retain any property. The second part provides for the case of a person who by deceiving another intentionally induces the person so deceived to do an act which causes or is likely to cause damage or harm, although the deceiver has not acted fraudulently or dishonestly.[5] *The evidence must establish the existence of a fraudulent or dishonest intention at the time of the commission of the act in respect of which the cheating is alleged.*[6] *To describe consequences of an act to be more serious than, in fact, they were likely to be, may be to deceive, but is not cheating if done without any fraudulent or dishonest intention.* Thus to induce a son to pay his father's debts, by acting merely on *his fear of consequences to his father,* is not cheating.[7] A owed B a debt, of which B could not get payment. C, a servant of B, went to A's wife and obtained two sacks of malt of her, saying that B had bought them of A. C knew this to be false, and took the malt to B, his master, to enable him to pay himself the debt. It was held that if C did not intend to defraud A but merely to put it into his master's power to compel A to pay *him* a just debt, C ought not to be convicted of obtaining the malt by false pretences.[8]

A person who sent an insured cover, purporting to contain Government currency notes, but which, on receipt by the addressee, was found to contain only a letter advising the despatch of notes, and pieces of waste paper, was held not guilty of cheating. The Court observed: "All that the person deceived has been induced to do is that he has signed a receipt acknowledging the delivery of a cover. He has not acknowledged by that the receipt of any sum of money alleged to be contained in the cover. That being so, the charge of cheating has not been brought home to the accused."[9] In response to a serious demand by complainant for re-payment of a loan which accused had

[1] *Umesh Chunder Miller,* (1888) 16 Cal. 310.
[2] *Light,* (1915) 24 Cox 718.
[3] *Jessop,* (1858) 7 Cox 399.
[4] *Woolley,* (1850) 4 Cox 103.
[5] *Mohabat,* (1889) P. R. No. 20 of 1889.
[6] *Viraswami,* (1881) 1 Weir 478 *Dict.*
(1914) 12 A. L. J. R. 1258.
[7] *Raj Coomar Banerjee,* (1861) W. R. (Gap. No.) Cr. 25.
[8] *Henry Williams,* (1836) 7 C. & P. 354.
[9] *Raman Behari Roy,* (1923) 50 Cal. 849.

taken from him sometime back, accused addressed an insured cover to complainant. On opening this cover the complainant discovered that instead of Government Currency Notes, it contained a number of Khilafat Bonds. Thereupon he reported the matter to the Post Office. In the course of an inquiry accused stated that he had sent Government Currency Notes and not the Khilafat Bonds. It was held that no offence under this section was committed. The Court observed: "The mere fact that a cover insured for a certain amount is sent raises no presumption in law that that cover contains the necessary amount of Government Currency Notes. It is, therefore, not easily conceivable what is the thing which the complainant would have done or omitted to do if the fraud contemplated by the accused had succeeded. The only thing that can be said is that the accused imagined that he would have had some sort of a proof that the debt had been paid off...Then the offence would be an attempt to fabricate false evidence within the meaning of s. 192 of the Indian Penal Code. The accused, however, has not been charged with any such offence."[1] Where a person receives money due to him from another which that other person pays, with the intention not to credit the money to the real debt due, but to deceive him into paying money due on a real debt and keeps the money under the pretence of crediting it to a debt which the other person did not owe upon a bond which he did not execute, the person is guilty of cheating.[2] A charge of cheating can be sustained even though the promise which induced the delivery of property was a promise to do a criminal act, or an act forbidden by law, and one which could not form a cause of action in a civil Court.[3]

[illegible] honestly,' s. 24 [illegible] the word 'dis[illegible] different from 'dishonestly.'[4]

'Any property.'—It is no objection to an indictment for this offence that the thing obtained was not in existence at the time of cheating, provided the thing when made is delivered under the influence thereof.[5]

A health certificate is property within the meaning of this section.[6] So is a certificate of having passed an examination,[7] or a ticket entitling its holder to enter an examination room,[8] or a railway ticket.[9]

'To consent that any person shall retain any property.'—It is equally a cheat whether a deception causes a person fraudulently or dishonestly to acquire property by delivery, or to retain property already in his possession. If a man to whom property is lent or who is entrusted for a time with the charge of it deceives the owner and thereby induces him for some purpose of wrongful gain to the borrower or wrongful loss to the owner to allow the property to be retained in the borrower's possession, this amounts to cheating.[10]

Cases.—**Inducing the person deceived to deliver property.**—Where a person hired certain property for use at a wedding, paying a portion of the hire, and giving a written promise to pay the balance of the hire, and to restore the property after the wedding, he being well aware that there was to be no wedding, and intending, when he got the property, to apply for its attachment in a civil suit in respect of an alleged claim[11]; where the accused received a Government promissory note, promising to return certain jewels pledged to them but not intending to do so, and

[1] *Tula Ram*, (1923) 21 A. L. J. R. 865; *Sadho Lal*, (1916) 1 P. L. J. 391, commented on.

[2] *Ramanath Kalapahar*, (1905) 2 C. L. J. 524. Mookerjee, J., expressed a contrary opinion.

[3] *Meera*, (1917) 10 B. L. T. 255.

[4] Per Henderson, J., in *Baburam Rai*, (1905) 32 Cal. 775, 779.

[5] [illegible]

[6] [illegible]

[7] [illegible]

[8] *Appasami*, (1889) 12 Mad. 151.

[9] *Horace Chapman*, (1910) 4 Cr. App. R. 276.

[10] M. & M. 382.

[11] *Kadir Bux*, (1871) 3 N. W. P. 16.

they subsequently claimed to return the note for another debt alleged to be due to them by the sender[1]; and where a person obtained delivery of a valuable security under the inducement of a promise not intended to be kept and with fraudulent intention,[2] this offence was held to have been committed.

The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4-0 and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta, to have then requested the Postal Authorities at Calcutta, by a letter signed Robert S. Wilson, to have the money orders re-directed to him as above at Rajam; to have similarly requested the Post Master at Rajam to pay the money orders to his clerk Sheshgiri Rau; and to have subsequently received the value of money orders made out in favour of Robert S. Wilson, from the Post Master of Rajam, signing receipts as Sheshgiri Rau. Robert S. Wilson and Sheshgiri Rau were alleged to be fictitious persons, and it was alleged that the accused had no book on English idioms ready to be despatched to purchasers. It was held that the above allegations supported the charges of cheating and forgery.[3]

Complainant's firm had advanced money to the accused on the understanding that the accused would purchase rice from the outlying shops and ship and deliver the same at the firm's place of business, where it would be sold, the profits on the sale going to the accused and the accused, being liable to pay to the complainant's firm the capital advanced with interest, and a commission of one anna per maund of rice sold. The accused failed to deliver the rice within the stipulated time and was charged with cheating. The representations made by the accused to the complainant's firm when getting the advance were not entirely false, and it appeared that the accused had to some extent endeavoured to carry out the terms of the agreement, though he was also found to have converted a small portion of the money to his own use in paying off his own debts. It was held that the case was really one of breach of contract. The mere fact that the accused converted a small portion of the money to his own use was not in itself sufficient to prove that his intention, when he received the money from the complainant's firm, was dishonest or that he obtained it by a fraudulent misrepresentation of facts. The important question to be considered was whether the accused, when he took over the money from the complainant's firm, had any intention of performing the contract.[4]

The accused obtained an advance for which he gave a promissory note, stating that he had two boat-loads of paddy in the adjoining creek and that he would bring the paddy to the complainant for sale, he then absconded. It was held that the conviction under this section was good; that the facts warranted the inference that the accused, at the time of obtaining the advance, had no intention of performing his promise.[5] The accused, who was the complainants' paddy-broker and regular paddy-supplier, took from them advances for the purchase of paddy and gave promissory-notes for the advances in question From time to time he had supplied paddy the total quantity of which, however, had not been sufficient to satisfy all the advances. He last obtained an advance of Rs. 4,000 when there was already due to the complainants a large sum on the previous advances, but only supplied a further small lot of paddy valued at Rs. 800, and was in consequence prosecuted in respect of this last advance. It was held that the facts did not warrant the inference that the accused, at the time of obtaining the advance, had no intention of performing his promise and that, in the absence of proof of any representation at the time on the part of the accused, which he knew or, had reason to believe, to be false, there was no offence of cheating committed.[6]

[1] *Sheodurshan Dass*, (1871) 3 N. W. P. 17.
[2] (1880) 1 Weir 478
[3] *Pera Raju*, (1889) 13 Mad. 27.
[4] *Ijjatulla Ka*[illegible], (1906) 10 C. W. N. 1005.
[5] *Po Yon* v. *Mohr. Brothers & Co., Ltd.*, (1911) 6 L. B. R. 38.
[6] *Maing Po Lu*, (1923) 1 Rang 397.

The accused, a judgment-debtor, applied for permission to raise the amount of the decree by a private transfer of his house, which had already been sold in execution of the decree. The application was refused. The accused mortgaged the house to the complainant, representing that he was empowered to mortgage the house in order to pay off the decretal amount due to the decree-holder. He got the mortgagee to pay the amount due to the decree-holder and received the balance himself. He did not enter appearance in Court and the sale was confirmed. The mortgagee, failing to get refund of the money paid to the accused, charged him with cheating. It was held that he was guilty of cheating.[1]

The accused was in charge of a mare belonging to C who had given it to him for sale. One L made an offer for the mare and insisted on the offer being communicated to the owner. The accused showed L a telegram which the latter understood to have come from C refusing the offer. He thereupon raised the offer and purchased the mare. Subsequently he instituted these proceedings against the accused on the ground that deception was practised on him, but, when he was examined, stated that he would have paid the same price had he known that the mare belonged to the accused. It was held that no wrongful loss was caused to L by reason of the fact that he was induced to bid up to what he considered to be the full value of the mare; and that by merely placing before L the telegram which purported to have been received from C, the accused could not be said to have acted fraudulently.[2]

A and B went to C and B asked for a loan on the security of a ring seemingly, but not really, of gold. A assured C that B was an honest man, and thereby induced C to advance the money. B was convicted of cheating It was held in revision that B's conviction was wrong as A's assurance was the effective inducement for C's advancing the money irrespective of the question whether B's dishonesty was or was not proved [3] The accused drew a *hundi* and borrowed money on it, without assuring himself that the drawee, with whom he had no previous dealings and who was not supplied with funds, would honour the same. The money so borrowed was spent by him on his own purposes. The *hundi*, when presented for payment, was dishonoured by the drawee. The accused, though apprised of the dishonouring, took no steps either to have the *hundi* honoured or to repay the money borrowed on the *hundi*, but made himself scarce. It was held that the accused was guilty of cheating [4]

English cases.—Where a postman falsely pretended that 2*s.* was payable on a postal letter entrusted to him for delivery, whereas 1*s.* only was payable, this offence was held to have been committed.[5] It was the duty of the accused, who was an officer of a society, to return the names of members entitled to sick pay. He wrongfully entered on the list a member's name, which he gave to the secretary, and in due course received an order from the treasurer to pay the member the sum named. When the accused received the money he applied it in payment of a debt due from the member to himself. It was held that there was evidence upon which the jury might find that the money was obtained by the accused by a false pretence made by him to the treasurer.[6] Where a person put the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the original, it was held that he had committed this offence and not forgery.[7] Under the Code this will amount to forgery.

2-b. 'Intentionally induces the person so deceived to do or omit to do anything . . and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.'—By this clause intentional deceptions are

[1] *Ram Chand* v. *Jai Dial*, (1912) P L. R No. 114 of 1912, P. W. R. (Cr.) No 10 of 1912

[2] *Diel*, (1914) 12 A. L J. R. 1258.

[3] *Mata Prasad*, (1920) 18 A. L J. R. 371.

[4] *Uttamlal Narottamdas*, (1920) 23 Bom L. R. 340, 6 Bom. Cr. C. 37.

[5] *Matthew Byrne*, (1866) 10 Cox 369.

[6] *Taylor*, (1901) 65 J. P. 457.

[7] *Closs*, (1857) 7 Cox 194.

made punishable as cheats if they cause or are likely to cause any damage or harm, whether to property or to reputation. It is sufficient to constitute cheating within this clause if the deception is intended to cause any damage or harm whatsoever to the person deceived ... The deception must be intended not only to induce the person deceived to do or omit to do something, but also to cause damage to that person. False statements are often made incautiously or carelessly or without sufficient information or inquiry and without any intention to deceive or injure. It may be observed of all incorrect or deceptive statements that they are not deception within this section, unless the person making them intends to induce the person to whom they are made to act upon the strength of such statements; even they are not deceptions within the definition unless the person who does or omits, etc., is induced to act by such statements and not by other independent motives; and lastly they will amount to the offence of cheating only when they are intended to cause damage or harm to that person.[1]

The word 'intentionally' only applies to the act or omission which the person deceived is induced to do or omit to do, and it is not necessary in order to sustain a charge under this branch of the definition that the accused person should also have intended to cause harm or damage as the result of such act or omission. It is sufficient if he intentionally induces the person deceived to do or omit to do anything which he would not do or omit to do if he were not deceived and the act or omission causes damage or harm to that person in body, mind, reputation or property.[2] The intention need not be fraudulent or dishonest. In the latter part of the section the words 'fraudulently' or 'dishonestly' do not find a place.[3]

Cases.—Inducing the person deceived to do something.—Where a prostitute communicated syphilis to a man who had sexual intercourse with her on the strength of her misrepresentation that she was free from disease[4]; where the accused passed off girls of a low caste as girls of a higher caste and thus obtained money from persons who married them[5]; and where the accused applied to a Tahsildar for a quantity of land on *cowle* tenure free of tax for five years and falsely represented that the land was waste land[6]; this offence was held to have been committed.

The accused, a cooly recruiter, induced the complainant to come to a cooly depot, and promising him domestic service entered his name in the books of the depot and wrote a letter to a cooly contractor in Calcutta offering the complainant as a cooly; on the same day the accused persuaded the complainant to go to a railway station to fetch a parcel and the accused bought a railway ticket for Calcutta for the complainant and tried to get him to enter the train, but the complainant refused to go. The object of the accused was to get the complainant to go to Calcutta that he might be sent from there to Assam as a tea garden cooly. It was held that the act of the accused amounted to an attempt to cheat.[7]

The accused, a fireman, applied for employment to the Superintendent of Burma Railways. He forwarded with his application a copy of a certificate purporting to have been granted to him by another railway authority to the effect that the accused had been employed as an engine-driver on that railway for a considerable period and was of good conduct, when in fact no such certificate had ever been issued to him, [illegible] that railway. It was held that he [illegible][8] Where a registered opium consumer got a license to purchase opium in [illegible] his names and another license in the other of his names, and thereby obtained more opium

[1] *M. & M.* 383.
[2] *Nand Lal*, (1888) P. R. No. 36 of 1888
[3] *Baburam Rai*, (1905) 32 Cal. 775, 781.
[4] *Ralma*, (1886) 11 Bom. 59.
[5] *Komul Dass*, (1865) 2 W. R. (Cr.) 7; *Puddomonie Boistobee*, (1866) 5 W. R. (Cr.) 98; *Dabee Sing*, (1867) 7 W. R. (Cr.) 55; *Sheoram*, (1882) 2 A. W. N. 237.
[6] (1868) 4 M. H. C. App. 12.
[7] *Kishori Lal Chatterji*, (1905) 9 C. W. N. 764.
[8] *Fazal Din*, (1906) P. R. No. 1 of 1907.

than he would have done otherwise, it was held that he had committed the offence of cheating.[1]

The accused proposed to the father of a girl for the hand of his daughter and obtained his consent and was admitted into his house. Subsequently information was received by the father that the accused was a married man; this the accused admitted to be true. Shortly after the daughter who was major left the father's protection of her own accord and went to the accused. On the complaint of the parents the accused was convicted of cheating. It was held that the facts did not bring the case within s. 417, read with this section.[2]

English cases.—The accused ordered goods of the prosecutors, and said he wished to pay ready money for them. He gave cheques on a bank for the price, and took away the goods. He had shortly before opened an account at the bank but had drawn out the amount deposited except a few shillings. It was held that he was guilty of cheating.[3] Where the accused conspired to obtain a passport from the Foreign Office by false representation in the name of M for his use in Russia intending that it should be used by some other person, it was held that they were guilty of cheating and criminal conspiracy.[4] The accused ordered a meal in a restaurant: he made no verbal representation at the time as to payment, nor was any question asked him with regard to it. After the meal he said that he was unable to pay, and that he had only one half-penny in his possession. It was held that he [illegible] pretences, but he [illegible] within the meanin[illegible] red by the definition of cheating.

'Causes or is likely to cause.'—These words are very wide. Thus, under illustrations (*f*) and (*g*) deception as to a future event is criminal this is not the case under English law. The expression 'or is likely to cause' may apply to such cases as the following A by deception is induced to make an entry in his shop books that certain goods have been paid for, when in fact they have not; to give credit in account for a greater amount than has actually been paid; or to sign a receipt for a sum which has not been received. In these cases the thing which A is induced [illegible] for such admissions [illegible] 's claim if they were [illegible] death in a Court of Justice.[6]

'Damage or harm to that person in body, mind, reputation or property.'—" The illustrations throw no light on what is meant by damage or harm in body, mind or reputation and so far as such damage is concerned the offence is not very appropriately placed in the Chapter of the Code relating to offences against property. An essential ingredient of the offence is the damage or harm caused or likely to be caused in the said respects or in property. Generally speaking, a criminal offence consists in an act done by the accused with a specific criminal intent, or state of mind, constituting the *mens rea*. Difficulties connected with the notion of causation; common enough in other branches of the law, such as tort, seldom arise. It is true that negligence is sometimes punishable as an offence because it causes or is likely to cause hurt or injury to another (*cf.* ss. 279 and 280 and 284-287 of the Code). But cheating in the second form has this additio[illegible] to be caused by the person deceived to himself. [illegible] is to result from the induced act of the person deceived. This no doubt explains why the word 'injury,' defined in s. 44 of the Code as 'any harm whatever illegally caused to any person in body, mind, reputation, or property' " was not employed

[1] *Milton* v. *Sherman*, (1918) 22 C. W. N. 1001.
[2] *Tha Byaw*, (1908) 4 L. B. R. 315, F. B
[3] *Hazelton*, (1874) L. R. 2 C. C. R. 134; *Cornett*, (1901) 20 Cox 6. See ill. (*d*) to s. 415.
[4] *Bradleford*, [1905] 2 K. B. 730.
[5] *William Jones*, [1898] 1 Q. B. 119.
[6] M. & M. 384.

[illegible]

able damage to the railway company's reputation, as the damage would be too remote.[2]

Certain recruits were rejected by a Recruiting Officer at Lahore as unfit. The accused took them to Lyallpur and offered them to a *Lambardar* on condition that he would pay Rs. 50 for each recruit. It was arranged that this money would only be paid if the recruits were accepted by the Recruiting Officer. The *Lambardar* asked the accused whether the recruits had already been rejected and they replied in the negative. The *Lambardar* on presenting the recruits to the Lyallpur Recruiting Officer was told by that Officer's orderly that they had already been rejected in Lahore. It was admitted that the *Lambardar* was not liable to any punishment departmentally as merely presenting rejected recruits was not an offence unless it was done knowingly. It was held that no offence under ss. 420 and 511 had been established as the money was not to be paid to the accused by the *Lambardar* unless the recruits were accepted. It was further held that the first and second ingredients of the offence of cheating existed, but not the third, seeing that the *Lambardar*'s action in presenting the recruits not knowing that they had been previously rejected was not likely to cause him any harm or injury at all. There was only a possibility that he might suffer annoyance in case his explanation was not at once accepted, while the damage or harm caused or likely to be caused to the person deceived in mind, body, reputation or property, within the meaning of this section must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.[3]

Explanation.—Concealment of any facts which deceive a person must be dishonest, an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent. Where the cheating consists in concealment, it must be shown that *suppressio veri* was a violation of a legal duty or it was an illegal omission in fact.[4] Where the accused, who was indebted to the complainant, despatched to the latter an envelope insured for Rs. 530 containing two pieces of [illegible] intending to use the receipt for the same as evide[illegible] the complain[illegible] [illegible]efers to the actual deception itself and not to the concealment of a deception by someone else.[5]

Puffing.—The authors of the Code say: "If all the misrepresentations and exaggerations in which men indulge for the purpose of gaining at the expense of others were made crimes, not a day would pass in which many thousands of buyers and sellers would not incur the penalties of the law. It happens hourly that an article which is worth ten rupees is affirmed by the seller to be cheap at twelve rupees, and by the buyer to be dear at eight rupees. The seller comes down to eleven rupees, and declares that to be his last word; the buyer rises to nine, and says that he will go no higher; the seller falsely pretends that the article is unusually good of its kind, the buyer that it is unusually bad of its kind; the seller that the price is likely soon to rise, the buyer that it is likely soon to fall. Here we have deception practised for the sake of gain, yet no judicious legislator would punish these deceptions....The moralist may regret this; but the legislator

[1] *Bhedwar* v. *Rao Shahat C. S. R. Rao*, (1923) 27 C. W. N. 919, 39 C. L. J. 273.

[2] *Legal Remembrancer* v. *Manmatha Bhusan Chatterjee*, (1923) 51 Cal. 250.

[3] *Muhammad Shah*, (1918) P. R. No. 34 of 1918.

[4] *Bishan Das*, (1905) 27 All. 561. See *Dori Lal*, (1919) 17 A. L. J. R. 500, 1 U. P. L. R. 58; *Sada Ram*, (1920) 18 A. L. J. R. 408.

[5] *Arura*, (1912) P. L. R. No. 299 of 1913.

[6] *Nga Po Maung*, (1895) 1 U. B. R. (1892-1896) 255.

sees that the result of the attempts of the buyer and seller to gain an unfair advantage over each other is that, in the vast majority of cases, articles are sold for the prices which it is desirable that they should fetch, and therefore he does not think it necessary to interfere. It is enough for him to know that all this great mass of falsehood practically produces the same effect which would be produced by truth; and that any law directed against such falsehood would in all probability be a dead letter, and would, if carried into rigorous execution, do more mischief in a month than all the lies which are told in the making of bargains throughout all the bazaars of India produce in a century."[1]

Where the allegation against the accused was that he advertised in the papers that he was willing to sell an almost new jazz set, and the complainant answered the advertisement and after some correspondence sent the price settled to the accused, and on receipt of the goods the complainant found that they were not of the quality he expected according to the advertisement and certain articles mentioned in the list were not sent, and the accused was summoned to answer a charge of cheating; it was held that the allegations were insufficient to justify the prosecution of the accused for a criminal offence, and the proceedings against the accused were quashed. The giving of untrue praise of articles by a seller does not amount to a criminal offence.[2]

English cases.—A simple misrepresentation of the quality of goods is not a false pretence.[3] In order to obtain an advance of money on a large quantity of plated spoons, the defendants represented to a pawn-broker that they were of the best quality, that they were equal to Elkington's A, that the foundation was the best material, and that they had as much silver upon them as Elkington's A. *The jury found that these representations were wilfully false and that by means* of them an advance of money was made. It was held that the representation *being a mere exaggeration or puffing of the quality of the goods in the course of a* bargain, it was not a false pretence.[4] This case was governed by the maxim *simplex commendatio non obligat*. Any exaggeration or deception in the ordinary course of dealings between the buyer and the seller during the progress of a bargain cannot be the subject of a criminal prosecution. But when the thing sold is of an entirely different description from what it is represented to be and the statements made are not in form an expression of opinion or mere praise, the offence of cheating will be committed. Where, therefore, the prisoner induced the prosecutor to purchase a chain from him by fraudulently representing that it was 15-carat gold, when, in fact, it was only of a trifle better than 6-carat, knowing at the time that he was falsely representing the quality of the chain as 15-carat gold, it was held that the statement that the chain was 15-carat gold, not being mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the knowledge of the prisoner, was a false pretence.[5]

The accused induced the prosecutor to buy certain plated goods plate, at an auction for £7 on the representation that they were the best silver lined with gold, and worth £20. The foundation of the goods was Britannia metal, instead of nickel, as in the best goods, covered with a transparent film of silver, and they were worth only about 30*s*. It was held that there was no false pretence.[6] The Court said "It is most important not to bring within the criminal law the ordinary enhancing of value and quality by the seller of goods. There is always a conflict of knowledge and skill between a buyer and seller, the one wishing to buy as advantageously, and the other to sell as advantageously as he possibly can, and it would be very dangerous to extend the criminal law to such cases. At present the line is fixed, and there must be a false representation of an existing fact, operating on

[1] Note N, p. 163.

[2] *Da Costa* v. *Deepholts*, (1924) 29 C. W. N. 362.

[3] *Bryan*, (1857) 7 Cox 312.

[4] *Ibid.*

[5] *John Ardley*, (1871) L. R. 1 C. C. R. 301; *Roebuck*, (1856) 25 L. J. (M. C.) 101.

[6] *Levine and Wood*, (1867) 10 Cox 374.

the mind of the buyer, and deceiving him in such a manner that he cannot protect himself against it."

Statutory application.—The Bombay City Police Act (Bom. Act IV of 1902), s. 126; the Madras City Police Act (Mad. Act III of 1888), s. 51.

CASES.

Vendor and purchaser—The selling of milk and water in about equal proportion as pure milk would support a finding of cheating.[1] Where a person was purposely sent to buy milk knowing it was watered, in order to prosecute the seller, it was held that as there was no deception a conviction for cheating would not stand.[2] But according to *Government of Bengal* v. *Umesh Chunder Mitter*,[3] the seller would probably be guilty of an attempt to cheat. Where the accused sold nasty sweetmeats, it was held that he could not be held guilty of this offence as the purchaser might have tasted the sweetmeats before buying them.[4] Where the accused sold liquor, measuring it with a glass which was not a prescribed measure, and of which they fraudulently misrepresented the capacity, it was held that they ought to have been tried for this offence and not for one under s. 265.[5] Where a licensed opium vendor sold opium at rates higher than those fixed by the Government, it was held that he had committed this offence.[6] Where the vendor of immoveable property omitted to mention that there was an incumbrance on the property, it was held that he could not be convicted of cheating unless it was shown either that he was asked by the vendee whether the property was incumbered and said it was not, or that he sold the property on the representation that it was unincumbered.[7]

The vendee defendant in a suit for pre-emption compromised the suit, the plaintiff agreeing to pay a certain sum in cash and to discharge certain incumbrances on the property in suit. It was subsequently discovered that the vendee had, after his purchase but before the suit, mortgaged the property, which was the subject of the suit for pre-emption. It was held that the vendee could not, on account merely of his omission to disclose the existence of this subsequent mortgage, be held guilty of cheating.[8] D sold certain trees to S which stood on land in respect of which D held a mortgage. D brought the land to sale under the mortgage and purchased it before the sale of the trees by him to S; but in the interim the mortgagor had given the trees in suit to other persons as compensation for certain trees which the mortgagor had wrongfully cut down. S was resisted in cutting the trees and found that the trees belonged to certain other persons. S complained to D but D put him off and eventually drove him away with abuse and would not return the money. It was held that D was guilty of dishonestly concealing the facts within the meaning of the explanation to this section.[9]

The accused contracted to supply to the complainants 260 bales of fully good machine ginned cotton. In fulfilment of this contract, he delivered as many bales largely composed of cotton-seed, raw cotton and rubbish, carefully packed into the middle, while all round the sides was placed good ginned cotton. The percentage of the admixture was from 6 to 15 per cent. as against the normal admixture of ½ or 1 per cent. The accused was shown to have business relations with a factory which owned ginning machines which were capable of making the admixture, and was found to be present there whilst the machines were ginning such adulterated cotton. It was held that the accused was guilty of cheating.[10]

[1] *Nana*, (1880) Unrep. Cr. C. 145.
[2] *Kalee Modock*, (1872) 18 W. R. (Cr.) 61.
[3] (1888) 16 Cal 310.
[4] *Tumizooddeen* v. *Kangales Gwala*, (1872) 18 W. R. (Cr.) 61.
[5] *Nurodin*, (1888) Cr R. No 36 of 1888, Unrep. Cr. C. 386.
[6] *Pandurang Ramchandra*, (1902) 4 Bom. L. R. 823.
[7] *Bishan Das*, (1905) 27 All. 561.
[8] *Gendan Lal* v. *Abdul Aziz Khan*, (1904) 27 All. 302.
[9] *Dori Lal*, (1919) 17 A. L. J. R. 500, 1 U. P. L. R. 58.
[10] *Kanji Shivaji*, (1912) 14 Bom L. R. 137, 1 Bom. Cr. C. 78.

Misstatement as to nature of goods.—The accused, a travelling hawker, represented to the prosecutor's wife that he was a tea-dealer, and induced her to buy certain packages which he stated to contain good tea, but three-fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious to health. It was held that he was guilty of false pretence.[1]

Where the offence charged consisted of selling or pawning as genuine gold mohurs of the reign of Shahajahan silver rupees of that reign which had been gilt or in some way covered over with gold, it was held that this offence had been committed.[2]

Where property is delivered, fraudulent or dishonest intention on the part of the accused is necessary : where any act is done, through deception, that act should have caused damage or harm.—Where the accused gave a false name and address in order to shield prosecution for an offence[3]; where the accused falsely told his master's brother that his master was ill in a certain village and so induced him to go to that village[4]; and where the accused presented a stolen note to a shopkeeper for encashment, and in reply to the inquiry of the shop-keeper after he had cashed the note gave his name falsely[5] this offence was not held to have been committed. Where the accused secretly entered an exhibition building without having purchased a ticket, and was there apprehended, it was held that such act did not amount to cheating because he had not made a false representation to anyone.[6] If the accused had said to the door-keeper that he had a ticket, and had thus obtained access to the building that would have been cheating. Where a person, who purchased rice from a famine-relief officer, at a certain rate, on condition that he should sell it at a pound less, was convicted of cheating because he did not sell it at the rate agreed on, it was held that as there was no wrongful gain or loss to anyone, no offence was committed.[7] For, the rice having been sold to him, and he having paid for it, it was not unlawful for him to sell it again at such price as he thought fit. The fact that a trader in a statement of his account included, amongst other articles delivered, an article, which the complainant alleged she had returned, was held not to amount to cheating unless it was proved that he had intentionally done so with an intention to defraud and had obtained a payment of the whole bill or of the bill in part including the price of that article.[8] Where a person attempted to obtain his recruitment in the police [illegible] intend- [illegible] ttempt- [illegible] person [illegible] deceived in body, mind, reputation or property.[9] Where the accused promised to withdraw his charge against the complainant's brother-in-law and others without intending to do so, and thereby deceived the complainant and induced him to withdraw his charge against the accused, it was held that the act of the complainant so induced by the accused's deceit could not be said to be one likely to cause damage or harm to him in body, mind, reputation or property within the meaning of this section and that the accused was not, therefore, guilty of cheating.[10] Where a person was charged [illegible] Registrar of the University of Madras by [illegible] and trying to obtain a duplicate of the [illegible] person, it was held that as there was no

[1] *Foster*, (1877) 2 Q. B. D. 301.
[2] *Khushali*, (1906) 29 All. 141.
[3] *Ladka*, (1893) Cr. R. No. 10 of 1893, Unrep. Cr. C. 635.
[4] *Punya*, (1888) Unrep. Cr. C. 423.
[5] *Shaikh Basit*, (1883) 1 Weir 479.
[6] *Mehervanji Bejanji*, (1869) 6 B. C. H. (Cr. C.) 6.
[7] *Lal Mahomed*, (1874) 22 W. R. (Cr.) 82.
[8] *Bay Nath Ram Marwari v. Burgess*, (1900) 5 C. W. N. 255.
[9] *Dwarka Prasad*, (1883) 6 All. 97.
[10] *Durgiah*, (1892) 1 Weir 477.

proof of harm or damage to the Registrar or to the University and no wrongful gain to the accused or loss to the University the charge of cheating must fail. Where the accused, a public servant, purchased at an auction a quantity of waste paper, bidding for it under an assumed name, it was held that in the absence of any rule forbidding employees in the office to bid at such sales, the conviction of the accused under this section could not be sustained.[2] The petitioners were charged before the District Magistrate with cheating in that they waylaid certain intending customers of the complainant and falsely represented themselves as belonging to the complainant's shop, took them to their own shop on the pretence that it was the shop of the complainant and sold sweets to them. It appeared that the customers sustained no pecuniary loss in consequence of the accused's acts who apparently had not tried to make anything out of their victims and had only charged the market rate for the sweets. The Magistrate convicted the accused of cheating, holding that the deception must have injuriously affected the business of the complainant. It was held that the conviction was bad.[3]

The accused, a shopkeeper, having sold goods worth Rs. 2-13-0 to a customer, received in payment two currency notes one of Rs. 2-8-0 and the other of Re. 1. Instead of returning eleven annas, as he ought to have done, he paid only 0-9-3 to the customer, saying that the notes were not worth their face value. On these facts, the accused was convicted of cheating. It was held in revision that the offence of cheating was not committed, for there was no deceit, inasmuch as the customer was not induced to hand over the notes by any representation on the part of the accused that he would get change calculated on the face value of the notes but the notes were handed over in the ordinary course of the sale and purchase and what really happened was that a dispute then arose as to the correct amount of the change due to the customer.[4]

With a view to escape the payment of just dues of their creditors, the accused, who were retail traders, fraudulently induced the creditors, just before the closing of the civil Courts for vacation, to grant them some time to pay up. Their object in gaining time was to remove the goods from their shop. The civil Courts having closed within the time thus granted, the creditors were prevented from seeking any remedy in the civil Courts. It was held that as time was obtained fraudulently the accused were guilty of cheating.[5]

False entries.—Where the accused was requested to make an entry in a book of accounts, belonging to the complainant, to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts, instead of making this entry entered in a language not known to the complainant that this sum had been paid to the complainant, it was held that he had committed an offence of attempt to cheat, and not one under s. 465.[6] Where the lessee of a forest presented false accounts to a Forest Officer in order to defraud the Government, it was held that he might be convicted of attempting to cheat.[7]

Fraud by railway passengers.—Where a passenger travelled in a carriage of higher class than that for which he had paid fare[8]; and where a passenger gave some part of his luggage to a co-passenger to evade the charge for overweight[9] this offence was not committed. Where a man endeavoured to evade payment of a railway fare by the production of an old pass altered as to date and number of persons, it was held that he was rightly convicted of an attempt to

[1] *Srinivasan*, (1902) 25 Mad. 726. This case lays down bad law. It is opposed to *Jagannami*, (1889) 12 Mad. 151; *Sadhi Bhusan*, (1893) 15 All. 210 and *Abbas Ali*, (1896) 25 Cal. 512, F. B. and has been disapproved in *Kotamraju Venkatrayudu*, (1905) 28 Mad. 90.

[2] *Kutub Ali*, (1901) 23 A. W. N. 231.

[3] *Sundar Singh*, (1901) P. R. No. 25 of 1901.

[4] *Murarji Raghunath*, (1919) 21 Bom. L. R. 763, 5 Bom. Cr. C. 98.

[5] *Rameshwar v. Govind Prasad*, (1925) 23 A. L. J. R. 433.

[6] *Kunju Nayar*, (1888) 12 Mad. 114.

[7] *Ramajirao Jaibajirao*, (1875) 12 B. H. C. (Cr. C.) 1.

[8] *Dayabhai Parjaram*, (1861) 1 B. H. C. 140.

[9] *Parsu Ram*, (1907) P. R. No. 27 of 1907.

cheat.[1] Where a railway employee obtains a free pass for his wife and mother and hands it over to a woman who is neither his wife nor his mother and she uses it, he is guilty of the offence of cheating punishable under s. 420 and not under s. 112 of the Railways Act.[2]

Abetment.—The forwarding of fictitious consignment notes was held to be abetment.[3] The accused by falsely representing F, a notorious and practised gambler well skilled in all the tricks of gambling, to be a rich merchant, induced the prosecutor to gamble with him, on the representation that the merchant would fall an easy prey if the prosecutor gambled with him, and he (the prosecutor) was thus induced to part with all his property. It was held that those facts were sufficient to sustain a conviction for abetment of cheating.[4]

Cheating by personation.

416. A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

ILLUSTRATIONS.

(*a*) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(*b*) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

COMMENT.

Ingredients.—This section requires any one of the following essentials:—

1. Pretention by a person to be some other person
2. Knowingly substituting one person for another.
3. Representation that the person representing or any other person is a person other than he or such other person really is

"To 'personate' means to pretend to be a particular person".[5] "As soon as a man by word, act, or sign holds himself forth as a person entitled to vote with the object of passing himself off as that person, and exercising the right which that person has, he has personated him. [6] If a person at Oxford, who is not a member of the University, go to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtain goods, this appearing in cap and gown is a sufficient thing, although nothing passed in words.[7]

Explanation.—The person personated may be a real or an imaginary person.

CASES.

False personation at an examination.—Where A falsely represented himself to be B at a University Examination, got a hall-ticket under B's name, and wrote papers in B's name, it was held that A had committed the offence of cheating by personation and forgery.[8]

Personation before a public servant.—A female vendor started for D, in company with three persons, to get her deed of sale registered. She fell ill on the way, and

[1] *Gunpat*, (1868) P. R. No. 6 of 1868.
[2] *Ram Dayal*, (1925) 2 O.W.N. 510.
[3] *Raghunath*, (1889) Unrep. Cr. C. 470.
[4] *Jahana*, (1904) P. R. No. 4 of 1905.
[5] Per Crompton, J., in *Hague*, (1864) 3 B. & S. 715, 720, 33 L. J. (M. C.) 81.
[6] Per Blackburn, J., in *ibid*, p. 721.
[7] *Barnard*, (1837) 7 C. & P. 784.
[8] *Appasami*, (1889) 12 Mad. 151. See *Ganesh Khanderao*, (1889) 13 Bom. 506.

her three companions went to the Registrar's office. One of them, a woman, there personated the vendor, and got registry of the deed. She was convicted under this section and the other two of abetting the offence. It was held that as there was no apparent intention on the part of the accused to injure or defraud any one, the convictions should have been under the Registration Act and not under the Code.[1] Similarly, where a servant purchased a stamp paper of his master, giving his master's name as if it had been his own, it was held that a conviction under the section was bad, inasmuch as although there might have been personation, there was no cheating as there had been no fraudulent intent.[2]

Where the accused was found to have knowingly represented one J to be B, the mother of a sepoy K, who had been killed in action, and thereby induced the military authorities to grant a pension to J to which she was not entitled, it was held that he had committed this offence.[3]

Where the accused travelled by rail without a ticket and on arriving at the place of destination presented a forged railway pass made out in the name of the "Servant of Mr. Brown, Assistant Auditor"—a description which did not apply and never had applied to him, it was held that as it was not proved whether he had shown the pass to a Ticket Examiner before the completion of his journey, he was guilty of an attempt to cheat under this section.[4] A and L induced the *muharrir* at a fair to write out a certificate of sale of a mare giving S as the name of the seller and L as the purchaser. A posed as S and affixed thereto his thumb-mark. It was held that as the *muharrir* was deceived, A and L were guilty of an offence under this section whatever reason they had for deceiving him and inducing him to write a false certificate.[5]

Where a person falsely personated another and induced a Health Officer to deliver to him a health certificate, it was held that he was guilty of this offence.[6]

Personation by a witness.—A witness falsely deposing in another's name should be charged with giving false evidence, under s. 193, and not with cheating by personation.[7]

False representation as to caste.—Where the accused represented to the prosecutor that a girl was [illegible] consideration of the [illegible] the Sudra caste, it w[illegible]

But the former Chief Court of the Punjab decided that a person could not be convicted of an offence under this section for disposing of a girl representing her to be of a different caste from that to which she belonged.[9] It held that to describe a Brahmin woman as a Kirari,[10] or a sweeper woman whose husband was alive as a *jat* widow[11] was not an offence under this section but one under s. 420.

Misrepresentation as to position in life.—The first illustration indicates that a misrepresentation by false description of one's position in life falls under this section. Where, therefore, a document purported to have been signed by G. L, a *putwaree*, and it was said that it was signed by G. L., but at a time when G. L. was not a *putwaree*, it was held that this offence was committed.[12] Similarly,

[1] *Loothy Bewa*, (1869) 11 W. R. (Cr.) 24, [illegible]

[illegible] 480.

[illegible] 1.

[illegible] L. J.

748.

[2] *Ahmada*, (1913) P. R. No. 9 of 1914.

[3] *Pachinathan*, (1919) 11 L. W. 368.

[4] *Prema Bhika*, (1863) 1 B. H. C. 89.

[5] *Mohim Chunder Sil*, (1871) 16 W. R. (Cr.) 42. See *Komul Dass*, (1865) 2 W. R. [illegible] 5 W. R. [illegible] R. (Cr.) [illegible] Cr. R.

[illegible] of 1903.

[illegible] of 1904.

[illegible] 16 of [illegible] No. 28 of 1918.

[9] [illegible]

[10] [illegible]

[11] *Joy Kurn Singh* v. *Man Patuck*, (1874) 21 W. R. (Cr.) 41.

where a person represented a girl to be the daughter of a certain woman of good family, when she was within his knowledge the daughter of another woman, it was held that he was guilty of this offence.[1]

False statements as to name and performances.—Entries for two handicaps were sent to the secretary of an athletic meeting, in the name of Sims, containing a statement as to the recent performances of Sims, which were very moderate, and in consequence Sims was given long starts. The entries were not written by either Sims or the accused. At the meeting the accused, who was a good runner, personated Sims, who was absent, and came first in both the races. After the first race the handicapper asked the accused whether he was really Sims, whether the performances given in the entry form were really his, and whether he had never won a race, as stated in the entry. He answered these questions falsely in the affirmative. It was held that the accused was rightly convicted of attempting to obtain property by false pretences.[2] Under the Code this offence will fall under this section.

Punishment for cheating.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section punishes simple cases of cheating. When there is delivery of any property or destruction of any valuable security s. 420 is the proper section to apply. The offence under this section is non-cognizable, the one under s. 420 is cognizable.

PRACTICE.

Evidence.—Prove (1) that the person deceived delivered to someone, or consented that some person shall retain certain property.

(2) That the person deceived was induced by the accused to do as above.

(3) That such person acted upon such inducement in consequence of his having been deceived by the accused.

(4) That the accused acted fraudulently or dishonestly when so inducing that person.

Or prove (1) that the person deceived did, or omitted to do, something which he was not bound to do or omit to do.

(2) and (3) as above.

(4) That the accused so induced that person intentionally.

(5) That such act or omission caused, or was likely to cause, damage or harm to that person in body, mind, reputation or property.

There must be some evidence of fraudulent or dishonest intention at the time of the omission of the act in respect of which the cheating is alleged.[3] Subsequent conduct of the accused would be evidence to show the previous dishonest intention.[3] The test to be applied in considering whether, on the trial of an indictment charging obtaining money, goods, or credit by false pretences, evidence of acts of the defendant subsequent to those which are the subject of the indictment is admissible, is whether the evidence is relevant. A connection must be shewn to exist between the acts which are the subject of the indictment and the acts sought to be proved. The fact that the subsequent acts show that the defendant has committed an offence distinct from that which is charged in the indictment is not sufficient to make evidence

[1] *Dhunput Ojhab*, (1867) 7 W. R. (Cr.) 51.
[2] *Button*, [1906] 2 Q. B. 597.
[3] *Hargovandas*, (1872) 9 B. H. C. 448; *Fazul*, (1886) Cr. R. No. 66 of 1887, Unrep. Cr. C. 312; *Venkatachala Pillai*, (1888) 1 Weir 476; *Virasvami*, (1881) 1 Weir 478.
[4] *Heeramun Hulwye*, (1866) 5 W. R. (Cr.) 5.

of the subsequent acts admissible if a connection is shown to exist between the transactions.[1] The accused was tried for obtaining eggs by false pretences; it was proved that he had falsely represented by advertisements in newspapers that he was carrying on a *bona fide* dairyman's business. Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements. It was held that such evidence was admissible.[2] The defendant was indicted for obtaining a cheque by falsely pretending that another cheque, which he then gave to the prosecutor, was good and valid order for the payment of money. The prosecutor deposed that he gave his cheque to the defendant on the faith of the defendant's statement that a cheque, which the defendant then gave to the prosecutor, was a good cheque. The cheque given by the defendant was dishonoured. The defendant stated that when he gave the cheque he expected a payment which would have enabled him to meet it. The defendant was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three cheques which were dishonoured. To prove guilty knowledge the prosecutor in the first case was called, and gave the same evidence as in the first case. It was held that his evidence was admissible for the purpose of proving guilty knowledge.[3]

At the trial of an accused person on an indictment charging him with obtaining a pony and cart by false pretences on June 4, 1909, evidence was admitted that, on May 14, 1909, and on July 3, 1909, the accused had obtained provender from other persons by false pretences different from those alleged in the indictment. The accused was convicted. It was held that the evidence was wrongly admitted, as it did not show a systematic course of fraud, but merely that the accused was of a general fraudulent disposition, and therefore it did not tend to prove the falsity of the representations alleged in the indictment; that although there was sufficient evidence of the false pretences alleged to justify the conviction, the evidence as to the other cases might have influenced the jury, and the conviction must, therefore, be set aside.[4]

Evidence with regard to a previous act of fraud alleged to have been committed by an ac[illegible] in law. [illegible]

Evidence Act, the case being one in which the [illegible] depends upon proof of actual facts and not upon the state of the accused's mind.[5] On a charge against the accused of cheating by falsely representing that he was the *dewan* of an estate and could procure for the complainant an appointment to the vacant post of manager to the estate, and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, was admissible under ss. 14 and 15 of the Evidence Act, not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent.[6]

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate or Magistrate of the first or second class.

A criminal [illegible] upon the very same finding of a civ[illegible] of the case of the facts has succeeded in satisfying a civil Court upon the [illegible] justice of his claim. Parties should not be encouraged to resort to the criminal

[1] *Smith*, (1905) 20 Cox 804.
[2] *Rhodes*, (1899) 1 Q. B. 77
[3] *Ollis*, (1900) 2 Q. B. 758.
[4] *Fisher*, [1910] 1 K. B. 149.
[5] *Gokul Khatik*, (1924) 29 C.W.N. 483.
[6] *Debendra Prasad*, (1909) 36 Cal. 573, 9 C. L. J. 605.

Courts in cases in which the point at issue between them is one which can more appropriately be decided by a civil Court.[1]

Attempt to cheat.—In a prosecution on a charge of attempting to cheat a certain person, that person need not be the complainant.[2]

Charge— In the case of cheating the charge must set out the manner in which the offence was committed. Whether the words of the charge are reasonably sufficient to give the accused notice of the accusation which he has got to meet depends upon the circumstances of each particular case. The omission to state the manner of the cheating is regarded as material or not according as the accused has or has not in fact been misled by the omission and the omission has or has not occasioned a failure of justice.[3]

The charge should run thus:

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, (*set out the manner in which the cheating was committed*), and thereby committed cheating, an offence punishable under s. 417 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Where an accused person attempts to cheat a whole body of villagers and speaks to them in a body and not to each individual villager for the purpose, he may be tried on one charge for each attempt to get money from him.[4] There should be as many charges as there are persons cheated.[5]

Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.

418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section applies to cases of cheating by a guardian, a trustee, a solicitor, an agent, a manager of a Hindu family, a *karnavan* of *tarwad* in Malabar or by directors or managers of a bank in fraud of the shareholders It is the abuse of trust that is visited with severe punishment.

False balance-sheets.—If the directors, manager and accountant, dishonestly, that is, to obtain wrongful gain for themselves or to cause wrongful loss to others, put before the shareholders balance-sheets which they know to be materially false and misleading and likely to mislead the public as to the condition of the bank, and conc[illegible] to remair[illegible] the mere [illegible] them wit[illegible] cheating. The guilty knowledge of each director cannot be presumed from the fact that he authorises the issue of a balance-sheet containing false entries. The nature of false statements, the ease or difficulty with which their truth or falsity

[1] *Bishan Das*, (1909) P. R. No. 33 of 1910.
[2] *Mahader Lal* v. *Dhonraj Maiseri*, (1908) 12 C. W. N. 750
[3] *Kedarnath Chakravarti*, (1924) 41 C. L. J. 172.
[4] *Johan Subarna*, (1905) 2 C. L. J. 618.
[5] *Kailash Chandra Pal*, (1918) 46 Cal. 712.
[6] *Moss*, (1893) 16 All. 68. See *Clifford*, (1913) 7 L. B. R. 143.

can be ascertained, the course of business of the company, and the position, experience and attainment of each individual director, are some of the circumstances that should be considered.[1]

PRACTICE.

Evidence.—Prove (1) that the accused cheated some person (see s. 417).
(2) That he was under a legal obligation to protect the interest of that person.
(3) That the cheating had relation thereto.
(4) That the accused knew he was likely to cause wrongful loss to such person.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, cheated XY by doing an act, to wit——, with the knowledge that you were thereby likely to cause wrongful loss to the said XY whose interest in the transaction to which the cheating related you were bound either by law (*or* a legal contract) to protect, and that you thereby committed an offence punishable under s. 418 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment for cheating by personation.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section provides punishment for the offence described in s. 416.

PRACTICE.

Evidence.—Prove (1) that the accused cheated the complainant.

(2) That he did so by pretending to be some other person ; or by knowingly *substituting one person for another ; or by representing that he,* or some other person, is a person other than the person he really is.

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at ——, pretending to be (*specify the person personated*) [*or* knowingly substituted A *for* B] *or* represented that you or A were (*so and so*)], and thereby committed an offence punishable under s. 419 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Cheating and dishonestly inducing delivery of property.

420. Whoever cheats and thereby dishonestly[1] induces the person deceived to deliver any property[2] to any person, or to make, alter or destroy the whole or any part of a valuable security,[3] or anything which is signed or sealed, and which is capable

[1] *Seddon* v. *Loane,* (1910) 9 M. L. T. 20.

of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Simple cheating is punishable under s. 417. But where there is delivery or destruction of any property or alteration or destruction of any valuable security resulting from the act of the person deceiving, the proper section to apply is this section and not s. 417. Section 417 covers cases of cheating in which though there is fraud yet there is no intention of causing wrongful loss, or wrongful gain. The word 'fraudulently' is not used in s. 420.

1. **'Dishonestly.'**—See s. 24 *supra*. The word "dishonestly" implies a deliberate intention to cause wrongful gain, or wrongful loss, and when this is coupled with cheating the offence is punishable under this section.[1] A young boy was married to a girl who was much older. The girl having grown up to womanhood, the mother and the elder brother of the boy suggested to the father of the girl to return certain ornaments which had been given to the bride at the time of marriage and thus put an end to the marriage. The father called a *panchayat* of leading men, and in accordance with their advice the ornaments demanded were made over and a formal receipt written and signed by the parties. Subsequently, the bride's father charged the boy's mother and brother for cheating. It was held that the charge of cheating could not be entertained as it was found that there was no dishonest inducement.[2] Two contracts were entered into between the complainant and the accused, one for the sale by the complainant of a certain number of shares of a particular kind and the other for the purchase by the complainant of certain shares of another kind. Subsequently, when the position between the parties was that the contract regarding the purchase by the complainant was either cancelled or so disputed that it could not be enforced except by litigation the accused induced the complainant to part with his shares promising to give him back cash for it but instead of doing it he offered to credit the value thereof against the sum due to him under the other contract and subsequently tendered the amount less the loss sustained by him for the non-fulfilment of the other contract; it was held that the action of the accused was dishonest and fraudulent within the meaning of this section.[3]

2. **'Deliver any property.'**—Property in this section refers only to moveable property.[4] 'Moveable property' is defined in s. 22, *supra*. It includes money.[5] A certificate of having passed an examination is 'property' within the meaning of this section.[6] So is a promissory note. The accused who had left certain promissory notes with the complainant as security for a loan, dishonestly induced him to return the promissory notes pretending that they were required to collect money from the debtors with the aid of which the complainant would be paid, but instead of doing so disposed of them and did not pay the complainant. It was held that the act of the accused in dishonestly inducing the complainant to return the same to him constituted cheating.[7] When property is delivered by means of cheating the offence falls under the first clause.[8]

Delivery of money.—The accused falsely representing himself to be the manager of an estate induced one G to borrow some money and pay it to him as advance of security money to be deposited for a post promised by him to G. He then put off G from time to time and at length when he was found out, he promised to return the money. It was held that the offence of cheating was completed as soon as the

[1] *Ba Shein*, (1920) 13 B. L. T. 239.
[2] *Jumman*, (1923) 21 A. L. J. R. 321.
[3] *Aswini Kumar Chatterji*, (1921) 25 C. W. N. 618.
[4] *Abdul Ahad*, (1882) 2 A. W. N. 6.
[5] *Birendra Lal Bhaduri*, (1904) 32 Cal. 22.
[6] *Local Government* v. *Gangaram*, (1921) 18 N. L. R. 52.
[7] *Venkatagurunatha Sastri*, (1923) 45 M. L. J. 133, 17 L. W. 580.
[8] *Sadanund Doss*, (1865) 2 W. R. (Cr.) 29 *Bavaji*, (1875) Unrep. Cr. C. 96.

accused obtained the money by a promise which he knew he could not fulfil. The fact that long afterwards the accused paid back under pressure a part of the money, did not in any way affect his criminality. The test of criminality is what was in his mind at the time when the money was given to him and whether he at that time intended to repay the same.[1] G, by falsely representing to L that G had been instructed by a competent authority to recruit unskilled labour for service in Africa and that G would, on payment of a certain sum of money as a fee for registering L's name, be able to engage L for service in that country, induced L to pay G the said fee, it was held that G had committed this offence.[2] Where an accused person had taken a ransom for the restoration of stolen property, and failed to return that property to the person who had paid him the ransom, it was held that he ought to be convicted of the more serious offence of cheating under this section.[3] The accused drew a *hundi* and borrowed money on it, without assuring himself that the drawee, with whom he had no previous dealings and who was not supplied with funds, would honour the same The money so borrowed was spent by him on his own purposes. The *hundi*, when presented for payment, was dishonoured by the drawee. The accused, though apprized of the dishonouring, took no steps either to have the *hundi* honoured or to repay the money borrowed on the *hundi*; but made himself scarce. It was held that he was guilty of cheating under this section.[4] Accused adulterated saccharine with bicarbonate of soda and put the mixture into tins which he gave to a broker to sell. The broker sold the mixture as genuine saccharine and received money for it, which he made over to the accused. It was held that the accused was guilty of cheating and abetting that offence.[5]

Suppression of facts.—Mere suppression of some facts at the time of borrowing money does not amount to cheating where there is no evidence of either active deception or dishonest or fraudulent action. So where a person mortgaged to [illegible] and [illegible] this defect to his creditor.[6]

Delivery of money under an immoral contract.—The accused agreed to let her daughter on hire to the complainant for concubinage for one year in consideration of Rs. 70, out of which she received Rs. 35 in advance. Later, she refused to carry out the contract or to return the advance. She was convicted of cheating. It was held, reversing the conviction, that a party to an immoral contract should not be allowed to prosecute on a criminal charge when he could not get performance of the contract in a civil Court.[7]

Delivery of goods.—A person whose duty it was to ascertain and report the current rates in the market, by arrangement with persons in the market, reported rates higher than those really current, and in consequence of which higher rates were paid to sellers than they were entitled to, it was held that he had committed this offence.[8] Where the accused induced the complainant to deliver to him a bicycle under false representations that he was a commission agent and that the machine

[1] *Debendra Prasad*, (1909) 36 Cal. 573, 9 C. L. J. 605.
[2] *Girdhari Lal*, (1910) P. W. R. (Cr.) No. 26 of 1910.
[3] *Nga Shan*, (1922) 1 B. L. J. 179
[4] *Uttamlal Narottamdas*, (1920) 23 Bom. L. R. 340, 6 Bom. Cr. C. 37.
[5] *Bholasingh Amersingh*, (1924) 26 Bom. L. R. 211, 7 Bom. Cr. C. 139.
[6] *Hari Kishan*, (1920) P. W. R. (Cr.) No. 40 of 1910.
[7] *Jani Hira*, (1912) 14 Bom. L. R. 500, 1 Bom. Cr. C. 148.
[8] *Parmeshar Dat*, (1886) 8 All. 201.

was required for an up-country purchaser, but after taking its delivery he negotiated its sale to a customer in Bombay, it was held that the offence of cheating and dishonestly inducing the delivery of property was complete as soon as this bicycle was handed over.[1] Where A went to an opium shop with B's ticket and explicitly or by implication represented himself to be B, thereby induced the shop-keeper to deliver to him a certain quantity of opium, it was held that A had committed the offence of cheating by personation; and as opium was actually delivered in consequence of the cheating, he should be convicted under this section.[2] The accused, by making a false representation that he was an employee of the Calcutta Municipal Corporation, obtained rupees ten as subscription from the Health Officer of that Corporation towards the funds of a charitable society. The money was duly made over by the accused to the charity, but he was subsequently charged with the offence of cheating and was convicted under this section. It was held that the conviction and sentence should be set aside, there being no such deception in this case as to cause "wrongful loss" or "wrongful gain."[3]

Obtaining of a certificate—A railway company offered some concession rates to student travellers, and a certificate was presented by somebody—not the accused—containing the names of students who had not applied for the certificate which the accused did not know and the endorsement of the railway official 'may be issued' was made thereon, and the accused thereafter presented the same for the necessary pass to be issued. The company issued the pass and arrested the accused. It was held that the accused being himself entitled to travel at the reduced rate was not guilty of any fraudulent intent, no fraudulent intention could be assumed on the part of the accused to use the pass for persons not entitled to travel at the reduced rates and that as the company had not been defrauded the accused could not be convicted.[4] A person who obtains a certificate from a Deputy Inspector of Schools by stating untruly that he passed the examination in a certain year, when another person of the same name did, acts fraudulently within the meaning of s. 415, and is guilty of an offence punishable under this section.[5]

3. 'Valuable security.'—See s. 30, *supra*. A 'decree' does not come within the definition of a "valuable security": it merely declares the existence of legal rights or the extinguishment, extension, transfer or restriction of legal rights, etc.; the rights are there, etc., and all that the decree does is that it formally expresses the adjudication by the Court on the rights of the parties. Therefore a 'decree' is not a "valuable security." Even if a 'decree' did satisfy the definition of a "valuable security," there is no delivery of any property when the Court passes a decree, because the original decree remains in Court, and the term "valuable security" can only apply [illegible] copy of a decree which may be supplied [illegible] ne arguments would apply to orders in [illegible] valuable security. The complainant was taken to a village on the pretence that a buffalo would be bought for him and that the money necessary for this purpose would be advanced to him. He was then given a large amount of liquor to drink and when in the state of intoxication a document purporting to be a bond was executed and his signature was obtained. This document was a deed of divorce of his wife who was then taken away by some of the accused. It was held that the offence committed came within the purview of this section and not s. 417.[7]

An acknowledgment of receipt of an insured parcel is not a "valuable security." It is merely evidence that a parcel of some sort was delivered to the addressee and it cannot operate as a discharge of any liability. Where the accused, in order to

[1] *Banaji Framji Munshi*, (1900) 2 Bom. L. R. 621.
[2] *Nga Po Lu*, (1902) 1 L. B. R. 356.
[3] *Ashutosh Mallick*, (1905) 33 Cal. 50.
[4] *James Fletcher*, [1910] 1 M. W. N. 510.
[5] *Local Government* v. *Gangaram*, (1921) 18 N. L. R. 52.
[6] *Charu Chandra Ghose*, (1923) 39 C. L. J. 122, 132, 28 C. W. N. 414.
[7] *Balkhawar Singh*, (1920) 3 L. L. J. 283.

PRACTICE.

Evidence.—Prove (1) that the accused removed, concealed, or delivered the *property; or that he transferred it or caused it to be transferred to some one.*

(2) That such transfer was without adequate consideration.

(3) That the accused thereby intended to prevent, or knew he was thereby likely to prevent, the distribution of that property according to law among his creditors, or creditors of another person.

(4) That he acted as above dishonestly or fraudulently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Jurisdiction.—The Magistrate's jurisdiction to entertain a complaint under this section is not taken away by the provisions of the Presidency Towns Insolvency Act, III of 1909,[1] or the Provincial Insolvency Act (V of 1920), s. 69.[2]

Charge.—*I (name and office of Magistrate, etc.,) hereby charge you (name of the accused)* as follows :—

That you, on or about the——day of——, at——, *dishonestly (or fraudulently)* removed *(or* concealed, *or* delivered to a certain person, to wit——, without [illegible] prevent or [illegible] of the said [illegible] ; and that [illegible] Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Dishonestly or fraudulently preventing debt being available for creditors.

422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section, like the preceding one, is intended to prevent the defrauding of creditors by masking property. Any proceedings to prevent the attachment and sale of debts due to the accused will fall under it. The offence consists in the dishonest or fraudulent evasion of one's own liability.

CASES.

Where A entered into an agreement with B not to compromise a case with C, because he had assigned the benefit of the suit to B as a security for the *due* payment of an instalment of money and A notwithstanding did afterwards compromise *the suit with C, it was held that A could not be convicted under this section* unless the compromise was made dishonestly or fraudulently towards B.[3] The petitioners' estate was under mortgage and in the management of certain persons under certain conditions as to payment of moneys *realised by them. In execu*tion of a decree obtained by the managers in a suit brought by them in the name of the petitioners, a certain under-tenure was sold for Rs. 3,000. The judgment-debtor arranged with the petitioners that on payment of Rs. 1,000 the sale should be set aside and he accordingly paid that sum into Court, and an application was

[1] *Mulshankar Harinand Bhat,* (1910) 12 Bom. L. R. 750.

[2] *Segu Baliah* v. *N. Ramasamiah,* (1917) 6 L. W. 283.

[3] *Nobin Chunder Mudduck,* (1874) 22 W. R. (Cr.) 46.

made by the accused to draw out the money upon which no order was made. They were, thereupon, convicted, at . . . . . commit an offence under this section . . . . . money paid into Court might have . . . . . gagors, but such conduct would not necessarily be regarded as dishonest or fraudulent so as to render the accused liable to punishment; their attempt to get the money being more to put an end to the management than to prevent money from being available for the payment of their debt under the mortgage.[1]

PRACTICE.

Evidence.—Prove (1) that the debt or demand was due to the accused, or some other person.

(2) That the accused prevented such debt or demand from being made legally available for his debts, or for debts of another person.

(3) That he did as above dishonestly or fraudulently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class.

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.

423. Whoever dishonestly[1] or fraudulently[2] signs, executes or becomes a party to any deed or instrument[3] which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer[4] or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section deals with fraudulent and fictitious conveyances and trust. If the consideration for the sale of immoveable property is, with the consent of the purchaser, exaggerated in a deed of sale in order to defeat the claim of the pre-emptor, the purchaser will be guilty of this offence.[2] In such cases it is necessary to prove the existence of a right of pre-emption in respect of the subject-matter of such sale, as it is not an offence if the property sold is not subject to such a right.[3]

Under this section the dishonest execution of a *benami* deed will be punishable. The institution of a civil suit is not a condition precedent to a maintenance of a charge in a criminal Court for this offence.[4]

1. '**Dishonestly.**'—See s 24, *supra*.

2. '**Fraudulently.**'—See s 25, *supra*. This word does not connote deprivation of property It is not essential that the person deceived or to be deceived should be the same as the person injured or intended to be injured.[5]

3. '**Any deed or instrument.**'—A *kabuliat* is not a document contemplated under this section. Although a *kabuliat*, when accepted, operates as a lease for some purposes, it is not a document which purports to transfer or subject to any charge any property or any interest therein.[6]

[1] *Hara Kumary Choudhurani* v. *R. Sen*, (1900) 28 Cal. 314.

[2] *Cordita Mal*, (1901) P. R. No. 10 of 1902. *Lachman Das*, (1907) P. R. No. 16 of 1907; *Mahabir Singh*, (1902) 25 All. 31.

[3] *Chhajju*, (1907) P. R. No. 16 of 1908.

[4] *Umrao Singh*, (1883) 3 A. W. N. 209.

[5] *Legal Remembrancer* v. *Ali Lal Mandal*, (1921) 48 Cal. 911.

[6] *Mohammad Kajim Ali* v. *Jowahdi Nasbar*, (1919) 46 Cal. 956.

4. **'False statement relating to the consideration for such transfer.'**—*The law does not make punishable every false statement in an instrument of transfer. The false statement in order to become criminal must relate to the consideration or to the person to be benefited by it. The word 'consideration' cannot mean the property transferred. A statement that the vendee purchased the whole land while the vendor could only sell part of it, is not one coming under this section.*[1] *Where an accused person had unsuccessfully sought to obtain a woman in marriage and thereafter made and registered an agreement in her favour falsely reciting that he had married her, and purporting to convey to her a plot of land in lieu of her dower, it was held, that he had an intention to cause injury to her and her husband, and to support his own false claim to that status, and that he was guilty under this section.*[2]

PRACTICE.

Evidence.—Prove (1) that the accused signed, executed, or became a party to the deed, or instrument in question.

(2) That the purport of such document was to transfer, or to subject to a charge, the property or any interest in question.

(3) That such document contained a false statement relating to the consideration, or relating to the person for whose use or benefit it was really intended to operate.

(4) That the accused did as above dishonestly or fraudulently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Dishonest or fraudulent removal or concealment of property.

424. Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT:

This section provides for cases not coming within the purview of ss. 421 and 422. It contemplates such a concealment or removal of property from the place in which it is deposited, as can be considered dishonest or fraudulent, whether the fraud is intended to be practised on creditors or partners.[3]

CASES.

Removal by a partner.—Where one of the several partners removed the partnership books at night, and when questioned denied having done so, this offence was held to have been committed.[4]

Removal during attachment is an offence.—Where a judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force, this offence was held to have been committed.[5]

Removal under an illegal order is no offence.—A removal of crops in violation of an order which the person making it has no authority to make, does not constitute

[1] *Manis Goundan*, (1911) 37 Mad. 47.
[2] *Legal Remembrancer v. Ahi Lal Mandal*, (1921) 48 Cal. 911.
[3] *Cour Benode Dutt*, (1873) 21 W. R. (Cr.) 10.
[4] *Ibid.*
[5] *Obayya*, (1898) 22 Mad. 151; *Daya Karsan*, (1899) 1 Bom. L. R. 515; *Appayya Goundan*, (1883) 1 Weir 485; *Mokam Abbya*, (1893) 8 M. L. J. 264.

this offence.[1] Removal of crops to avoid an illegal distraint is not an offence under this section.[2]

Removal of crops by tenants.—Where ryots holding land on *varam* tenure removed crops for the purpose of protecting them from injury or damage owing to delay or refusal on the part of the Zemindar to perform his part in harvesting or division, it was held that such a removal was not dishonest. But where it was proved that the crops had been removed dishonestly or fraudulently, it was held that this offence was committed, even though the Zemindar, under the terms of the tenancy, acquired no property in the share due to him until the ryots had delivered it to him.[3] Similarly, where the accused who was a ryot under the Madras Estates Land Act and who was bound to share the produce of his land with the landholder in a certain proportion, dishonestly concealed or removed the produce, thus preventing the landholder from taking his due share, it was held that the accused was guilty under this section apart from the provisions of the Madras Estates Land Act.[4]

Removal during bona fide dispute.—Where the accused was convicted under this section, for dishonestly removing certain property from a shop upon which were the padlocks of two widows and it appeared that he removed the property at the instance of the widow who claimed to be entitled to the whole of it. It was held that if eventually it be decided that the other widow was not entitled to a share in the property, it would follow that the accused's action in removing the property from the locked shop was not a dishonest one within the meaning of this section.[5]

PRACTICE.

Evidence.—Prove (1) that the accused concealed or removed the property; or that he assisted in doing so.

(2) That he did as above dishonestly, or fraudulently.

Or prove (1) that the accused was entitled to the demand or claim in question.

(2) That he released the same

(3) That he did so dishonestly, or with intent to defraud.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

The legality or formality of the mode of attachment allowed by a civil Court is not a matter for a Deputy Magistrate's consideration.[6] Civil rights are not to be disposed of in criminal Courts.[7]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the the accused*) as follows :—

That you, on or about the——day of——, at——, dishonestly (*or* fraudulently) concealed (*or* removed) a certain property, to wit——, belonging to yourself (*or* to——) [*or* dishonestly or fraudulently assisted in the concealment or removal thereof; *or* dishonestly released a certain demand, to wit——] and that you thereby committed an offence punishable under s. 424 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Mischief.

Mischief.

425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person,[1] causes the destruction

[1] *Baburi Magala*, (1882) 1 Weir 483; *Ananda Muttusami Aiyan*, (1883) 1 Weir 484.

[2] *Gopalasamy*, (1902) 25 Mad. 729.

[3] *Subudhi Pantho* v. *Balarama Pudi*, (1902) 26 Mad. 481.

[4] *Sivanupandia Thevan*, (1914) 38 Mad. 793; *Kuldip Pendey*, (1916) 1 P. L. J. 353; *Lalu Gope*, (1917) 1 P. L. W. 691.

[5] *Khushi Ram*, (1920) 3 L. L. J. 99, P. W. R. (Cr.) No. 6 of 1921.

[6] *Brajo Kishore Dutt*, (1867) 8 W. R. (Cr) 17.

[7] (1868) 1 Weir 483.

4. **'False statement relating to the consideration for such transfer.'**—The law does not make punishable every false statement in an instrument of transfer. The false statement in order to become criminal must relate to the consideration or to the person to be benefited by it. The word 'consideration' cannot mean the property transferred. A statement that the vendee purchased the whole land while the vendor could only sell part of it, is not one coming under this section.[1] Where an accused person had unsuccessfully sought to obtain a woman in marriage and thereafter made and registered an agreement in her favour falsely reciting that he had married her, and purporting to convey to her a plot of land in lieu of her dower, it was held, that he had an intention to cause injury to her and her husband, and to support his own false claim to that status, and that he was guilty under this section.[2]

PRACTICE.

Evidence.—Prove (1) that the accused signed, executed, or became a party to the deed, or instrument in question.

(2) That the purport of such document was to transfer, or to subject to a charge, the property or any interest in question.

(3) That such document contained a false statement relating to the consideration, or relating to the person for whose use or benefit it was really intended to operate.

(4) That the accused did as above dishonestly or fraudulently.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Dishonest or fraudulent removal or concealment of property.

424. Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT:

This section provides for cases not coming within the purview of ss. 421 and 422. *It contemplates such a concealment or removal of property from the place in which it is deposited, as can be considered dishonest or fraudulent, whether the fraud is intended to be practised on creditors or partners.*[3]

CASES.

Removal by a partner.—Where one of the several partners removed the partnership books at night, and when questioned denied having done so, this offence was held to have been committed.[4]

Removal during attachment is an offence.—Where a judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force, this offence was held to have been committed.[5]

Removal under an illegal order is no offence.—A removal of crops in violation of an order which the person making it has no authority to make, does not constitute

[1] *Mania Goundan*, (1911) 37 Mad. 47.

[2] *Legal Remembrancer v. Abi Lal Mandal*, (1921) 48 Cal. 911.

[3] *Gour Benode Dutt*, (1873) 21 W. R. (Cr.) 10.

[4] *Ibid.*

[5] *Obayya*, (1898) 22 Mad. 151; *Daya Karsan*, (1899) 1 Bom. L. R 515; *Appaya Goundan*, (1883) 1 Weir 485; *Molam Abayya*, (1898) 8 M. L. J. 259.

this offence.[1] Removal of crops to avoid an illegal distraint is not an offence under this section.[2]

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Removal during bona fide dispute.—Where the accused was convicted under this section, for dishonestly removing certain property from a shop upon which were the padlocks of two widows and it appeared that he removed the property at the instance of the widow who claimed to be entitled to the whole of it. It was held that if eventually it be decided that the other widow was not entitled to a share in the property, it would follow that the accused's action in removing the property from the locked shop was not a dishonest one within the meaning of this section.[5]

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(3) That he did so dishonestly, or with intent to defraud.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

The legality or formality of the mode of attachment allowed by a civil Court is not a matter for a Deputy Magistrate's consideration.[6] Civil rights are not to be disposed of in criminal Courts.[7]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the the accused*) as follows:—

That you, on or about the——day of——, at——, dishonestly (*or* fraudulently) concealed (*or* removed) a certain property, to wit——, belonging to yourself (*or* to——) [*or* dishonestly or fraudulently assisted in the concealment or removal thereof; *or* dishonestly released a certain demand, to wit——] and that you thereby committed an offence punishable under s 424 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Mischief.

Mischief.

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[1] *Barwa Mapula*, (1882) 1 Weir 483. *Ananda Muttusamy Aiyan*, (1883) 1 Weir 484.

[2] *Gopalasamy*, (1902) 25 Mad. 729.

[3] *Subadhi Rantho v. Balarama Padi*, (1902) 26 Mad. 481.

[4] *Sivasuppadia Thevan*, (1914) 38 Mad. 793; *Kuldip Pandey*, (1916) 1 P. L. J. 353. *Lalu Gope*, (1917) 1 P. L. W. 691.

[5] *Khushi Ram*, (1920) 3 L. L. J. 99, P. W. R. (Cr.) No. 6 of 1921.

[6] *Brojo Kishore Dutt*, (1867) 5 W. R. (Cr) 17.

[7] (1868) 1 Weir 452.

of any property or any such change in any property[2] or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously,[3] commits "mischief."

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

ILLUSTRATIONS.

(*a*) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(*b*) A introduces water into an ice-house belonging to Z, and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(*c*) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(*d*) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.

(*e*) A, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(*f*) A causes a ship to be cast away intending thereby to cause damage to Z, who has lent money on bottomry on the ship. A has committed mischief.

(*g*) A, having joint property with Z in a horse, shoots the horse, intending thereby [illegible] committed mischief

(*h*) [illegible] ding to cause and knowing [illegible] mitted mischief.

Punishment for mischief.

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

COMMENT.

The section deals only with a physical injury from a physical cause.[1]

Ingredients.—This section necessitates three things[2]:—

1. Intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person.

2. Causing the destruction of some property or any change in it or in its situation.

3. Such destruction or change must destroy or diminish its value or utility or affect it injurously.

[1] *Moti Lal*, (1901) 24 All. 155, 156.
[2] (1868) 4 M. H. C. App. 15; (1874) 7 M. H. C. App. 39; *Nga Tha Zan*, (1901) 8 Burma L. R. 80.

1. **'Intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person.'**—As to the meaning of 'wrongful loss,' see s. 23, *supra*; and of 'public,' see s. 12, *supra*. The Bombay High Court in an old case said that the gist of this offence lay in the intention.[1] But in a subsequent case it has held that the terms of the section are, however, satisfied when there is a distinct finding on the question of the accused's knowledge, and the question of intention is material only as regards the sentence.[2] This decision seems to be correct.

This section does not necessarily contemplate damage of a destructive character. It requires merely that there should be an invasion of a right, and diminution of the value of one's property, caused by that invasion of right, which must have been contemplated by the doer of it when he did it.[3] The damage need not, necessarily, consists in the infringement of an existing, present, and complete right, but it may be caused by an act done now with the intention of defeating and rendering infructuous a right about to come into existence (*vide* ill. (*d*)). Any person who contracts to purchase property, and pays in a portion of the purchase-money, has such an interest in that property, although his title may not be complete, or his right final and conclusive, that the destruction of such property may cause to him wrongful loss or damage within the meaning of this section.[4] The probable consequential damage to other property would not of itself constitute mischief.[5]

[illegible] necessary.—The accused's premises, ad- [illegible] which there grew a chestnut tree, which [illegible] of the accused's premises. The accused cut off certain portions of the tree, contending that he had a right to do so in order to protect his property from the nuisance caused by stones which boys threw at the blossoms and by the branches interfering with the entrance of light and air to his dwelling. It was held that he was guilty of causing damage to the tree.[6] Where tenants finding their fields flooded cut a channel through a railway in order to let the water run off their fields, it was held that the act having been intentionally done amounted to mischief and it was no defence to say that their motive in doing it, namely, to free their fields from water, was an innocent one.[7]

[illegible] he accused threw at her two stones [illegible] the accused was guilty of mischief [illegible] maimed or rendered useless the conviction would be under s. 428.[8]

The accused dug a trench in his own land but alongside of a wall belonging to the complainant and removed the lateral support of the wall so as to cause the wall to tumble down. The complainant had not acquired lateral support for his wall by prescription. It [illegible] ing such support cou[illegible] to the complainant as the means adopted by him to cause the loss were not "unlawful."[9]

Destruction by the owner of premises of a trespasser's property found thereon.—The owner of land has no right to destroy the property of a trespasser found upon the premises. The complainant obtained possession of certain land as tenant of the accused, D, and after the term of his lease had expired, he was left in possession by D who took no steps to evict him. But when the complainant attorned to one B as landlord, D, who was litigating with B, forcibly and wantonly destroyed

[1] *Shama*, (1874) Unrep. Cr. C. 88.
[2] *Reesing*, (1894) Cr. R. No. 13 of 1894, Unrep. Cr. C. 690.
[3] *Juggeshwar Dass* v. *Koylash Chunder Chatterjee*, (1885) 12 Cal. 55.
[4] *Dharma Dass Ghose* v. *Nusseruddin*, (1886) 12 Cal. 660.
[5] (1868) 4 M. H. C. App. 15.
[6] *Hamilton* v. *Bone*, (1888) 16 Cox 437.
[7] *Chulhan Ahir*, (1908) 16 C. W. N. 263.
[8] *Mahadeo*, (1916) 12 N. L. R. 188.
[9] *Athi Ayyar*, (1920) 14 L. W. 728.

the earthen pots and put out of order a water-wheel of the well from which the complainant watered the crop raised by him on the land in dispute. It was held that the damage caused by D amounted to mischief. Batty, J., said: "The applicant's pleader, I understand, is unable to contend that if a trespasser left his watch in the room of another person, that would justify that other person in smashing the watch or throwing it down a well."[1]

Accident.—Where the accused who were employed in floating timber through a bridge, struck the arch of the bridge with some of the logs, it was held that this offence was not committed.[2]

No mischief if no wrongful loss or damage is caused to the public or to any person or if the act amounts only to an invasion of a civil right.—Where the accused cut down crops planted by the complainant on land to which he had no right whatever[3]; where the accused was found catching fish in a public river, the right of fishing in which was let out by Government to another but no fencing was put up to shut up the fish in any manner[4]; [illegible] which a civil Court had [illegible] innocently removed a b[illegible] front of his house which impaired his ingress and egress to or from his house[6]; where an agent of a landlord accompanied by a bailiff broke open the door of a room, in his chawl, in the possession of his tenant, in execution of a distress warrant issued against the tenant for non-payment of rent[7]; where the owner of an animal buried its carcass to prevent the *mahars* (low class people) of a village from taking off its skin[8]; where a person, in a *bona fide* belief that the construction of a wall on his land was a civil trespass, destroyed the construction[9]; where members of a [illegible] in Municipal limits to be cut for public [illegible] Committee as a body[10]; where persons took cattle to a pound whereby their owners were subjected to a fine[11]; where the reversioner of a mortgagor sold some of the bricks of the mortgaged house, which had tumbled down[12]; where a person dug out tombs of the forefathers [illegible][13]; and where the accused, members [illegible] of way, pulled down a wall obstruct- [illegible] plainant[14], it was held in all these [illegible]

The fact that for years a deity was allowed to be brought once a year underneath a tree standing on the land of the accused for public worship, was not sufficient to divest the owner of the land and of the tree standing thereon of his ownership and not to amount to a dedication of the tree to the deity or the public, and the accused, who cut the tree, was therefore not guilty of mischief.[15]

Where the accused, a servant of one R, acting solely in the interest of his master, removed or damaged some bamboos which belonged to the estate of his master which was under the management of the Court of Wards, it was held that the act of the accused did not amount to this offence inasmuch as by his act no wrongful loss was caused to anybody, not even to the Court of Wards. The Court said: "It is a well-known rule of law that a man may commit mischief by

[1] *Dinkar Chintaman Patkar*, (1904) 7 Bom. L. R. 86, 87.
[2] [illegible] App. 40
[3] [illegible] 126.
[4] [illegible] *me*, (1888) [illegible] *Dinobandhu* [illegible] r. J.) 17.
[5] [illegible] 573.
[6] [illegible] 10 of 1895, Unrep. Cr. C. [illegible]
[7] *Kaikhusro Cursedji*, (1898) Unrep. Cr. C. 949.
[8] *Govinda Punja*, (1884) 8 Bom. 295.
[9] *Shankar Lal*, (1887) 7 A. W. N. 101; [illegible] 2 A. W. N. 209.
[10] [illegible] 9 of 1878.
[11] [illegible] 158.
[12] [illegible] *Tansuk* [illegible]
[13] [illegible] R. 463; [illegible] (1889) 1 Weir 496.
[14] *Dharmalinga Mudali*, (1914) 39 Mad. 57.
[15] *Venkatapurnanandam*, (1902) 1 Weir 496.

damaging his own property, provided he does so in order to cause wrongful loss to somebody else, or knowing it to be likely to cause wrongful loss to somebody else. But it can hardly be said that a man who damages his own estate, although he has at present only a qualified interest, damages the trustees in possession, whose only object is to preserve the estate for the benefit of the owner."[1]

2. **'Causes the destruction of any property or any such change in any property.'**—It is the essence of this offence that the perpetrator must cause the destruction of property or such change in it as destroys or diminishes its value or utility. To cut a crop that is grown to be cut is not to destroy it, or affect it injuriously.[2] But walking across a field of long grass is causing damage to the grass[3], making a breach in the wall of a canal is an act which causes such a change in the property as destroys or diminishes its value or affects it injuriously and therefore amounts to mischief.[4] The section contemplates a physical injury from a physical cause. Certain Hindus present at a caste dinner had sat down to partake of the food which had been served to them, when certain other members of the caste came, and, after telling those who were seated to move to another place which they refused to do, threw down a shoe amongst the men who were seated. The persons who threw the shoe were convicted of mischief inasmuch as their action had polluted the food, and had, from a Hindu religious point of view, rendered it unfit to be eaten. It was held that they were not guilty of mischief.[5]

The accused threw large pieces of brick at the back of the complainant's house, complainant being at the time on the ground in front of the house and there being no one in the house. It was held that the accused was guilty of mischief because roofs and walls of dwelling houses were not put up to be pelted at with brick-bats and their owners had a right to be protected from even hurts and marks being made in and on them without their consent.[6]

'Property' means some tangible property capable of being forcibly destroyed, but does not include an easement. The accused with intent to cause wrongful loss or damage to the complainant caused the destruction of certain stairs The Magistrate found that the accused was the owner of the stairs but that the complainant had the right to use them, and convicted the accused It was held, quashing the [illegible] be considered [illegible] tick from a village branch postmaster was requested to sign an acknowledgment for the article received by him, but instead of returning the same duly signed he tore it up and threw it on the ground, it was held that the accused was guilty of mischief The Court said: "The act of tearing is an act of mischief, and the postal receipt is the property of the post office, which has some value, however small. The tearing of such a receipt causes damage to the post office, that is wrongful loss to it, and there can be no question that the accused is liable under s. 426 for his act."[8] The destruction of a document evidencing an agreement void for immorality constitutes this offence as it can be used as evidence for other collateral purposes.[9]

'Change' means physical change in composition or form. A change in value is not sufficient to constitute mischief.

3. **'Destroys or diminishes its value or utility, or affects it injuriously.'**—It is highly essential that the property regarding which the offence is alleged to have been committed must have been destroyed or its value or utility must have been

[4] *Ma Nyein Gale* v. *Nga Sein*, (1909) 5 L. B. R. 100, r. B.

[5] *Keru*, (1888) Unrep. Cr. C. 387.

[6] *Sukha Singh*, (1905) P. R. No. 24 of 1905.

[9] *Vyapuri*, (1882) 5 Mad. 401.

the earthen pots and put out of order a water-wheel of the well from which the complainant watered the crop raised by him on the land in dispute. It was held that the damage caused by D amounted to mischief. Batty, J., said: "The applicant's pleader, I understand, is unable to contend that if a trespasser left his watch in the room of another person, that would justify that other person in smashing the watch or throwing it down a well."[1]

Accident.—Where the accused who were employed in floating timber through a bridge, struck the arch of the bridge with some of the logs, it was held that this offence was not committed.[2]

No mischief if no wrongful loss or damage is caused to the public or to any [illegible] **if the act amounts only to an invasion of a civil right.**—Where the accused cut [illegible]

them by a priest, it was held that they had committed no offence.[1] The accused who were servants of S were convicted by a Magistrate under this section and s. 143 for having cut a channel from a *jhil* which was in the possession of B and by so doing let water and fish from the *jhil*. The Magistrate had found that the land adjoining the *jhil* across which the channel had been cut had been in the possession of S. On appeal, it was contended that the accused had a perfect right to make the cutting in their master's land. It was held that though they had that right, it did not follow that they [illegible] id through the bank of the *jhil*, which, [illegible] the water, were in the possession of B, [illegible] on that ground.[2] A game-keeper was prosecuted for unlawfully and maliciously killing a dog which was at the time near an aviary in which pheasants, the property of the appellant's master, were confined for breeding purposes. It was held that he was not liable if he acted under the *bona fide* belief that what he was doing was necessary for the protection of his master's property.[3]

Negligence is not mischief.—Where the accused set fire to a heap of rubbish in his own field, and a gust of wind came and carried the flame to an adjacent [illegible] offence of mischief.[4] Where the accused whilst driving his bullock cart pulled the bullock in the wrong direction and thereby dashed the pole of his yoke against the footboard of the complainant's carriage and caused damage, it was held that the accused was not guilty of mischief.[5]

Master not liable for the negligence of his servant.—An owner who lived elsewhere could not, in the absence of express malice, be held criminally liable for the negligence of his contractor in digging the foundations of a house then being built without proper precautions.[6]

Cattle.—In the case of mischief done by straying of cattle, mere neglect or carelessness on the part of the owner of cattle to keep them from straying into fields is not sufficient.[7] To warrant a conviction it must be proved that he actually and wilfully caused the cattle to enter, knowing that by so doing he was likely to cause damage,[8] or at least that he was present and able to restrain the animal from causing damage and did not restrain it from so doing.[9] The prosecution is bound to show that there was an intention to cause wrongful loss or damage.

But owners of cattle, who, knowing their animals to be not properly provided with fodder and accustomed to stray in search of food, intentionally omit to secure their cattle or neglect to take reasonable precautions for their care and custody, may be guilty of this offence. The omission or neglect however, must be such as to have an active effect conducing to the result, as a link in a chain of facts from which an intention to bring about the result may be inferred.[10] Where the accused

[1] *Viagula Fernandez Vas*, (1891) 1 Weir 489.

[2] *Shoshi Bhushan Bose v. Gobind Chandra Roy*, (1903) 7 C. W. N. 663.

[3] *Miles v. Hutchings*, [1903] 2 K. B. 714.

[4] Per Russell, Ag. C. J., and Heaton, J., (Aston, J., dissenting), in *Nandeyappagowda*, (1906) 8 Bom. L. R. 851.

[5] *Thornotti Madathil Poker*, (1886) 1 Weir R. 495.

[6] *Srish Chandra Sircar*, (1918) 17 A.L.J.R. 343.

[7] *Narsu*, (1882) Unrep. Cr. C. 185; *Rangu*, (1883) Unrep. Cr. C. 189; Cr. R. 19th April 1883; *Hyderally*, (1884) Unrep. Cr. C. 199; (1871) 6 H. M. C. App. 36.

[8] *Araz Sircar*, (1868) 10 W. R. (Cr.) 29; *Forbes v. Grish Chundra Bhuttacharjee*, (1878) 6 Beng. L. R. App. 3, 14 W. R. (Cr.) 31; *Bai Baya*, (1883) 7 Bom. 126; *Shaik Raju*, (1884) 9 Bom. 173; *Mehdi Hasan*, (1907) 29 All. 565.

[9] *Narsu*, (1888) Unrep. Cr. C. 357; *Vithu*, (1887) Unrep. Cr. C. 318, Cr. R. No. 5 of 1887.

[10] *Thornotti Madathil Poker*, sup.

diminished. In the latter case it is not said to what extent the value or utility must have been diminished. But there must be some appreciable diminution; otherwise s. 95 will apply. It is *not essential* that the property interfered with should belong to the person injuriously affected. See *Explanation 1*. Illustrations (*e*) and (*f*) exemplify this explanation.

D, as lessee of Government, held rights of fishery in a particular stretch of river. C, by diverting the water of that river, converted the bed of the river for a considerable distance into dry land, or land with a very shallow covering of water upon it, and by so doing he was enabled to destroy, and did destroy, very large quantities of fish, both mature and immature. It was held that when C deliberately changed the course and condition of the river in the manner described to the detriment of D, he was guilty of the offence of mischief.[1]

A person who destroys property which at the time belongs to himself with the intention of causing, or knowing that it is likely to cause, wrongful loss or damage to anybody else, is guilty of this offence.[2] Illustrations (*d*) and (*g*) shew that a man may commit mischief on his own property. See Explanation 2. In order, however, to his doing so, it is necessary that he intends to cause wrongful loss to some person, as in the cases stated in the illustrations. If a person destroyed a duplicate specimen (his own property) of some rare coin, painting, or other object to enhance the value of the remaining one, such an act would not be done with the intention of thereby causing wrongful loss to any person.[3]

Bona fides.—"If a person deals injuriously with property in the *bona fide* belief that it is his own he cannot be convicted of the offence of mischief, because his act was not committed with intent to cause *wrongful* loss or damage to any person. But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence."[4] Where, therefore, a person cut trees on land which he claimed, but of which possession, after an execution sale, had been legally made over to another person without any objection or formal intervention on his part, it was held that he had committed mischief.[5] But where the accused cut the branches of a tree regarding which there was a dispute it was held that he was not guilty.[6]

Where, in the *bona fide* assertion of a right, a wall was pulled down, it was held that the act did not amount to the offence of mischief and the dispute between the parties was one for settlement by a civil Court.[7] Where, in the exercise of a *bona fide* claim of right to bury a deceased person, the members of a congregation broke open the gate of a graveyard which they believed was wrongfully closed against

[1] *Chanda*, (1905) 28 All 204

[2] *Dharma Dass Ghose* v. *Nusseruddin*, (1886) 12 Cal 660

[3] M & M 392

[4] Per Turner, J., in *Budh Singh*, (1879) 2 All 101, 103, *Keru*, (1888) Unrep. Cr. C. 387, *Nanda*, (1889) Unrep. Cr. C. 465; *Natha Singh*, (1903) P. R. No 6 of 1903; *Madhu Sudan Das* v. *Sasti Prosad Nandy*, (1903) 7 C.W.N. 859; *Balar Halsana* v. *Dinobandhu Bawas*, (1869) 3 Beng. L. R. (A. Cr J.) 17; *Shakur Mahomed* v. *Chunder Mohun Sha*, (1874) 21 W. R. (Cr). 38; (1881) 1 Weir 488; *Daniel Grove*, (1882) 1 Weir 488; *Viagula Fernandez* v. *as*, (1891) 1 Weir 489; *Jagannathan*, (1893) 1 Weir 490; *James*, (1837) 8 C & P. 131, *Joshua Matthews*, (1876) 14 Cox 5; *Manikka Veera Raghava Chariar*, (1910) 8 M. L. T. 246; *Kondi Chetty*, (1910) 8 M. L. T. 382; *Gawu Pandey*, (1921) 2 P. L. T. 394.

[5] *Sonas Sardar* v. *Bukhtar Sardar*, (1876) 25 W.R. (Cr.) 46. See also *Dharma Dass Ghose* v *Nusseruddin*, sup.

[6] *Sardar Singh*, (1917) 4 P. L. W. 291; *Sham Lal Lohar*, (1918) 5 P. L. W. 114; *Sarat Chandra Sen* v. *Yakub Talukdar*, (1923) 28 C. W. N. 736.

[7] *Jagannathan*, sup; *Balkrishna Narkar Vethankar*, (1924) 26 Bom. L. R. 978, 7 Bom. Cr. C. 221.

them by a priest, it was held that they had committed no offence.[1] The accused who were servants of S were convicted by a Magistrate under this section and s. 143 for having cut a channel from a *jhil* which was in the possession of B and by so doing let water and fish from the *jhil*. The Magistrate had found that the land adjoining the *jhil* across which the channel had been cut had been in the possession of S. On appeal, it was contended that the accused had a perfect right to make the cutting in their master's land. It was held that though they had that right, it did not follow that they had a right to extend the cutting beyond and through the bank of the *jhil*, which, with the *jhil* itself and the land underneath the water, were in the possession of B, and the conviction could not be set aside on that ground.[2] A game-keeper was prosecuted for unlawfully and maliciously killing a dog which was at the time near an aviary in which pheasants, the property of the appellant's master, were confined for breeding purposes. It was held that he was not liable if he acted under the *bona fide* belief that what he was doing was necessary for the protection of his master's property.[3]

Negligence is not mischief.—Where the accused set fire to a heap of rubbish in his own field, and a gust of wind came and carried the flame to an adjacent [illegible] forest, and that the "neglect or carelessness" was not sufficient to constitute the offence of mischief.[4] Where the accused whilst driving his bullock cart pulled the bullock in the wrong direction and thereby dashed the pole of his yoke against the footboard of the complainant's carriage and caused damage, it was held that the accused was not guilty of mischief.[5]

Master not liable for the negligence of his servant.—An owner who lived elsewhere could not, in the absence of express malice, be held criminally liable for the negligence of his contractor in digging the foundations of a house then being built without proper precautions.[6]

Cattle.—In the case of mischief done by straying of cattle, mere neglect or carelessness on the part of the owner of cattle to keep them from straying into fields is not sufficient.[7] To warrant a conviction it must be proved that he actually and wilfully caused the cattle to enter, knowing that by so doing he was likely to cause damage,[8] or at least that he was present and able to restrain the animal from causing damage and did not restrain it from so doing.[9] The prosecution is bound to show that there was an intention to cause wrongful loss or damage.

But owners of cattle, who, knowing their animals to be not properly provided with fodder and accustomed to stray in search of food, intentionally omit to secure their cattle or neglect to take reasonable precautions for their care and custody, may be guilty of this offence. The omission or neglect, however, must be such as to have an active effect conducing to the result, as a link in a chain of facts from which an intention to bring about the result may be inferred.[10] Where the accused

[1] *Vagula Fernandez Vas*, (1891) 1 Weir 489.

[2] *Shoshi Bhushan Bose* v. *Gobind Chandra Roy*, (1903) 7 C. W. N. 663.

[3] *Miles* v. *Hutchings*, [1903] 2 K. B 714

[4] Per Russell, Ag. C J., and Heaton, J., (Aston, J., dissenting), in *Nandeyappagowda*, (1906) 8 Bom L. R. 851.

[5] *Thornotti Madathil Poker*, (1886) 1 Weir R 495.

[6] *Srish Chandra Sircar*, (1918) 17 A L.J.R 343.

[7] *Nareu*, (1882) Unrep. Cr. C. 185; *Rangu*, (1883) Unrep. Cr. C. 189, Cr. R. 19th April 1883, *Hyderally*, (1884) Unrep Cr C 199, (1871) 6 H. M. C. App 36.

[8] *Araz Sircar*, (1868) 10 W. R. (Cr.) 29, [illegible]

[9] [illegible] (1887) Unrep. Cr. C 318, Cr. R. No 5 of 1887.

[10] *Thornotti Madathil Poker*, sup.

grazed their cattle on waste lands on which the Government had by notification prohibited the public from grazing cattle, when provision was made for the public grazing their cattle elsewhere, this offence was held to have been committed.[1] Where, in the absence of the accused, his cattle entered into the Government garden, it was held that he was not guilty of mischief. The act to be criminal should be done with dishonest intention.[2]

Statutory application.—The Madras Pier Act (Madras Act V of 1863), s. 7

PRACTICE.

Evidence.—Prove (1) that the accused caused the destruction of some property, or some change in such property or in the situation thereof.

(2) That the above act destroyed or diminished the value or utility of such property, or affected it injuriously.

(3) That the accused did as in (1) intending or knowing that he was likely to cause loss or damage to the public or to any person.[3]

(4) That the causing of such damage or injury was wrongful.

Onus.—It is for the prosecution to prove that the accused caused damage with a wrongful intent—with a knowledge that he was not justified in doing it, and that the party under whose orders he was acting had no real title.[4]

Where, in a case regarding mischief to land, the defence raises a *bona fide* plea of right to the land, the Magistrate should determine whether the accused acted with any such intent as made his act criminal, *viz.*, any such intent as is mentioned in this section.[5]

Procedure.—Not cognizable—Summons—Bailable—Compoundable, when the only loss or damage caused is loss or damage to a private person—Triable by any Magistrate—Triable summarily.

Warning to Magistrate.—The authority vested in the criminal Court of punishing persons for acts of mischief is one which must be exercised with great caution, and it must be very clear, before conviction, that the accused has brought himself within the true meaning of s. 425, otherwise this provision of the law will be frequently resorted to as a trenchant mode of deciding disputed civil questions of right.[6]

Conviction for mischief and theft.—It is not illegal to convict the accused of mischief as well as of theft. Where, therefore, the prisoners had cleared a piece of Government land, cutting down and appropriating the trees thereon without permission, it was held that it was not illegal to convict them of mischief and theft, as the mischief preceded the theft which could not have been committed according to Expln. 1 of s. 378 until the trees had been detached from the ground.[7] But where the accused stole a sheep and killed it, it was held that he could not be charged with and convicted of mischief as well as of theft.[8]

Summary trial.—A person may be tried summarily for criminal trespass and mischief unless there is a *bona fide* claim of right depriving the Magistrate of jurisdiction.[9]

[1] *Gurram Siddugadu*, (1886) 1 Weir 492. See *Nga Lun*, (1903) 2 L. B. R. 158.

[2] *Ghazi*, (1904) P. R. No. 23 of 1904. See *Joti Babu*, (1906) 8 Bom. L. R. 549.

[3] *Denoo Bundhoo Biswas*, (1869) 12 W. R. (Cr.) 1; *Kashi Nath Ghose* v. *Dinobundhoo Mytee*, (1871) 16 W. R. (Cr.) 62 (72); (1881) 1 Weir 488.

[4] *Issur Chunder Mundle* v. *Rohim Sheik*, (1876) 25 W. R. (Cr.) 65.

[5] *Mahadshet*, (1889) Unrep. Cr. C. 432.

[6] *Ram Golam Singh*, (1866) 6 W. R. (Cr.) 59.

[7] *Narayan Krishna*, (1866) 2 B. H. C. 392.

[8] *Madar Saheb*, (1902) 1 Weir 497; *Nga Paik Hmwe*, (1894) 1 U. B. R. (1892-1896) 241; *Nga Aung So*, (1900) P. J. L. B. 633; *Genya*, (1877) Unrep Cr. C. 129; *Ramla Ratanji*, (1903) 5 Bom. L. R. 460. See *Krishna*, (1889) Unrep. Cr. C. 430, in which double conviction was considered to be legal.

[9] *Gamirullah Sarkar* v. *Abdul Sheikh*, (1884) 10 Cal. 408, disapproving *Shakur Mahomed* v. *Chunder Mohun Sha*, (1874) 21 W. R. (Cr.) 38.

Punishment.—In laying down the punishment for different degrees of the offence of mischief, the gradation observed refers to the amount of loss sustained, a mode of distinction not admitted in estimating the degrees of criminality in other offences against property.[1] The penal provisions relating to mischief have been framed on the same principle which pervades the Code of first providing a certain amount of punishment for all offences of a particular denomination and then proceeding to provide heavier punishment for aggravated offences of that kind.[2] Section 426 provides punishment for the offence of mischief generally. But if in any particular case there is any circumstance which brings it within any of the subsequent penal clauses whereby heavier punishment is provided and if that circumstance can be proved, that subsequent clause is then the appropriate one for the punishment of the offence committed. And when one set of aggravating circumstances properly attaches to an act making it an offence, another set should not be applied to the same act, unless there be in the mind of the offender a wholly separate intention.

Mischief causing damage to the amount of fifty rupees.

427. Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section provides for enhanced sentence where the loss or damage caused is upwards of fifty rupees.

In estimating the amount of the loss or damage caused, the actual loss or damage only should be taken into consideration and not the damage which, in consequence of such loss may be occasioned to the sufferer.[3] But the damage done to several things may be added together, provided the things are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction.[4]

Statutory application.—See the Madras Pier Act (Mad. Act V of 1863), s. 7.

CASES.

Where some persons belonging to a certain village pulled up and removed fishing stakes lawfully fixed in the sea, within three miles of the shore, by the villagers of another village, and the removal of the stakes, though without any intention to appropriate them, occasioned "damage," it was held that they had committed mischief.[5]

Cattle belonging to the accused, who were Rabaris, having trespassed on the complainant's farm and done damage to the crops there, the accused were tried for the offence of mischief under this section and also for an offence under s. 26 of the Cattle Trespass Act. It appeared that on previous occasions too cattle of each of the accused were impounded a number of times for similar acts. It was held that they were guilty of mischief.[6]

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further :—

(5) That the loss or damage caused amounted to Rs. 50 or more.

There ought to be evidence to show that the defendant caused mischief.[7]

[1] 1st Rep. s. 608.
[2] M. & M. 302.
[3] *Ibid*, 303.
[4] *Shepherd*, (1868) L. R. 1 C. C. R. 118.
[5] *Kashya Rama*, (1871) 8 B. H. C. (Cr. C.) 63.
[6] *Punja Godad*, (1918) 21 Bom. L. R. 247; 5 Bom. Cr. C. 1.
[7] (1870) 5 M. H. C. App. 30.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable, when the only loss or damage caused is loss or damage to a private person—Triable by Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed mischief, causing loss or damage to the amount of——, and thereby committed an offence punishable under s. 427 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*) and 12 (2).

Mischief by killing or maiming animal of the value of ten rupees.

428. Whoever commits mischief by killing, poisoning, maiming[1] or rendering useless any animal[2] or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section is intended to prevent cruelty to animals and consequent loss to the owner.

1. 'Maiming.'—The term "maiming" refers to those injuries which cause the privation of the use of a limb, or a member of the body.[1] 'Maiming' implies a permanent injury.[2] Wounding is not necessarily maiming. Wounding is causing an injury to the person by which the skin is broken.[3] To constitute a wound it is necessary that there should be a separation of the whole skin ; and a separation of the cuticle or upper skin only is not sufficient.[4] The external surface of the body must be divided.[5] Maiming must mean some permanent injury because it occurs in this section and s. 429 between 'killing' and 'rendering useless.' This last expression again differs from 'diminishing utility,' the expression used in the definition of 'mischief.'[6] Meres, C. J., in a case[7] said : "It is true that in its primitive meaning the verb 'to maim' involves the notion of mutilation of some part of the body useful for fighting...I do not think the framers of the Code intended this restricted meaning only of this expression. It seems difficult to understand how many of the domestic animals could be 'maimed' within this meaning of the term. I think the expression would fairly include the amputation of any member, or the injury, of an animal by which its speed, or endurance, or use, was permanently diminished." Maiming then means some permanent injury to one of the members of the body. 'It involves the notion of the privation of the use of some limb or member involving a permanent injury and not a mere disfigurement.[8] Where the ribs of a pony were broken so as permanently to diminish its usefulness and value, it was held to be 'maimed.'[9] Similarly, where the ears of a horse[10] and an ass[11] were cut off, it was held that the accused was guilty of maiming. But where one-half of one ear of a mare was cut off whereby the animal's sense of hearing was not impaired, it was held this did not amount to maiming

[1] *Fattehdin*, (1881) P. R. No. 33 of 1881.
[2] *Richard Jeans*, (1844) 1 C. & K. 539. *Narnian Singh*, (1905) U. B. R. (P. C.) 25, 22 Burma L. R. 116.
[3] *Moriarty v. Brooks*, (1834) 6 C. & P. 684.
[4] *Owen M'Loughlin*, (1838) 8 C. & P. 635.
[5] *Beckett*, (1836) 1 Mood. & Rob. 526.
[6] *Bahawal*, (1891) P. R. No. 7 of 1891.
[7] *Nga San Yun*, (1885) S. J. L. B 404.
[8] *Anna Laxman*, (1916) 18 Bom. L. R. 289. 3 Bom. Cr. C. 194.
[9] *Nga San Yun*, sup
[10] *Marigowda v. Srinivasa Rangachar*, (1911) 35 Mad. 594.
[11] *Rangaswami Goundan*, (1917) 22 M. L. T. 68.

within the meaning of this section.[1] Where the accused caused the death of a mare through injuries inflicted by his inserting the handle of a fork into her vagina and pushing it into her body, it was held that the accused was liable for killing, maiming or wounding the mare.[2]

It is not necessary to prove that any instrument was used to inflict the wound.[3] Pouring acid into the eye of a mare, and thereby blinding her, amounts to maiming.[4] But, if a person inflicts wound on an animal whereby it is disabled for some days only, his offence falls under s. 426.[5]

2. **'Animal.'**—See s. 47, *supra*. The animal destroyed must be the subject of property. The escape of an animal that is originally in the condition of *feræ naturæ* but is subsequently reduced into possession does not terminate the owner's right to it, and any person shooting such an animal is guilty of mischief.[6]

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the property injured consisted of an animal or animals.

(6) That the value thereof at the time of injury was Rs. 10 or more.

(7) That the injury in question was caused by killing, poisoning, maiming, or rendering useless such animals.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed mischief by killing (*or* poisoning, etc.) an animal, to wit——, of the value of——, and thereby committed an offence punishable under s 428 of the Indian Penal Code and within my cognizance

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*), and 12 (2).

Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.

429. Whoever commits mischief by killing, poisoning, maiming[1] or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox,[2] whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENT.

This section provides enhanced punishment owing to the greater value of the animals mentioned therein. Intention is the gist of the offence. The accused threw a stone at a young buffalo and thereby caused its death, and it appeared that her intention was to drive it out of her backyard. It was held that the accused was not guilty of mischief ?

1. **'Maiming.'**—See s. 428, *supra*.

2. **'Bull, cow or ox.'**—According to the Madras High Court a 'calf' does not come within the term 'bull, cow or ox,'[3] but the Calcutta High Court has

[1] *Anna Laxman*, (1916) 18 Bom. L. R. 289.
[2] *Welch*, (1875) 1 Q. B. D. 23.
[3] *Bullock*, (1868) L. R. 1 C. C. R. 115.
[4] *Owen Owens*, (1828) 1 Mood. Cr. C. 205.
[5] [illegible]
[6] [illegible]

held that the words 'bull' and 'cow' in this section include the young of those animals. The section specifies the more valuable of the domestic animals, without any regard to age; but in respect of other kinds of animals not so specified, the section will not apply unless the particular animal in question is shown to be of the value of fifty rupees or upwards.[1]

Upon an indictment on the statute of 2 & 3 Edw. VI., which mentioned the words "horses, geldings, and mares," it is held that foals and fillies are included in those words, and that evidence of stealing a mare fully supports an indictment for stealing a mare.[2]

Bulls set at large according to a religious usage.—Such bulls are not the subject of ownership by any person, as the original owner surrenders all his rights as its proprietor and gives it its freedom to go whithersoever it chooses. They are, therefore, *nullius proprietas*, and as such cannot be the subject of mischief.[3] But if there is not total abandonment of control and property, the animal would not cease to be the private property of the owner. Before finding that the animal ceased to be the private property of anyone it is necessary to see whether the ceremony at which it was released was followed by an abandonment of all control and property over it.[4] There is also a material distinction in principle between the case of an animal, property in which is wholly renounced or abandoned and allowed in accordance with superstitious or religious usage to roam at large free from control, and an animal so abandoned and at large after dedication to a temple.[5]

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the property injured consisted of an elephant, camel, horse, mule, buffalo, bull, cow, or ox; or that such property consisted of any animal of the value of Rs. 50 or more.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*,) hereby charge you (*name of the accused*) as follows:—

That you, on or about the—— day of——, at——, committed mischief by killing (poisoning, maiming *or* rendering useless) (*specify the animal. Where the animal is not of the kind mentioned in the section specify its value also*), and that you thereby committed an offence punishable under s. 429 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*) and 12 (2).

Mischief by injury to works of irrigation or by wrongfully diverting water.

430. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water[1] for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture,

[1] *Hari Mandle* v. *Jafar*, (1895) 22 Cal. 457.
[2] Roscoe.
[3] *Romech Chunder Sannyal* v. *Hru Mondal*, (1890) 17 Cal. 852.
[4] *Ghanta Veeranna*, (1888) 1 Weir 500.
[5] *Nallo*, (1887) 11 Mad. 145, 1 Weir 498.

shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENT.

This section deals with diminution of water supply. Section 278 applies if the water is fouled so as to be unfit for use.

1. **'Diminution of the supply of water.'**—Under this section the physical requisites of the act are the doing of any act which causes, or to the doer's knowledge is likely to cause, a diminution of supply. He also fulfils the mental requisites when he does this with intent to cause wrongful loss, and the intention is properly held to be such when he takes it without any sort of right, and it matters not that he claims to set up such a right if the facts are so clear that the claim is manifestly only an additional wrong. It is for judicial tact to distinguish where the case is sufficiently doubtful to prevent the inference of a wrong intent.[1]

The section applies equally to irrigation channels as to other sources of irrigation, such as tanks and ponds.[2]

The placing, across a channel, of an embankment[3] or the cutting of an embankment,[4] may lead to a diminution of supply. If a supply channel is obstructed or filled up by a dam put up or by raising a dam already existing, there is a change made in the channel which diminishes its value or utility and which, if it was done with intention to cause or with knowledge that it was likely to cause wrongful loss to any person, would constitute 'mischef.' If the act so done causes a diminution of supply of water an offence under this section is committed.[5] The mere deprivation of water supply to the complainant by a cut in the bund is not an offence under this section. It is the destroyed property that must have lost its utility or value to bring the offence under it.

Bona fides.—This section will not apply to proceedings taken by anybody in good faith in the exercise of his rights of property. Where, therefore, a Zemindar stopped a water-channel running over his own land on the complainant's refusing to pay him the rent he demanded, it was held that he was not guilty under this section.[6] Where the accused cut open a *bund* and diverted water to his fields in anticipation of usual permission to do so, it was held that he had committed no offence under this section.[7] Where there was no doubt that the accused knew that by their act they were causing a diminution of the water supply and where they had not substantiated a right to take the water nor shown that the other side had no right; it was held that a *bona fide* claim to take the water could not be entertained.[8]

CASES.

Diminution of the supply of water is necessary.—Where it appeared that the complainant was the exclusive owner of a water-course, and that the accused had no sort of right to assert any claim to it, the causing of a diminution of the supply of water by the accused, even though in assertion of a right, was held to be only an additional wrong, and to constitute this offence.[9] Where the accused closed a water-course by which water had been supplied to the complainant's land, he was held not to have committed this offence, as no damage was alleged to have been

[1] *Ramakrishna Chetti* v. *Palaniyandi Kudambar*, (1876) 1 Mad. 202, F.B.

[2] *Sypu Chinna Mangaiya*, (1886) 1 Weir 510.

[3] *Nalla Narayanasami*, (1884) 1 Weir 504.

[4] *Sheikh Arif*, (1908) 35 Cal. 437.

[5] *Deenabandu* v. *Parmasaroya*, [1923] M. W. N. 534.

[6] *Mohur Singh* v. *Lallan*, (1906) 3 A. L. J. R. 142n. See *Arunyam Chetti*, (1883) 8 Mad. Jur 328; *Akinarayanasamy Pillai* v. *Subbier*, (1898) 1 Weir 505; *Matukdhari Singh*, (1915) 20 C. W. N. 128.

[7] *Kallappa Navlea* v. *Pakira Ammal*, [1920] M. W. N. 131, 27 M. L. T. 214.

[8] *Bindeo Singh*, (1924) 2 P. L. R. 194.

[9] *Jayanath Bhikaji*, (1885) 10 Bom. 183.

caused by the stoppage of water to any crop in the land.[1] Where the accused bunded up a portion of the channel, running in his own land, and carrying water to the complainant's land to which he was not found to be entitled either by way of contract or by easement, it was held that no actual wrongful loss had been proved and that therefore the accused's action in bunding up the channel did not constitute any offence.[2]

Where the accused took water for agricultural purposes to which he was not entitled, and thereby diminished the supply of others who were entitled, it was held that he was guilty under this section.[3]

Diminution of water by the cutting of an embankment.—Where the accused cut a dam erected by the complainant, not to take a supply of water but to save their own crops, and it was not proved that the act of the accused caused a diminution of the supply of water for agricultural purposes or that the accused knew that it was likely to cause such diminution in future, it was held that the accused could not be convicted of this offence.[4]

The complainant put up an embankment on Government land without previous permission to store water for the use of his land. The accused cut the embankment and were charged with mischief but were acquitted on the ground that the complainant's act was illegal. It did not appear that the accused interfered to protect their own interests. It was held that the acquittal was wrong.[5]

The accused cut the embankment of an irrigation tank and kept the embankment open for more than twenty-four hours and pleaded in excuse of their act the authorization of the Public Works authorities given to them to take the water for twenty-four hours. It was held that, assuming the original act of cutting the embankment was lawful in consequence of the authorization given by the Public Works authorities to the accused to take the water for twenty-four hours, by keeping the breach open for six hours longer, they were guilty of an illegal omission which was under s. 32 of the Code equivalent to an illegal act, and that they were guilty under this section, as their act was clearly likely to cause a diminution of water-supply for agricultural purposes; and that it was not necessary to prove actual damage.[6] But in a Punjab case it was held that the person by merely irrigating his land from a Government canal-cut for a period exceeding that allotted to him, did not commit any offence under this section.[7]

The accused entered into the lands of the complainant and cut three bunds which had been erected in a channel that ran through the land, with the result that water in that channel ran down another channel off the complainant's land, and was utilized by the accused for sale to ryots holding the lands lower down. The complainant was entitled to the whole of the water in the channel in question. It was held that this section applied not only where the water was wantonly wasted but also where the accused himself utilized it, or sold it to others provided the person entitled was deprived of its use.[8]

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the mischief in question caused, or was likely to cause, diminution

(6) That such supply of water was for purposes of agriculture ; or for food or drink for human beings ; or for animals which are property ; or for cleanliness; or for carrying on any manufacture.

(7) That such mischief was done with a knowledge that it would, or was likely to, cause such diminution of the supply of water.[1]

The prosecution must prove that there has been unlawful and intentional interference on the part of the accused with the admitted or proved rights of the complainant.[2]

It is not necessary to prove actual loss.[3]

Where there was nothing to show that the complainant had any legal right to the water intercepted by the accused, it was held that the complainant's loss was not wrongful and the offence of mischief was not established.[4]

Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

A Magistrate can make an enquiry by personal inspection of the disputed place.[5]

Where there was a genuine dispute between the two parties in regard to a channel and one party was charged with mischief for closing the channel, it was held that the matter was not one for trial in a criminal Court and that the act of closing the channel was not an offence.[6]

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed mischief by doing——which act caused (*or* which you knew to be likely to cause) a diminution of the supply of water for agricultural purposes (*or* for food, *etc.,*) and thereby committed an offence punishable under s. 430 of the Indian Penal Code, and within my cognizance [*or* cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Mischief by injury to public road, bridge, river or channel.

431. Whoever commits mischief by doing any act[1] which renders or which he knows to be likely to render any public road,[2] bridge, navigable river, or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENT.

To support a conviction under this section there must be evidence of intention to cause mischief, and of knowledge that injury is likely to result from the act of the accused.[7] Such intention or knowledge is not necessary for offences under ss. 279, 280 and 283.

1. **'Act.'**—See s. 52, *supra.*

2. **'Road.'**—A path through a jungle is not a road.[8]

[1] *Nga Myat Aung,* (1903) 10 Burma L. R. 122.

[2] *Banwari Karmakar* v. *Gosto Behary Karmakar,* (1920) 32 C. L. J. 476.

[3] (1881) 1 Weir 503.

[4] *Tun Aung,* (1907) 4 L. B. R. 149.

[5] *Muruga Pillai,* (1883) 1 Weir 508.

[6] *Athinaryanasamy Pillai* v. *Subbier,* (1898) 1 Weir 505.

[7] *Malayan Kalan,* (1883) 1 Weir 510.

[8] *Nga Shwe Laukke,* (1889) P. J. L. B. 629.

CASES.

The facts found were (1) that two pieces of timber came floating down the river in flood and coming in contact with a bridge destroyed two of its pillars; (2) that the accused cut the smaller piece at a point on the bank of the river some eight miles above the bridge, and left it lying on the bank. It was held that the conviction could not be sustained.[1] Where the accused dug a trench on waste land bordering upon the public road in order to protect his land from drainage water and thereby incidentally caused damage to the public road, it was held that this was not sufficient to constitute the offence of mischief.[2] Mere placing of bricks on a road was held not to come within this section[3].

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the mischief in question consists of an act rendering or likely to render impassable or less safe, a public road, bridge, navigable river or channel, natural or artificial, for the purpose of travelling or conveying property.

(6) That such mischief was done with a knowledge that it would, or was likely to, cause such injury.

Procedure.—*Cognizable—Warrant—Bailable—Not compoundable—Triable* by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Mischief by causing inundation or obstruction to public drainage attended with damage.

432. Whoever commits mischief by doing any act[1] which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENT.

This section provides for a more severe punishment where the mischief is committed by causing inundation to public drainage as it affects the health of the community.

1. 'Act.'—See s. 52, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the mischief consisted of an inundation or *obstruction to drainage.*

(6) That such inundation or obstruction was, or was likely to be, attended with injury or damage.

(7) That such drainage was *public.*

(8) That the mischief was done with a knowledge that it would, or was likely to, cause such injury.[4]

It is not sufficient [illegible] property.[5]
The accused were conv
river knowing it to be
sequence inundated.

[1] *Malayan Kalan*, (1883) 1 Weir 510.
[2] *Kairthadi Anantha Bhattar*, (1888) 1 Weir 511.
[3] *Jugal Narain Singh*, (1908) 12 C. W. N. cxxii (122).
[4] *Pran Nath Shaha*, (1876) 25 W. R. (Cr.) 69.
[5] (1868) 4 M. H. C. App. 15.

act done was the erecting of a dam which did not cause 'the destruction' of any property the offence of mischief was not committed.[1]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Mischief by destroying, moving or rendering less useful a light-house or sea-mark.

433. Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark, or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT.

This section is an extension of the principle laid down in s. 281. Sea-marks are very important in navigation and any tampering with them may lead to disastrous results.

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the mischief consisted of an act causing the destruction, or moving of, or rendering less useful, a light-house, sea-mark, etc

(6) That such light-house, sea-mark, etc, was at the time of mischief used as a guide for navigation

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session

Mischief by destroying or moving, etc., a land-mark fixed by public authority.

434. Whoever commits mischief by destroying or moving[1] any land-mark fixed by the authority of a public servant,[2] or by any act which renders such land-mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section deals with the destruction or removal of land-marks. The preceding section dealt with sea-marks. But as destruction of sea-marks is likely to lead to disastrous consequences the punishment provided in s. 433 is much higher than the punishment provided under this section.

1. **'Moving.'**—See s 378, Explanation 3, *supra*.

2. **'Fixed by the authority of a public servant.'**—The Madras High Court has held that in construing the words 'authority of a public servant' the same considerations would apply to an offence under this section as to an offence under ss. 183 and 186.[2] A Magistrate making an order, under s. 145, Criminal Procedure Code, has no authority to cause the property which is the subject of a dispute likely to occasion a breach of the peace to be demarcated by boundary pillars, and, consequently,

[1] (1868) 4 M. H. C. App. 15 305, 311, [1916] 2 M. W. N. 183.
[2] *Madhava Bhowo, Santa* (1916) 31 M. L. J

if he does so, a person destroying or removing such boundary pillars is not liable to conviction under this section.[1] *Where a surveyor empowered by a notification under the Survey and Boundaries Marks Act to survey certain lands, in good faith and under colour of his office, entered upon the lands of the accused and fixed demarcation stones on them and the accused obstructed the surveyor in measuring the lands and removed the demarcation stones. It was held that the accused were guilty under this section though it might be proved that the lands on which the surveyor carried on his operations were not actually included in the notification.*[2]

Innocent removal.—*Where a person innocently removed a barricade placed by a Municipality on a piece of land in front of his house, which impaired his ingress and egress to, or from, his house, it was held that he had committed no offence.*[3]

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the mischief consisted of an act causing the destruction, or moving of, or rendering less useful, a land-mark.

(6) That such land-mark was fixed by the authority of a public servant.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.

435. Whoever commits mischief by fire or any explosive substance,[1] intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards, or (where the property is agricultural produce) ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Where the mischief is committed by means of fire or any explosive substance [illegible] ees, the conviction must be under this section. If the evidence fails short of this, but is sufficient to show that mischief to the amount of 50 rupees has been caused, whether by fire or by any means whatsoever, the offender may be convicted under s. 427. In the case of agricultural produce the value fixed under the section is Rs. 10, in the case of other property it is Rs. 100.

1. **'Explosive substance.'**—This expression, according to the Explosive Substances Act (VI of 1908), s. 2, includes any materials for making any explosive substance, also any apparatus, machine, implement, or material used, or intended to be used, or adopted for causing, or aiding in causing, any explosion in or with any explosive substance: also any part of any such apparatus, machine, or implement.

Amendment.—The words "or (where the property is agricultural produce) ten rupees or upwards" were inserted by Act VIII of 1882, s. 1. The amendment was introduced to protect agricultural produce.

[1] *Rameshar*, (1904) 27 All. 300.
[2] *Madhava Bhonjo Santos*, (1916) 31 M. L. J. 305, [1916] 2 M. W. N. 183.
[3] *Abdul Aziz*, (1895) Unrep. Cr. C. 745.

PRACTICE.

Evidence.—Prove points (1) to (4) as for s 426; and further—

(5) That the mischief was caused by fire or some explosive substance.

(6) That the damage caused thereby amounted to Rs. 100 or more; or if the property in question is agricultural produce, to Rs. 10 or more.

(7) That the accused intended or knew that he was likely thereby to cause such damage

Mere negligence or carelessness would be of no avail. Where the accused set fire to a heap of rubbish in his field which was close to a protected forest and the wind carried the flames to a forest and destroyed a part of it, it was held that he was not guilty of mischief.[1]

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Charge.—In drawing up a charge it is necessary to enter in the charge the fact that the mischief was caused intentionally or knowingly that destruction of building would follow.[2] Further, the building should be described "as one ordinarily used as a place of worship, or as a human dwelling, or as a place for custody of property."[3]

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss 6, 11 (3) (*d*) and 12 (2) See the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II.

Mischief by fire or explosive substance with intent to destroy house, etc

436. Whoever commits mischief by fire or any explosive substance,[1] intending to cause,[2] or knowing it to be likely that he will thereby cause, the destruction of any building[3] which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section punishes mischief by fire or explosive substance. Owing to the serious nature of the means employed the punishment is severe.

1. **'Explosive substance.'**—See s. 435, *supra*.

2. **'Intending to cause.'**—The offence is not intentionally committing mischief by fire, and thereby causing the destruction of building, etc., but committing mischief by fire, with the intention of causing the destruction of a building, etc. The intention is a most important element in such a charge.[4]

3. **'Building'** is not necessarily a finished structure.[5] An unfinished house, of which the walls were built and finished, the roof unfinished, a considerable part of the flooring laid, and the internal walls and ceilings prepared ready for plastering, was held to be a building.[6]

The Law Commissioners observe: "The grass or mat huts of the lowest classes are placed on a level with the substantial, secure, and valuable dwellings of the better classes,...It is obviously proper that in the case of mischief by fire a distinction should be made between the huts...and substantial houses, but there is sufficient room for such a distinction between the maximum of fourteen years

[1] *Nandeyappagowda*, (1906) 8 Bom. L R 851.

[2] (1865) 3 W. R. (Cr. L.) 7.

[3] *Durbarro Polie*, (1867) 8 W. R. (Cr.) 30.

[4] (1865) 3 W. R. (Cr. L.) 18.

[5] *Manning*, (1871) L. R. 1 C. C. R. 338.

[6] *William Edgell*, (1867) 11 Cox 132.

and the minimum of one year, and between rigorous and simple imprisonment,...and we think it best that the distinction should be left to the discretion of the Judge."[1]

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the property injured consisted of a building.

(6) That such building was ordinarily used as a place of worship, or as a human dwelling, or as a place for the custody of property.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

In a charge under this section the amount of mischief done is not altogether to be the measure of the penalty to be inflicted. A person who mischievously sets fire to a human dwelling may put in jeopardy the lives and the property, not only of those dwelling therein, but of others dwelling in adjoining houses, of persons assisting to put out the fire, and so on. Severe penalties of this section are, therefore, justified.[2]

Charge.—In a case of mischief by fire with intent to cause the destruction of a dwelling-house, the charge should lay the intent as an intent to cause the destruction not of a house simply, but of a house used as a human dwelling.[3]

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*), and 12 (2).

Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.

437. Whoever commits mischief to any decked vessel[1] or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section would operate in the case of decked vessels or any vessel of a burden of twenty tons or upwards. Only vessels of large dimensions have decks. Fishing boats, ferry boats, canoes, etc., will not come under it. Thus, small crafts of all kinds are excluded. The intention of the legislature is to punish mischief committed on vessels which are likely to carry passengers.

1. **'Vessel.'**—See s. 48, *supra*. Where a sailor on board a ship entered a part of the vessel where spirits were kept, for the purpose of stealing rum, and, while tapping a cask of rum, a lighted match, held by him, came in contact with the spirits which were flowing from the cask tapped by him, and a conflagration ensued, which destroyed the vessel, it was held that a conviction for the arson of the vessel could not be upheld.[4]

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the mischief was committed in respect of a decked vessel, or a vessel of a burden of twenty tons or upwards.

(6) That the accused when committing mischief intended, or knew that he was likely, to render unsafe that vessel.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

[1] 1st Rep., ss. 614, 615.

[2] (1867) 8 W. R. (Cr. L.) 14.

[3] *Darbarro Polie*, (1867) 8 W. R. (Cr.) 80.

[4] *Faulkner*, (1877) 13 Cox 550.

Punishment for the mischief described in section 437 committed by fire or explosive substance.

438. Whoever commits, or attempts[1] to commit, by fire or any explosive substance,[2] such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section provides for much more severe punishment than the last section when the mischief is committed by fire or explosive substance to a decked vessel or a vessel of a burden of twenty tons or upwards.

1. **'Attempts.'**—See s. 511, *infra*

2. **'Explosive substance.'**—See s 435, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That the accused committed or attempted to commit mischief by fire, or any explosive substance.

(6) That the mischief was committed in respect of a decked vessel, or a vessel of a burden of twenty tons or upwards.

(7) That the accused, when committing, or attempting to commit, mischief intended, or knew that he was likely, to destroy or render unsafe such vessel.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.

439. Whoever intentionally runs any vessel[1] aground or ashore, intending to commit theft[2] of any property contained therein or to dishonestly misappropriate[3] any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section punishes an act which is akin to piracy. Under the section it is quite sufficient if a vessel is run aground or ashore with the intention to commit theft of any property contained therein ; whether actual theft is committed or not is immaterial As to what amounts to piracy, see p 29.

1. **'Vessel.'**—See s. 48, *supra*.

2. **'Theft.'**—See s. 378, *supra*

3. **'Dishonest misappropriation.'**—See ss. 403 and 24, *supra*.

PRACTICE.

Evidence.—Prove (1) that the property in question was contained in a vessel.

(2) That the accused ran such vessel aground or ashore.

(3) That he did so intentionally.

(4) That he intended thereby (*a*) to commit theft of the property so contained therein ; or (*b*) to dishonestly misappropriate the same ; or (*c*) that such theft or misappropriation thereof might be committed.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Mischief committed after preparation made for causing death or hurt.

440. Whoever commits mischief, having made preparation for causing to any person death,[1] or hurt,[2] or wrongful restraint,[3] or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENT.

The aggravating circumstance which is visited with severe punishment under this section is preparation for causing to any person death, hurt, or wrongful restraint if any opposition is offered while committing mischief.

1. **'Death.'**—See s. 16, *supra*.

2. **'Hurt.'**—See s. 319, *supra*.

3. **'Wrongful restraint.'**—See s. 339, *supra*.

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 426; and further—

(5) That when such mischief was committed, the accused had made preparation for causing death, hurt, or wrongful restraint, or fear thereof.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (1901), ss. 11 (3) (*d*) and 12 (2). As to Burma, see the Burma Laws Act (1898), s. 4 (3) (*b*) and Sch. II.

Of Criminal Trespass.

Criminal trespass.

441. Whoever enters into or upon property in the possession of another[1] with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,[2]

or, having lawfully entered into or upon such property, unlawfully remains there[3] with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,[3] is said to commit "criminal trespass."

COMMENT.

The authors of the Code say: "We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass, as such, an offence except when it is committed in order to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Even then we propose to visit it with a light punishment, unless it be attended with aggravating circumstances.

"These aggravating circumstances are of two sorts. Criminal trespass may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed."[1]

[1] Note N, p. 162

Scope.—Straight, J., in a case said: "The unusually vague and elastic language used in section 441, which, if not closely scrutinized and strictly interpreted, might lead to its application to sets of facts or circumstances, for which it was never intended by the legislative authorities who framed it. For it is easy enough to conceive multitudinous cases, some approaching the verge of absurdity, that would fall within the letter, not the spirit, of the section, and which no one would for a moment consider fit subject even for civil proceedings, much less for a prosecution in a criminal Court. To lay down any rule, as to the extent to which its operation should be limited, is scarcely possible, but it is plain that its scope must be confined within those bounds that common sense and sound reason dictate."[1]

Ingredients.—The section has three essentials.—

1. Entry into or upon property in the possession of another.
2. If such entry is lawful then unlawfully remaining upon such property.
3. Such entry or unlawful remaining must be with intent
   (i) to commit an offence; or
   (ii) to intimidate, insult or annoy the person in possession of the property.

1. 'Whoever enters into or upon property in the possession of another.'—"There must be an unauthorized entry into or upon property,—unauthorized, that is to say, either directly against the will of the person in possession, or constructively against his will, in the sense that he who enters has an unlawful intention, which, were it known to such person, would make him object, forbid or prevent the entry that in ignorance of such intention he sanctions and permits."[2]

A man may be guilty of criminal trespass on the land of another without ever personally setting foot on the land, if, for example, he causes others to build on the land against the wishes and in spite of the protest of the owner of the land[3]

The use of criminal force is not necessary.[4]

'**Whoever**' enters in the manner indicated in the section commits this offence. The accused must have committed the trespass in person. Merely sending a servant to plough up land is not an entry by the master.[5]

'**Property**' in this section means immoveable corporeal property, and not incorporeal property. A right of fishery is not property of such a nature as that a man who unlawfully infringes that right can be said to enter upon property in the possession of another, within the meaning of the section.[6] Similarly, a person plying a boat for hire at a distance of three miles from a public ferry cannot be said, with reference to such ferry, to commit criminal trespass[7]

'**Possession.**'—The possession must be actual possession of some person other than the alleged trespasser.[8] If one person forcibly enters upon property in the possession of another, and there does an act with intent to annoy the person so in possession, he is guilty of criminal trespass without reference to the question in whom the title to the land may ultimately be found.[9] The question of title is not to be raised on a plea of possession. But "a mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession"[10] The offence may be committed in respect of property in a person's

[1] *Gobind Prasad*, (1879) 2 All. 465, 466; *Shatidhar Paru*, (1872) 9 Beng. L. R. App. 19; *Chooramoni Sant*, (1870) 14 W. R. (Cr.) 25.

[2] Per Straight, J., in *Gobind Prasad*, sup p. 466.

[3] *Ghasi*, (1917) 39 All. 722, 15 A. L. J. R. 793.

[4] *Pottiredu* v. *Veerayya*, (1902) 12 M. L. J. 447.

[5] *Shwe Kun*, (1906) 3 L. B. R. 278; *Mg Shwe Kyi*, (1922) 1 B. L. J. 276.

[6] *Charu Nayiah*, (1877) 2 Cal. 354.

[7] *Mutkra* v. *Jowahir*, (1877) 1 All. 527.

[8] *Fouzdar*, (1878) P. R. No. 28 of 1878; *Kunji Lal*, (1913) 12 A. L. J. R. 151.

[9] *Ram Dyal Mundle*, (1867) 7 W. R. (Cr.) 28.

[10] Per Denman, C. J., in *Browne* v. *Dawson*, (1840) 12 Ad. & E. 624, 629.

possession even though such possession may not have *originated in right.*[1] A person entering upon the property in the possession of another, when the latter is absent therefrom, is not guilty of criminal trespass when he enters upon it not with the intent to commit an offence.[2]

It would seem that a person entitled to a right of way or other incorporeal right is not a person in possession of property *within the definition of this offence,* and there can be no criminal trespass 'into or upon' such property.

Joint possession.—A joint owner of land who enters upon the land with the intention or knowledge of doing a wrongful act commits criminal trespass.[3] A prosecution for criminal trespass on the part of one co-owner against another co-owner will not lie unless there has been an ouster from possession or some destruction or waste of the common property.[4] Where one co-sharer built upon a piece of a common land against the will of the other co-sharer, whose consent had been previously asked and refused, it was held that this circumstance alone was not sufficient to render the co-sharer so building guilty of criminal trespass.[5] One member of a joint family commits no trespass by entering into the house which forms the joint property, but he is guilty of that offence when he enters into the room ordinarily occupied by another member of the family.[6] A joint-owner of property is entitled to have joint possession restored to him in a civil Court; but he is not justified in taking the law into his own hands to recover possession. If he does so he is liable for criminal trespass.[7] The entry of a stranger into a family dwelling house, with the permission and license of one of the members, is not criminal trespass.[8]

Entry to commit an offence.—Where a person entered on another's property to cut down trees in that property, it was held that he had committed this offence.[9]

Where a person does not personally set foot on the land of another but gets people to build on it in spite of the protests of that other, he is guilty of criminal trespass.[10]

Where the accused cultivated village waste-land, which he had been ordered not to cultivate, it was held that this offence was committed as the accused had entered upon the land with intent to commit an offence under s. 188.[11] Where the accused enclosed and cultivated a portion of a burial-ground, it was held that he had committed this offence. The Court said: "The person (corporate) in possession of the burial-ground is the portion of the public entitled to use the burial-ground...and it is scarcely possible to conceive any act more calculated to cause annoyance, especially to superstitious people attaching sanctity to the relics of mortality, than the act of ploughing up a burial-ground."[12]

No criminal trespass is committed if the entry is not to commit an offence or to intimidate, insult, or annoy any person.—Where the accused secretly entered an exhibition building without a ticket but without any of the intents specified in this section[13]; where a prisoner went into the cavalry lines, without the permission of the commanding officer, with a cavalryman of the regiment with intent to

[1] *Surwan Singh,* (1869) 11 W. R. (Cr.) 11.

[2] *Chinna Thoyi,* (1895) 1 Weir 518; *Narain Das,* (1918) 17 A. L. J. R. 334; *Balkrishna Narhar Velhankar,* (1924) 26 Bom. L. R. 978, 7 Bom. Cr. C. 221; *Moti Lal,* (1925) 23 A. L. J. R. 679.

[3] *Rank Prasad,* (1911) 8 A. L. J. R. 927.

[4] *Khaja Mahomed Hamin Khan,* (1881) 3 Mad. 178, 1 Weir 286.

[5] [illegible] 283.

[6] *Prankrishna Chandra,* (1870) 6 Beng. L. R. App. 80.

[7] *Jeenut Bebee,* (1864) 1 W. R. (Cr.) 46

[8] *Ghasi,* (1917) 39 All 722, 15 A. L. J. R 793.

[9] (1870) 5 M. H. C. App. 17. See *Nagoji Ramchandra,* (1898) 1 Weir 143.

[10] (1871) 6 M. H. C. App. 25, 26. But see 6 M. H. C. App. 26 in which a person who included in his own land a portion of a public foot-path was held to have not committed this offance. See also *Fakirgarda,* (1888) Cr. R. No. 49 of 1888, Unrep. Cr. C. 393.

[11] *Mehervanji Bejanji,* (1869) 6 B. H. C. (Cr. C.) 6.

commit adultery[1]; where a person drove his cart across an open green, in contravention of an order issued by Municipal Commissioners, who had no power to issue the order[2]; where an excommunicated Hindu wife entered the house of her husband to claim maintenance[3]; where a person effected an entry into a Local Fund market with intent to evade payment of market dues[4], where A, having shot a deer near B's land, followed it into B's land for the purpose of killing it, although he was warned off the land beforehand[5], where a man for several years cultivated land under a lease from the Forest Department, and during his occupation built a dwelling house and made other improvements, but refused to relinquish the land after notice of ejectment was served upon him until he was paid compensation[6]; where an owner entered his own lands permissively used or occupied by, but not in the possession of, another[7], where a person fished in a tank to which the public generally had access[8]; where a person entered into premises purchased by him at a Sheriff's sale for the purpose of acquiring possession[9], where a Zemindar, under the pretext that one of his tenants had left the village and abandoned his holding, took possession of the tenant's holding wrongfully[10]; and where the accused drove a cart over Government waste land in respect of which the Municipality had put up notices prohibiting cart traffic[11], this offence was not held to have been committed

The accused granted a lease of pepper on certain hills described to be the property of his *tarwad* The lease granted comprised within the boundaries mentioned therein not only land belonging to the *tarwad* of the accused but also other land stated to be the property of Government The lessee conveyed his rights to others and, under colour of the lease, the sub-lessee *bona fide* entered upon the land and took the pepper The accused was convicted of abetment of criminal trespass and of theft It was held that the execution of the document could not be said to aid either the entry or the taking and that in the absence of evidence that the accused either suggested the entry or the taking, he was not guilty.[12]

Where a servant of a proprietor, who had voluntarily surrendered his estate to the Court of Wards, cut or removed bamboos, etc, growing thereon for the benefit of his master, it was held that no offence was committed[13] A school was built by public subscription and put in charge of a teacher He went away having locked the building The accused who were some of the managers of the school took possession of the building and started certain classes in it. They were convicted of criminal trespass. It was held that the conviction was improper as the building was not in the possession of the complainant and the accused had no intention of annoying him[14]

2. 'With intent to commit an offence or to intimidate, insult or annoy any person in possession of such property.'—The word "intent" is not to be taken as identical with "wish" or "desire" The intention constitutes the entry criminal. Merely to trespass is not ordinarily such an offence, but when the trespass is in order to the commission of an offence, or when it is to intimidate, to insult, or to annoy, it is punished. Thus, the essence of the offence is the intent in committing the trespass. It must be proved that some criminal intent was present in the mind of the accused, and it does not at all follow that, because an act is unlawful, and is one that the civil law will restrain, or for which it will compensate the injured party

[1] *Kushee*, (1887) Cr R No. 18 of 1887, Unrep. Cr. C. 328

[2] (1870) 5 M. H. C. App. 38.

[3] *Marimuttu*, (1881) 4 Mad. 213, (1881) 1 Weir 523.

[4] *Varthappa Nayakan*, (1882) 5 Mad. 382.

[5] *Chunder Narain* v. *Farquharson*, (1879) 4 Cal. 837.

[6] *Foujdar*, (1878) P. R. No. 28 of 1878.

[7] *Daniel Groves*, (1882) 1 Weir 521.

[8] (1879) 1 Weir 520.

[9] *Charoo Chunder Mutty Laul*, (1899) 4 C. W. N. 47.

[10] *Jangi Singh*, (1903) 26 All. 191; *Bazid*, (1904) 27 All. 298.

[11] *Nga U Thit*, (1909) U. B. R. (P. C.) 25.

[12] *Parapravan Bavothi Hadgi*, (1890) 1 Weir 48.

[13] *Parmeswar Singh*, (1910) 38 Cal. 180.

[14] *Narain Das*, (1918) 17 A. L J. R. 334

in damages, it is necessarily criminal.[1] There must, in all cases, be found an intent to cause intimidation, insult or annoyance. A conviction could not follow merely because one could pronounce with certainty that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance.[2] Criminal trespass depends on the intention of the offender and not upon the nature of the act and when the man's intention is to save his family and property from imminent destruction it cannot be said that because he commits civil trespass on his neighbour's land and cuts a portion of an embankment belonging to his neighbour which he ordinarily would not be justified in doing, he is guilty of any criminal offence.[3] It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result. The section is so worded as to show that the act must be done with intent and does not, as other sections do (*e.g.*, s. 425), embrace the case of an act done with knowledge of the likelihood of a given consequence. Although a trespasser knows that his act, if discovered, will be likely to cause annoyance, it does not follow that he does the act with that intent.[4]

Trespass is an offence only if it is committed with one of the intents specified in the section and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction.[5] The accused's son, a young boy, having stolen some jewels belonging to his father, told him that he had given them to the Head-Master of his school, the complainant, who kept them in a box in his house. Thereupon the second accused with his friends, the other four accused in the case, went into the complainant's house, and in spite of the latter's protest and remonstrances insisted on searching, and did in fact search, the house. But nothing was found. The complainant, naturally felt insulted and annoyed at the high-handed conduct of the accused and lodged a complaint against the accused. It was held that the accused were not guilty of criminal trespass.[6]

In a Full Bench case the former Chief Court of the Punjab held that where a person claiming a title to property, whether his title be good or bad, entered without any legal justification upon property in the established possession of another, he must be inferred to have had an intent to annoy the person in possession even though he had no primary desire to annoy and his only object was to obtain possession for himself.[7]

If the entry is to commit an offence, criminal trespass is committed.[8] In a Madras case it is laid down that it is sufficient if the evidence leaves no reasonable doubt that the accused intended to commit some offence. It is not necessary for the Magistrate to find what specific offence he wanted to commit.[9]

As regards the first part of this section, dealing with the intention to commit an offence, it does not appear to be necessary that the offence should be directed

[1] Per Rattigan, J., in *Albiditta*, (1882) P. R. No. 29 of 1882; *Ganpat*, (1889) Cr. R. No. 43 of 1888, Unrep. Cr. C. 390; *Rehana*, (1923) 5 Lah. 20.

[2] *Motilal*, (1925) 23 A. L. J. R. 679.

[3] *Madan Mandal*, (1913) 41 Cal. 662.

[4] *Rayapadayachi*, (1896) 19 Mad. 240, 241, approving *Sivaratri Guravaiya*, (1885) Weir (3rd Edn.) 329, disapproving *Veda Gurukkal*, (1882) Weir (3rd Edn.) 328. See to the same effect *Venkataramanuja Reddi*, (1909) 6 M. L. T. 262; *Po Kin*, (1902) 1 L. B. R. 355.

[5] *Vullappa v. Bheema Row*, (1917) 41 Mad. 156, F.B., *Sellamuthu Servaigaram v. Pallamuthu Karuppan*, (1911) 35 Mad. 186, overruled.

[6] *Vullappa v. Bheema Row*, sup.

[7] *Ram Saran*, (1905) P. R. No. 12 of 1906, F.B., Per Clark, C. J., and Reid, J. Rattigan, J., dissented from this view and held that it was not enough for the prosecution to prove or for the Court to find that the accused knew that his entry would probably annoy the person in possession, but it is absolutely essential to affirmatively establish and find that the accused acted with an intention to annoy, mere knowledge that annoyance is likely to result is not sufficient.

[8] *Jeenut Bebee*, (1864) 1 W. R. (Cr.) 46.

[9] See *Samban*, (1881) 1 Weir 570, followed in *Kurnan Seshayya*, (1911) 2 M. W. N. 71, 21 M. L. J. 781.

against the person in possession. It is sufficient that the property entered upon should be in the possession of another.[1]

As to the word 'offence,' see s. 40, *supra*.

The intention to intimidate, insult, or annoy may be against a person in constructive as well as against a person in actual possession of immovable property.[2] During the pendency of a civil suit, certain persons, on behalf of the plaintiff, went on the premises belonging to the defendant for the purpose of making a survey and for getting materials for a hostile application against the defendant. They went (some of them armed) and, without the permission of the defendant, and in his absence, and when the defendant's servants objected to their action, persisted in their trespass and endeavoured to prevent opposition by making false statements as to the authority under which they were acting. It was held that their actions amounted to criminal trespass as their object in taking swords with them was to intimidate.[3]

'Annoy.'—" The word 'annoy', must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual."[4] "'Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible, individual of a house."[5] Mere knowledge of the possibility of annoyance resulting from an act of trespass is not sufficient to bring the case within the definition of trespass, but the word 'intent' cannot be read as if it were identical with 'wish' or 'desire.' There may be no wish to annoy, but if annoyance is the natural consequence of the act, and if it is known to the person who does the act that such is the natural consequence, then there is an intent to annoy.[6] Most acts in the common course of natural events and human conduct lead to a series of results, and if these results are foreseen by the person doing the acts they cannot be said to be caused unintentionally. The ultimate object may be something different, but the person intends all the intermediate results which he knows will happen in the natural course of events, even though he may regret that they should happen. When it is uncertain whether a particular result will follow, there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend, when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result.[7] Where an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof, in that case the Court may find that the intention to insult or annoy, under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected. If there is an invitation (to enter a house) combined with an intention (on the part of the accused) to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused then his act becomes a direct defiance

[1] *Chinkvrana*, (1901) 1 U. B. R. (1897 1901) 352, 353.

[2] *Maung Kado*, (1893) 1 U. B. R. (1892-1896) 264.

[3] *Golap Pandey* v. *R. H. Boddam*, (1889) 16 Cal. 715.

[4] Per Straight, J., in *Gobind Prasad*, (1879) 2 All. 465, 467.

[5] Per Bowen, L. J., in *Tod-Heatly* v. *Benham*, (1888) 40 Ch. D. 80, 98.

[6] *Luxman Raghunath*, (1902) 4 Bom. L. R. 280, 26 Bom. 558. This case is not reconcilable with *Chunder Narain* v. *Farquharson*, (1879) 4 Cal. 837; *Rayapadayachi*, (1896) 19 Mad. 210, and has been dissented from in *Vallappa* v. *Bheema Row*, (1917) 41 Mad. 156, F.B., but it has been referred to with approval in *Chhote Lal*, (1917) 40 All. 221. It may be observed that intent and knowledge are distinguishable in the Indian Penal Code. In definitions of some of the offences both the words occur; in others only intent enters as an ingredient. The doctrine presuming intention from knowledge cannot be safely applied to the Indian Penal Code.

[7] *Luxman Raghunath*, sup., dissented from in *Vallappa's case*, sup.

to an express order and an intention to annoy the author of the order may be inferred from it. A person was found inside the house of another at night and he pleaded in defence, first that he had entered the house at the request of one of the inmates and, secondly, that he had no intention of annoying or insulting the complainant. It was found that he had taken the precaution of keeping his presence in the house entirely secret from the owner thereof, and it was not found that he was forbidden to enter the house by the owner. It was held that the conviction of the accused without enquiry into the truth or otherwise of the defence set up was bad in law.[1] A house was occupied only by the owner and his concubine who had an intimacy with the accused. The accused entered the house at her invitation in the absence of the owner and took measures to conceal himself as soon as the owner arrived who, however, arrested him. It was held that the accused was not guilty of an offence under this section.[2]

Where the accused entered on the land of another to stop him from ploughing in order to make him render an account[3]; where the complainant leased a portion of his lands to certain tenants for the purpose of making bricks and the accused entered on such land with an intention to annoy the complainant[4]; where the accused acting on behalf of or under the colour of the right of their master to whom possession had been awarded by a civil Court, entered upon land in the physical possession of tenants or others *prima facie* entitled to retain possession until ousted by due course of law[5]; where a person unauthorizedly entered the compound of the complainant's house in order to effect an entry into a neighbour's house to execute a warrant of attachment[6]; where a person, after having been ejected by due process of law from certain agricultural land, wilfully persisted in trespassing upon such land[7]; where the complainant, the purchaser of the rights of a mortgagee in possession and his predecessor-in-title, had been peacefully in possession of certain agricultural land for some years, and a relation of the mortgagor forcibly ousted the complainant on the plea that he was under the Hindu law entitled to share in the land and the mortgagor had no title to make a mortgage thereof with possession,[8] it was held that this offence was committed.

The accused was convicted under s. 509 for causing the roof of a house belonging to him, which the complainant occupied as his tenant, to be removed while the complainant's wife, a *purdanashin* woman, was in it, without giving any notice beforehand, and thereby causing her to be exposed to public view. It was held that the removal of the roof in the circumstances amounted to criminal trespass as it was clear that the accused intended to annoy the complainant, and house-trespass (s. 448) was thus established.[9] Where the accused entered into the complainant's house with the intention of having illicit intercourse with his widowed sister, it was held that he was guilty of this offence inasmuch as the particular object could not be obtained except by causing great annoyance to the owner of the house. In such cases secondary intention is sufficient, and a man may well be said to intend the inevitable consequences of his act.[10] On facts almost similar, the Allahabad High Court held that the accused was not guilty of any offence.[11] The decision of Sundar Lal, J., in this case is of doubtful authority. To say that a brother would not be annoyed if his widowed sister's paramour entered into his

[1] *Chhote Lal*, (1917) 40 All. 221; *Asa Ram*, (1923) 1 L. C. 340.
[2] *Rupa*, (1919) 22 O. C. 121.
[3] Weir (3rd Edn.) 204.
[4] *Munisandia Pillai*, (1882) 1 W ir 517.
[5] *Srinivasayangar*, (1884) Weir (3rd Edn.) 320.
[6] *Bhow*, (1877) Unrep. Cr. C. 122; *Luxman Raghunath*, (1902) 4 Bom. L. R. 280, 26 Bom. 558; *Lakhmi Das*, (1919) 4 L. J. 532.
[7] *Tika Ram*, (1902) 22 A. W. N. 6
[8] *Nandan*, (1902) 22 A. W. N. 42.
[9] *Dheramal*, (1901) 1 U. B. R (1897-1901) 350.
[10] *Jiwan Singh*, (1908) P. R. No. 17 of 1908. See *Kangla*, (1900) 23 All. 82, *Brij Bas*, (1896) 19 All. 74; *Balmakand Ram* v. *Ghansamram*, (1894) 22 Cal. 391; *Ram Saran*, (1906) P. R. No. 12 of 1906; *Chatter Singh Damai*, (1919) 3 U. B. R. (1917-1920) 194.
[11] *Gaya Bhar*, (1916) 38 All. 517.

house at dead of night with intent to have illicit intercourse is against human nature.

'Any person in possession.'—These words do not mean only "a complainant in possession" there being no authority for taking the offence of mischief and trespass out of the general rule which allows any person to complain of a criminal act.[1] C, a rate-payer, who had filed a petition against an assessment which in his absence had been dismissed, entered a room, where a committee of the Municipal Commissioners were seated hearing and deciding petitions in assessment matters, ostensibly with the object of presenting a petition for the revision of his assessment. The Chairman ordered him to leave the room, and on his refusal to do so, he was turned out. Outside the room in the verandah he addressed the crowd complaining that no justice was to be obtained from the Committee. It was held that C had committed no offence.[2] A headman was holding a regular trial in his private dwelling, and the accused attended to watch the proceedings on behalf of his nephew, who was the accused. The accused was ordered to withdraw by the headman, but he remained there to witness the proceedings. He was subsequently pushed out and then prosecuted for committing house-trespass. It was held that he had not said or done anything from which an intent to intimidate, insult, or annoy, might be inferred, and he was therefore not guilty.[3]

An intention to intimidate, insult or annoy any person in possession of a house does not mean to insult or annoy any person in constructive but in actual possession of the premises.[4] The section contemplates actual possession, not mere juridical possession. Where there is a person in actual physical possession of property, he is the only person whose feelings have to be considered under this section.[5] An owner has no right to re-enter land which he has let to a tenant, and may be convicted of an offence for so doing under s. 447 unless it can be shewn that the tenancy has been determined in accordance with law.[6] Where the accused occupied and locked up an empty house belonging to the complainant with the intention to assert his title and gain and hold possession of the house as against the complainant, it was held that as the complainant was not in possession of the house either by himself or through any other person when the trespass was committed, he could not be said to be in 'possession' within the meaning of this section; and that intimidation, insult or annoyance are results which more naturally follow when premises were occupied than when vacant.[7]

3. 'Having lawfully entered into or upon such property, unlawfully remains there.'—If the entry has been lawfully and legitimately obtained, there must be an unlawful 'remaining,' either directly or constructively, against the will of the person in possession

An unlawful act is not necessarily an offence (s. 40), and an intention to commit such act does not render the accompanying trespass criminal.[8] Thus, an

[illegible]

123, commented on in *Prayag Singh* v. *Morgan*, sup., *Nga Po Tok*, (1918) 3 U. B. R. (1917-20) 111; contra, *Nga Tok Kyi*, (1916) 10 B. L. T. 77.

[2] *Nga Po Ba*, (1922) 2 B. L. J. 17. See *Avudayappa Mudaliar*, (1923) 18 L. W. 181.

[3] *Ishur Chunder Kurmokar* v. *Seetul Das Mitter*, (1872) 17 W. R. (Cr.) 47.

[4] *Tok Gyi*, (1916) 8 L. B. R. 423; *Bhagwan Din*, (1918) 16 A. L. J. R. 501, leaves the point open. See *Jambulinga Chetty*, (1924) 47 M. L. J. 437, (1924) M. W. N. 546, which lays down that entry on a vacant piece of land for putting up a water-pandal with the consent of the person who could assert his title to the property under a registered deed is sufficient as against the person in actual possession under an unregistered sale-deed.

[5] *Maung San. Myin*, (1922) 2 B. L. J. 37.

[6] *Moti Lal* v. *Emperor*, (1925) 23 A. L. J. R. 679.

[7] *Alladitta*, (1882) P. R. No. 29 of 1882.

unlawful infringement of a right of exclusive fishing in a part of a public river is not an offence which can be brought within the definition of criminal trespass.[1]

The accused placed bricks on complainant's land with his permission but subsequently refused to remove them. For this he was convicted of criminal trespass. It was held that the possession being lawful in its inception the subsequent refusal did not amount to criminal trespass and the matter was one for decision by a civil Court.[2]

Bona fide claim.—"If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, but without any intention to intimidate, insult, or annoy the person in possession, or to commit an offence, then although he may have no right to the land he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence... But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence."[3] The existence of a *bona fide* claim of right is not irrefutable evidence of the absence of a criminal intent.[4] But where the accused acts on a belief of his own right, he cannot be held guilty of criminal trespass.[5] It should distinctly be found whether the entry of the accused upon the land was in the exercise of a *bona fide* claim of right or with one of the intents requisite to constitute a trespass criminal within the meaning of this section. If the accused entertained the belief in good faith that he was entitled to the possession of the land, his entry and continuance on it would constitute a trespass on the land for which he would, if he failed to prove his title, be answerable in a civil suit, but would not be liable to a criminal charge. If, on the other hand, the circumstances are such that he could not have entertained such a belief in good faith, it would be a fair inference that he intended the annoyance which his action must have caused to the complainants, and the conviction would be proper.[6]

Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass unless the intent to commit an offence or to intimidate, insult or annoy is conclusively proved.[7] But where A was in peaceful possession of land which he claimed to hold in mortgage from B, and C entered on the land and ploughed it ousting A, on the ground that he had bought the land from B, it was held that A was not liable to be ousted from the land save in due course of law, and C rendered himself liable to a conviction of criminal trespass.[8] Similarly, a forcible entry upon land, which had been sold in execution of a money-decree and of which actual possession had been given to the purchaser under s. 318 of the Criminal Procedure Code, without resistance or opposition, and over which the purchaser had thereafter

[1] *Charu Nayiah*, (1877) 2 Cal. 354.

[2] *Nand Singh*, (1925) 26 P. L. R. 247.

[3] Per Turner, J., in *Budh Singh*, (1879) 2 All 101, 103; *Gokul Chund* v. *Seth Roshun Lal*, (1870) 2 N. W. P. 82; *Shistidkar Parui*, (1872) 9 Beng. L. R. App. 19; *Po Ke*, (1904) 2 L. B. R. 319, 10 Burma L. R. 358; *Maung Kado*, (1895) 1 U. B. R. (1892-1896) 261; *Ramchandra* v. *Ratho*, (1908) 5 N. L. R. 69.

[4] *Arunachala Achari*, (1881) 1 Weir 520. See *Jhumuk Nonah* v. *Shadashib Roy*, (1881) 7 Cal. 26; *Chhakoo Mandal*, (1906) 11 C. W. N. 467.

[5] *Jurakhan Singh*, (1907) 7 C. L. J. 239; *Reajaddin Molla*, (1914) 18 C. W. N. 1245; *Alekhoy Singh* v. *Rameswar Bagdi*, (1916) 43 Cal. 1143; *Bhagwan Din*, (1918) 16 A. L. J. R. 501.

[6] *Devarasetti Gangaiya*, (1884) 1 Weir 516; *Po Ke*, sup.; *Maung Shwe Ku*, (1923) 2 B. L. J. 55.

[7] *Gobind Prasad*, (1879) 2 All. 465; *Shah Muhammad* v. *Ganesh Dass* (1904) P. R. No. 13 of 1905; *Nanak Chand*, (1883) 3 A. W. N. 188.

[8] *Mya Zan*, (1902) 1 L. B. R. 358.

exercised acts of possession, by sub-tenants claiming under a lease of an antecedent date from the judgment-debtor, was held to be criminal trespass.[1] Thus, superior title in the accused will not by itself convert the complainant into a mere trespasser, so as to justify him in ejecting the complainant, if the latter be in possession otherwise than as a mere trespasser.[2]

Statutory application.—See Orissa Tenancy Act (Beh. & O. Act II of 1913), s. 240; the Agra Tenancy Act (U. P. Act II of 1901), s. 149; the Bombay City Police Act (Bom. Act IV of 1902,) s. 111.

House-trespass.

442. Whoever commits criminal trespass by entering into[1] or remaining in any building,[2] tent or vessel[3] used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass."

Explanation.—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

COMMENT.

Circumstances which aggravate the offence of criminal trespass are of two sorts [illegible] ch it is committed. It m [illegible] rty which it is so desirable to guard against unlawful intrusion as the habitations in which men reside, and the buildings in which they keep their goods. The offence of trespassing on these places we designate as house-trespass, and we treat it as an aggravated form of criminal trespass."[3]

1. **'Entering into.'**—The introduction of any part of the trespasser's body is entering sufficient to constitute house-trespass.[4]

2. **'Building.'**—What is a 'building' must always be a question of degree and circumstances: its ordinary and usual meaning is, a block of brick or stonework covered in by a roof.[5] The mere surrounding of an open space of ground by a wall or fence of any kind cannot be deemed to convert the open space itself into a building, and trespass thereon does not amount to house-trespass.[6] A courtyard partly surrounded on the front by a mud wall with no roof over it nor any door or gateway is not a building or house within the purview of this section.[7] According to the Code any construction that is used as a human dwelling will be included in the term 'building.'

The building should be the property of another person. If an owner in charge of a house professes to be an accomplice and invites another to his house to commit an offence, a conviction for house-trespass is bad in law.[8]

The following are held to be buildings:—An entrance hall surrounded by a wall in which there were two doorways but no doors, and used for the custody of property,[9] a courtyard, consisting of a walled enclosure with four chambers, opening into it, and an outer door or gate leading into a side street,[10] a cattle yard originally walled on four sides, but one wall of which having fallen into disrepair,

[1] *Kailash Ghose* v. *Jugal Lohar*, (1905) 1 C. L. J. 104; *Gill*, (1904) P. L. R. No. 138 of 1904.

[2] *Ponnusami Pillai*, (1899) 1 Weir 522; *Rabi Lochan* v. *Purna Chandra Dey*, (1906) 11 C. W. N. 171; *Chhaloo Mandal*, (1906) 11 C. W. N. 467.

[3] Note N, p. 168.

[4] *Vide* Explanation.

[5] Per Esher, M. R., in *Moir* v. *Williams*, [1892] 1 Q. B. 264. See Stroud's Judicial Dictionary, 2nd Edn., Vol. I, p. 225.

[6] *Palani Goundan*, (1896) 1 Weir 523.

[7] *Sunder* (1919) P. W. R. (Cr.) No. 11 of 1919, P. L. R. No. 56 of 1919.

[8] *Kamaraju*, (1887) 1 Weir 534.

[9] *Dad*, (1878) P. R. No. 10 of 1879.

[10] *Shera*, (1879) P. R. No. 35 of 1879; *Ismail*, (1925) 6 Lah. 463.

the new addition to the wall. The accused were thereupon prosecuted for the offence of house-trespass and mischief under ss. 451 and 426. It was held that inasmuch as there was a *bona fide* claim of right by the accused to the wall in dispute and as the accused had entered the complainant's house and pulled down the addition in his absence, the offences charged were not made out against the accused.[1]

Where in execution of a decree of Court certain property was attached and taken out of the house in which it was, it was held that the decree-holder was not guilty of house-trespass.[2] A house was occupied only by the owner and his concubine, who had an intimacy with the accused. The accused entered the house at her invitation in the absence of the owner and took measures to conceal himself as soon as the owner arrived who, however, arrested him. It was held that the accused was not guilty of house-trespass.[3]

An officer exceeding his powers.—A police-officer is not justified by the mere fact that a person is of a suspicious character in entering his house at midnight to see whether he is in the house. Such an act is clearly a house-trespass, as it is calculated to annoy the members of the family of the suspected person and also to insult the latter person.[4] To constitute an offence of house-trespass it is not enough that there should be an entry into a house without complying with all the formalities required by law. It further requires an intention either to commit an offence or to intimidate, insult or annoy the person in possession. Therefore, where a Sub-Inspector of Police searched a house for cocaine and omitted to record his reasons as required by s. 53 of the Excise Act for not first obtaining a search warrant from a Magistrate it was held that he could not be convicted under s 448.[5]

Statutory application.—See the Madras Estates Land Act (Mad. Act I of 1908), s. 212 (3).

Lurking house-trespass.

443. Whoever commits house-trespass having taken precautions to conceal such house-trespass[1] from some person who has a right to exclude or eject the trespasser from the building, tent or vessel[2] which is the subject of the trespass, is said to commit "lurking house-trespass."

COMMENT.

The authors of the Code say: "House-trespass, again, may be aggravated by being committed in a surreptitious or in a violent manner. The former aggravated form of house-trespass we designate as lurking house-trespass; the latter we designate as house-breaking. Again, house-trespass, in every form, may be aggravated by the time at which it is committed. Trespass of this sort has, for obvious reasons, always been considered as a more serious offence when committed by night than when committed by day. Thus we have four aggravated forms of that sort of criminal trespass which we designate as house-trespass, lurking house-trespass, house-breaking, lurking house-trespass by night, and house-breaking by night.

"These are aggravations arising from the way in which the criminal trespass is committed. But criminal trespass may also be aggravated by the end for which it is committed. It may be committed for a frolic. It may be committed in order to (commit) a murder. It may also often happen that a criminal trespass, which is venial, as respects the mode, may be of the greatest enormity as respects the ends; and that a criminal trespass committed in the most reprehensible mode, may be committed for an end of no great atrocity. Thus A may commit house-breaking

[1] *Balkrishna Narhar Velhankar*, (1924) 26 Bom. L. R. 978, 7 Bom. Cr. C. 221.
[2] *Bhikam Singh*, (1917) 15 A. L. J. R 808.
[3] *Rupa*, (1919) 22 O. C. 121.
[4] *Doraswami Pillai*, (1903) 1 Weir 529.
[5] *Ali Abbas v. Subba Singh*, (1925) 2 O. W. N. 463.

by night for the purpose of playing some idle trick on the inmates of a dwelling. It may commit simple criminal trespass by merely entering another's field for the purpose of murder or gang-robbery. Here A commits trespass in the worst way. It commits trespass with the worst object. In our provisions, we have endeavoured to combine the aggravating circumstances in such a way that each may have its due effect in settling the punishment."[1]

1. **'Having taken precautions to conceal such house-trespass.**—In order to constitute lurking house-trespass the offender must take some active means to conceal his presence.[2]

Entry upon the roof of a building may be criminal trespass. But it cannot sustain a conviction for lurking house-trespass[3]; or for house-breaking.[4]

2. **'Vessel.'**—See s. 48, *supra*.

Lurking house-trespass by night.

444. Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night."

COMMENT.

Under this section the time of the entry aggravates the offence.

House-breaking.

445. A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence,[1] or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say:—

First.—If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.[2]—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor of the house-trespass has opened,[3] in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault.

[1] Note N, p. 163.
[2] *Budha*, (1916) P. R. No. 21 of 1916.
[3] *Alla Bakhsh*, (1886) P. R. No. 9 of 1887; *Mullua*, (1900) 20 A. W. N. 151.
[4] *Fazlo*, (1890) P. R. No. 9 of 1890.

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.—Any out-house, or building occupied with a house and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

ILLUSTRATIONS.

(*a*) A commits house-trespass [illegible] Z's house, and putting his hand through the [illegible]

(*b*) A commits house-trespass [illegible] between decks. This is house-breaking.

(*c*) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(*d*) A commits house-trespass by entering Z's house through the door, having open a door which was fastened. This is house-breaking.

(*e*) [illegible] lifted a [illegible]

(*f*) [illegible] pass by entering Z's house, having opened the door with that key. This is house-breaking.

(*g*) Z is standing in his doorway. [illegible] commits house-trespass by entering th[illegible]

(*h*) Z, the door-keeper of Y, is st[illegible] trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

COMMENT.

The section prescribes six ways in which the offence of house-breaking may be committed Clauses 1 to 3 deal with entry which is effected by means of a passage which is not ordinary. Clauses 3 to 6 deal with entry which is effected by force.

English law.—According to English law to constitute house-breaking there must be always an actual breaking of some part of the house, in effecting which more or less of actual force is employed, or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy. Under the Code the mere entry through a window not intended for human entrance will amount to house-breaking (*vide* ill (*c*)). According to English law if a thief enters through an aperture in a cellar window to admit light, it is not house-breaking.[1]

1. 'For the purpose of committing an offence.'—It is not necessary to specify any particular offence.[2] Intention of committing any offence is sufficient.

2. Clause 2.—This clause deals with those cases where a new passage has been created by a thief. When a hole is made by burglars in the wall of a house but their way is blocked by the presence of beams on the other side of the wall the offence committed is one of attempt to commit house-breaking and not actual house-breaking, and illustration (*a*) to this section does not apply.

3. Clause 3.—'Has opened.'—A door or window is not open if it is shut, though unfastened. Pulling down the sash of a window is a breaking.[3] Raising a window which is shut down close but not fastened, though it has a hasp which might have

[1] *Lewis*, (1827) 2 C. & P. 628.
[2] See *Jharu Sheikh*, (1912) 16 C. W. N. 696.
[3] *Haines*, (1821) R. & R. 451.

been fastened, is a breaking.[1] Where a window opens upon hinges, and is fastened by a wedge, so that pushing against it will open it; forcing it open by pushing against it is sufficient to constitute a breaking.[2]

The following acts are held to be breaking under the English law and will amount to house-breaking under the Code. Entry effected by taking out a glass from a door[3]; or breaking a pane of glass[4]; lifting up a heavy flap of a cellar to come out[5]; obtaining admission by getting down a chimney[6]; removing the fastening of a window by the hand introduced through a broken pane of the window, and thereby opening the window and entering.[7]

The accused suggested to a servant of the prosecutrix a plan for the commission of a robbery by the accused at the shop of the prosecutrix. The servant, pretending to agree to the accused's suggestion, lent the keys of the shop to the accused, who made duplicate keys, with one of which, on a day arranged with the servant, the accused unlocked a padlock attached to the outer door and entered the shop, where he was arrested. The prosecutrix had been informed by the servant of the accused's plan and knew that he intended to enter the shop on the day in question. The accused was convicted on an indictment which charged him with having broken and entered the shop with intent to steal therein. It was held that the conviction was right, notwithstanding that the prosecutrix knew that the accused had been supplied with the means of breaking and entering by her servant.[8]

Statutory application.—The Madras Pier Act (Mad. Act V of 1863), s. 12.

House-breaking by night.

446. Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night."

COMMENT.

Section 445 contains an elaborate definition of house-breaking. The addition in this section of the element of time turns the offence into 'house-breaking by night,' the equivalent of the crime of 'burglary' in English law. The analysis of this offence naturally suggests a division of its ingredients into—(1) the breaking; (2) the entry; (3) the place; (4) the time; and (5) the intent.

English law.—[illegible] to commit any felo[illegible] felony therein, and [illegible] night, shall be deemed guilty of burglary.[9]

Punishment for criminal trespass.

447. Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

PRACTICE.

Evidence.—Prove (1) that the complainant had possession of the property in question.[10] Whether a party is in possession of immoveable property or not is a question of fact to be ascertained by taking evidence in the usual way. The

[1] *Hyams*, (1836) 7 C. & P. 441.
[2] *Samuel Hall*, (1818) R. & R. 355.
[3] *Smith*, (1820) R. & R. 417.
[4] *Perkes*, (1824) 1 C. & P. 300; *Tucker*, (1844) 1 Cox 73.
[5] *Russell*, (1833) 1 Mood. Cr. C. 377.
[6] *Brice*, (1821) R. & R. 450.
[7] *William Robinson*, (1831) 1 Mood. Cr. C 327.
[8] *Chandler*, [1913] 1 K. B. 125.
[9] 24 & 25 Vic., c. 96, s. 51.
[10] *Kalinauth Nag Chowdhry*, (1867) 9 W. R. (Cr.) 1; *Parmeshwar Lall*, (1921) 3 P. L. T. 347.

mere fact that a decree has been given against one party by a civil Court does not determine the question of possession, as that party may still be in possession of the property in dispute until effect is given to the decree in due course of law.[1]

(2) That the accused entered into or upon the property; or after having lawfully entered unlawfully remained there.

(3) That he so entered or remained there with the intention (*a*) to commit an offence; or (*b*) to intimidate, insult, or annoy the person in possession.[2]

The Magistrate must find what the intent with which the accused committed the trespass was. He is not to leave it to inference what the intent with which he committed the trespass was.[3]

"Though the prosecution must prove the existence of some one or more of the intentions mentioned in s. 441, . .the proof need not be direct, that is, by the . . . . . ne of those mentioned in t . . . . . he admitted to them tha . . . . . oved like any other fact (and the existence of intention is a fact) by the evidence of conduct and of surrounding circumstances."[4]

Prima facie . . . . . any " . . . . . the . . . . . upon property in the possession of another may be guilty of criminal trespass, without reference to the question in whom the title to the land may ultimately be found.[6] The accused, after having been convicted of criminal trespass committed by entering on certain land, were again prosecuted for a further trespass by remaining on the land in spite of the previous conviction It was held that the accused were not liable to be again convicted.[7]

Punishment for house trespass

448. Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

COMMENT.

Section 442 defines the offence of 'house-trespass', this section provides punishment for it.

PRACTICE.

Evidence.—Prove (1) that the accused committed criminal trespass.[8]

(2) That such criminal trespass was committed by entering into, or remaining in, a building, tent, or vessel

(3) That such building, tent, or vessel, was used as a human dwelling or as a place for worship, or as a place for the custody of property.

To support a conviction under this section, some one or other of the intents mentioned in s. 441 must be expressly found and must not be left to inference.[9]

Procedure.—Cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate—Triable summarily

[1] *Mu Tok v. Mi Khan Me*, (1894) 1 U.B.R. (1892-1896) 262.

[2] *Ishwari*, (1868) Unrep. Cr. C. 10, *Sreedhar Parera v. Indrabhusan Chakrabarty*, (1872) 18 W. R. (Cr.) 25, *Nil Moth Banerjee*, (1875) 24 W. R. (Cr.) 58, *Punjab Singh*, (1881) 6 Cal. 579.

[3] *Durgayee*, (1882) 1 Weir 524. See *Ferozmoti Gangooli*, (1884) 1 Weir 516. See *Trespass v. Nasirullah Khan*, (1912) 16 C.W.N. 1097, *Amarendra Chunder Krishna Bolly v. Mere Pelesh*, (1912) 16 C.W.N. 335.

[4] Per Banerjee and Sale, JJ., in *Bilasmani Biswas v. Chandramani*, (1894) 22 Cal. 391, 400.

[5] *Narain Singh*, (1870) 11 W. R. (Cr.) 11.

[6] *Ram Dyal Mundle*, (1867) 7 W. R. (Cr.) 2.

[7] *Ma Hla Ya*, (1908) 4 L. B. R. 276.

[8] *Table* 441, *supra*.

[9] *Durgayee*, *supra*.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed house-trespass by entering into [*or remaining in*] the building [*or tent, or vessel*] of AB used as a human dwelling [*or as a place of worship, or for the custody of property*] with intent (*specify the motive for entering into or remaining in*), and that you thereby committed an offence punishable under s. 448 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation (III of 1901), ss. 6, 11 (3) (*d*) and 12 (2).

House-trespass in order to commit offence punishable with death.

449. Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with transportation for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

COMMENT.

This section provides punishment for house-trespass committed with intent to commit an offence punishable with death.

It is not made necessary under this section that the offender should do any further act than house-trespass towards the commission of the 'offence punishable with death.' But to justify a conviction there should be a clear proof of the design to commit a murder or other like offence. In the absence of proof of some further act done, in addition to the criminal trespass, in the prosecution of the [illegible]

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass.[2]

(2) That the same was committed in order to commit an offence punishable with death.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed house-trespass by entering into [*or remaining in*] the building of AB, used as a human dwelling in order to the commission of an offence punishable with death, to wit——, and that [illegible] 449 of the Indian Penal Code, [illegible] the High Court). [illegible] d Court on the said charge.

Punishment.—As to the Frontier District, see s. 448.

House-trespass in order to commit offence punishable with transportation for life.

450. Whoever commits house-trespass in order to the committing of any offence punishable with transportation for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

[1] M & M. 404.

[2] *Vide* s. 442, sup.

COMMENT.

This section is similar to the last section. It deals with house-trespass committed with intent to commit an offence punishable with transportation for life.

As to offences punishable with transportation for life, see page 71.

Evidence.—Prove (1) that the accused committed house-trespass.[1]

(2) That the same was committed in order to commit an offence punishable with transportation for life.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—See s. 449, *sup.*

Punishment.—As to the Frontier District, see s. 448, *sup.*

House-trespass in order to commit offence punishable with imprisonment.

451. Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

COMMENT.

This section is similar to ss. 449 and 450. It provides punishment for house-trespass committed with intent to commit an offence punishable with imprisonment. In order to constitute an offence under this section the prosecution must first establish that an offence of simple house-trespass has been committed and then satisfy the Court, in the particular case before it, that the house-trespass was committed with the object of committing a further offence punishable with imprisonment.[2]

It is not necessary that the Court should be in a position to say which specific offence the accused intended to commit. It is sufficient if the evidence leaves no room for reasonable doubt that the accused intended to commit an offence.[3].

CASES.

Where the accused was convicted of house-breaking, his object being to have sexual intercourse with the complainant's wife, it was held that the conviction was valid.[4] Similarly, where the accused was caught at night in the courtyard of the complainant's premises under circumstances which showed that he had come there to commit theft of cattle, it was held that he was guilty under this section.[5]

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass.[6]

(2) That the same was committed in order to commit theft, or an offence punishable with imprisonment.

When the prospective offence is that of adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman, the intent to commit adultery with whom is charged against the accused.[7] Where it has been shown that the husband was absent in the legitimate pursuit of his occupation, it may safely be presumed that such husband neither consented to

[1] *Vide* s. 442, sup.
[2] *Mansur Husain*, (1919) 17 A. L. J. R. 800.
[3] *Simbaa*, (1881) 1 Weir 533.
[4] (1875) 8 M. H. C. App. 6, 1 Weir 532; *Khanoom Ram*, (1920) 3 U. P. L. R. (L.) 18; *Anant Ram*, (1920) P. W. R. (Cr.) No. 8 of 1921.
[5] *Budha*, (1916) P. R. No. 21 of 1916.
[6] *Vide* s. 442.
[7] *Brij Basi*, (1896) 19 All. 74.

nor connived at any adultery or immorality on the part of his wife. It seems obvious that he would be wholly ignorant of what was going on in his house and that, therefore, he could neither consent to nor connive at the same.[1]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class, if theft was committed. If any other offence punishable with imprisonment was committed, then bailable, compoundable, when permission is given by the Court before which the prosecution is pending and triable by any Magistrate—Triable summarily.

House-trespass for committing adultery.—A Magistrate is right in refusing to convict when the husband declines to complain.[2] But the omission of the husband to prosecute for adultery does not absolve the prisoner from criminal liability under s. 457.[3]

Charge.—The charge must charge the accused with committing house-trespass with intent to commit some specific offence punishable with imprisonment.[4]

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed house-trespass by entering into (*or remaining in*) the building of AB used as a human dwelling (*or for the custody of property*), in order to commit the offence of—(*or theft*), and that you thereby committed an offence punishable under s. 451 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of Session or the High Court*).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.

House-trespass after preparation for hurt, assault or wrongful restraint.

452. Whoever commits house-trespass, having made preparation for causing hurt[1] to any person, or for assaulting[2] any person, or for wrongfully restraining[3] any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine.

COMMENT.

Section 451 prescribes penalty for house-trespass committed with intent to commit an offence punishable with imprisonment. In this way it envelops the provisions of this section. But the object of the legislature in enacting this section is to provide severer punishment where house-trespass is committed in order to cause hurt, or to assault, or to wrongfully restrain any person.

1. **'Hurt.'**—See s. 319, *supra*. Where the accused entered the complainant's house for the purpose of beating his (accused's) wife, who had taken refuge in it, it was held that the beating not being justifiable, that is, lawful, the entry amounted to criminal trespass, and a conviction under this section was good.[5]

2. **'Assault.'**—See s. 351, *supra*.

3. **'Wrongful restraint.'**—See s. 339, *supra*. Where a man went with a forged warrant of arrest into a house, and took away one of the inmates against

[1] *Khanoon Ram*, (1920) 3 U. P. L. R. (L.) 18; *Nala Ram*, (1924) 1 L. C. 69.
[2] (1869) 5 M. H. C. App. 5.
[3] *Bandhu*, (1894) Cr. R. No. 11 of 1894, Unrep. Cr. C. 689.
[4] *Mehar Dowalia*, (1871) 16 W. R. (Cr) [63] 53.
[5] *Katakam Narasingadu*, (1882) Weir (3rd Edn.), 329.

his will under the authority of such warrant, he was held guilty of house-trespass, by putting such person in fear of wrongful restraint under this section.[1]

PRACTICE.

Evidence.—Prove (1) that the accused committed house-trespass.[2]

(2) That the same was committed after making preparation for causing hurt or for assaulting, or for wrongfully restraining, some person; or for putting some person in fear of hurt, assault, or wrongful restraint.

The fact that the accused trespassed into the shop for the purpose of assaulting the complainant, is not sufficient to support a conviction under this section, though it is for a conviction under s. 448.[3]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed house-trespass by entering into [*or* remaining in] the building of AB, used as a human dwelling, having made preparation for causing hurt, etc., to AB; and that you thereby committed an offence punishable under s. 452 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s 448.

Punishment for lurking house-trespass or house-breaking.

453. Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

COMMENT.

This section provides penalty for the offences defined in ss. 443 and 444.

In all "house-breaking" there must be "house-trespass" and in all "house-trespass" there must be "criminal-trespass." Unless therefore the intent necessary to prove the offence of criminal trespass is present, the offence of house-breaking or house-trespass cannot be committed.

'Offence,' in this section, means a thing punishable under the Code or any special or local law (s. 40)

English law.—According to English law to constitute house-breaking there must be an actual or constructive breaking of some part of the house.

The word "break" means—

(*a*) The breaking of any part, internal or external, of the building itself, or the opening by any means whatever (including lifting, in the case of things kept in their places by their own weight) of any door, window, shutter, cellar, flap, or other thing intended to cover openings to the house, or to give passage from one part of it to another, and getting down the chimney;

(*b*) obtaining an entrance into the house by any threat or artifice used for that purpose, or by collusion with any person in the house.[4]

The word 'enter' means the entrance into the house of any part of the offender's body, or of any instrument held in his hand for the purpose of

[1] *Nund Mohun Sirkar*, (1869) 12 W. R. (Cr.) 33

[2] *Vide* s. 442.

[3] *Fakir Chandra De*, (1921) 38 C. L. J. 161.

[4] Stephen's Dig of Cri. L., Art. 341.

intimidating any person in the house or of removing any goods, but does not include the entrance of part of an instrument used to break the house open.[1]

PRACTICE.

Evidence.—For lurking house-trespass prove (1) that the accused committed house-trespass.[2]

(2) That the accused took precautions to conceal the same.

That such concealment was from some person who had a right to exclude or eject the accused from the building, tent, or vessel which was the subject of the trespass.

For house-breaking prove (1) that the accused committed house-trespass.[3]

(2) That the effected his entrance into the house or any part of it in any of the six ways mentioned in s. 445; or if he was in the house or any part of it for the purpose of committing an offence, he quitted it in any of those six ways.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.[4]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, committed lurking house-trespass [*or* house-breaking] by entering into a building belonging to AB and used as a human dwelling, and that you thereby committed an offence punishable under s. 453 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment.

454. Whoever commits lurking house-trespass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section: the aggravation being the commission of an offence punishable with imprisonment.

The latter portion of this section is framed to include the cases of house-trespassers, and house-breakers by night, who have not only intended to commit, but have actually committed, theft.[5]

The accused was seen leaving the house of one S and was seized on an outcry made by a female inmate of the house. He had on him jewels belonging to the female, which were ordinarily kept in an earthen receptacle in the house. The time was afternoon, before sunset. Upon these facts the District Magistrate convicted the accused of "lurking house-trespass by day for the purpose of committing theft" under this section. It was held that there was no evidence against the accused of house-breaking, nor of the essential element of lurking house-trespass, that the offence committed by the accused was theft in a dwelling-house, and that the conviction must be under s. 380.[6]

[1] Stephen's Dig. of Cri. L., Art. 341.
[2] *Vide* s. 448.
[3] *Vide* s. 448.
[4] Act I of 1903.
[5] *Zor Singh*, (1887) 10 All. 140.
[6] *Khuda Bakhsh*, (1886) P. R. No. 10 of 1886.

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass or house-breaking.[1]

(2) That he did so in order to commit an offence punishable with imprisonment.

Oudh Rule.—In charges under ss. 454 and 457 of the Indian Penal Code, the lurking house-trespass or house-breaking being first established, the intent to commit an offence on the part of the prisoner may be presumed, and it is for him to rebut that presumption by showing that he entered the house for an honest purpose; and if the prisoner be of bad character, or have no ostensible means of livelihood, it may be presumed that the offence when he entered the house with the intention of committing it was theft, unless the circumstances themselves are such as to rebut that presumption or the prisoner prove the contrary.[2]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.[3]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed lurking house-trespass, by entering into (*or* remaining in) a building belonging to AB, and used as a human dwelling, in order to the commission of an offence punishable with imprisonment, to wit——, and that you thereby committed an offence punishable under s. 454 of the Indian Penal Code and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448. As to Burma, see the Burma Laws Act, 1898, s. 4 (3) (*b*) and Sch. II.

Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.

455. Whoever commits lurking house-trespass, or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The relationship between this section and s. 453 is the same as that between ss. 452 and 450.

This section is similar to s. 458. The only difference is that this section deals with trespass committed by day: whereas s. 458 deals with trespass committed during night.

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass or house-breaking[4]

[1] *Vide* ss. 443, 445, 453.

[2] Circular No. 82 of 1885, Judl Com., Oudh.

[3] Act I of 1903.

[4] *Vide* ss. 443, 445, 453.

(2) That he did so after making preparation for causing hurt, or assaulting, or wrongfully restraining some person, or for putting some person in fear of hurt, assault, or wrongful restraint.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you on or about the——day of——, at——, committed lurking house-trespass (*or* house-breaking) by entering into (*or* unlawfully remaining in) the building in the possession of AB and used as a human dwelling (*or* for the custody of property) having made preparation for causing hurt to the said AB (*or* for assaulting any person or for wrongfully restraining any person, *or* for putting any person in fear of hurt *or* assault or of wrongful restraint), and that you thereby committed an offence punishable under s. 455 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [*by the said Court* (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Punishment for lurking house-trespass or house-breaking by night.

456. Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of *either description for a term* which may extend to three years, and shall also be liable to fine.

COMMENT.

[illegible] able under s. 453; but [illegible] less the intent necessary [illegible] ence under this section [illegible] on creditors, broke open [illegible] his property, for which [illegible] trespass by night or house-breaking [illegible] of the offence of criminal trespass [illegible]

CASES.

Scaling a wall.—Effecting entrance into a house at night by scaling a wall amounts to house-breaking by night.[2]

Departure through a doorway.—The accused entered into a house at night and effected his departure with a vessel under his arm from the house after knocking down a person who stood in the doorway. *It was held that the conviction for house-breaking by night was good.*[3]

Entry to commit adultery.—Where a stranger, uninvited and without any right to be there, effected an entry in the middle of the night into the sleeping ap[illegible] and when an attempt wa[illegible] it [illegible]

[1] *Jotharam Davay*, (1878) 2 Mad. 30.
[2] *Emdad Ally*, (1865) 2 W. R. (Cr.) 65.
[3] *Solai Kattayan*, (1892) 1 Weir 530.

an intent as was provided for by this section.[1] The accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her *hansli* (neck ornament). The evidence of the complainant clearly showed that the accused was not there with the consent or at the invitation or for the pleasure of the complainant. It was held that the accused was properly convicted under this section, it being for him to show that his intention was under the circumstances innocent.[2]

In a case where it was proved that the accused was found at night inside the complainant's house where he had gone for the purpose of visiting the latter's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room, it was held that the accused had been wrongly convicted under this section as he had none of the intentions necessary to constitute the offence described in s. 451 and could hardly have had the intention of committing the offence described in s. 509.[3]

PRACTICE.

Evidence.—For lurking house-trespass by night prove (1) that the accused committed lurking house-trespass.[4]

(2) That the same was committed after sunset and before sunrise.

For house-breaking at night prove (1) that the accused committed house-breaking.[5]

(2) That the same was committed after sunset and before sunrise.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

The splitting up of one aggravated offence into separate minor offences is prohibited, *e.g.*, a conviction for lurking house-trespass and theft under this section and s 380 instead of for lurking house-trespass in order to commit theft under s. 457.[6]

A conviction under this section may be made even though the accused is charged with the commission of an offence under s. 457.[7]

Charge.—A conviction under this section is not bad for want of the specifica- [illegible]

the accused had; it will be enough if it is shown that the intention must have been one or other of those specified in s 441, though it may not be certain which it was.[8] But if the accused pleads that his intention was an innocent one, it is for him to say what it was, as the burden of proving it is on him, the knowledge of that intent being specially within his knowledge.[9] Where, however, it appears that the accused has been prejudiced by the omission to frame a charge and to specify the intent, the conviction must be set aside and a re-trial ordered.[10]

[1] *Kailash Chandra Chakrabarty*, (1889) 16 Cal. 657; *Balmakand Ram* v. *Ghansamram*, (1894) 22 Cal. 391; *Premanundo Shaha* v. *Brindabun Chung*, (1895) 22 Cal 994; *Karali Prasad Guru*, (1916) 44 Cal 358; *Ram Rang*, (1902) P. R. No. 18 of 1905; *Mohammad Nasiruddin*, (1925) 4 Pat. 459.

[2] *Ishri*, (1906) 29 All. 46; *Mulla*, (1915) [illegible] conflicts with (1905) [illegible] which lays down that entry into a house with the object of committing adultery will constitute this offence though the husband alone can prosecute. See *Bandhu*, (1894) Unrep. Cr. C. 689, which also lays down that the omission of the husband to prosecute for adultery does not [illegible] 8;

[3] *Vide* s. 445, sup.

[4] *Ramcharan Katri*, (1866) Beng. L. R. Sup. Vol. 488, 6 W. R. (Cr.) 39, F. B.

[5] *Karali Prasad*, (1916) 20 C. W. N. 107.

[6] *Balmakand Ram* v. *Ghansamram*, sup.

[7] *Ishri*, sup.

[8] *Vide* s. 445, sup.

[9] *Jadav Mahton*, (1920) 2 P. L. T. 140.

(2) That he did so after making preparation for causing hurt, or assaulting, or wrongfully restraining some person, or for putting some person in fear of hurt, assault, or wrongful restraint.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or Magistrate of the first class.

Charge—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you on or about the——day of——, at——, committed lurking house-trespass (*or* house-breaking) by entering into (or unlawfully remaining in) the building in the possession of AB and used as a human dwelling (*or* for the custody of property) having made preparation for causing hurt to the said AB (*or for assaulting* any person or for wrongfully restraining any person, *or* for putting any person in fear of hurt *or* assault or of wrongful restraint), and that you thereby committed an offence punishable under s. 455 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Punishment for lurking house-trespass or house-breaking by night.

456. Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

Lurking house-trespass or house-breaking is punishable under s. 453; but when it is committed at night this section is applicable. Unless the intent necessary to prove the offence of criminal trespass is present, the offence under this section cannot be committed Where the accused persons, execution creditors, broke open the complainant's door before sunrise with intent to distrain his property, for which they were [illegible] convicted on a charge of lurking house-trespass by night or house-breaking [illegible]

CASES.

Scaling a wall.—Effecting entrance into a house at night by scaling a wall amounts to house-breaking by night [2]

Departure through a doorway.—The accused entered into a house at night and effected his departure with a vessel under his arm from the house after knocking down a person who stood in the doorway. It was held that the conviction for house-breaking by night was good.[3]

Entry to commit adultery.—Where a stranger, uninvited and without any right to be there, effected an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and, when an attempt was made to capture him, used great violence in his efforts to make good his escape, it was held that the Court should presume that the entry had been made with such

[1] *Jotharam Dhoray*, (1878) 2 Mad. 30.
[2] *Emdad Ally*, (1865) 2 W. R. (Cr) 65.
[3] *Solai Kattayan*, (1862) 1 Weir 570.

an intent as was provided for by this section.[1] The accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her *hansli* (neck ornament). The evidence of the complainant clearly showed that the accused was not there with the consent or at the invitation or for the pleasure of the complainant. It was held that the accused was properly convicted under this section, it being for him to show that his intention was under the circumstances innocent.[2]

In a case where it was proved that the accused was found at night inside the complainant's house where he had gone for the purpose of visiting the latter's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room, it was held that the accused had been wrongly convicted under this section as he had none of the intentions necessary to constitute the offence described in s. 451 and could hardly have had the intention of committing the offence described in s. 509.[3]

PRACTICE.

Evidence.—For lurking house-trespass by night prove (1) that the accused committed lurking house-trespass [4]

(2) That the same was committed after sunset and before sunrise.

For house-breaking at night prove (1) that the accused committed house-breaking.[5]

(2) That the same was committed after sunset and before sunrise.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

The splitting up of one aggravated offence into separate minor offences is prohibited, *e.g.*, a conviction for lurking house-trespass and theft under this section and s. 380, instead of for lurking house-trespass in order to commit theft under s. 457 [6]

A conviction under this section may be made even though the accused is charged with the commission of an offence under s. 457.[7]

Charge.—A conviction under this section is not bad for want of the specification of the intention in the charge, but one under s. 457 cannot be sustained without such specification In a charge under the former section, though a guilty intention must be proved, it is not necessary to prove which of the several guilty intentions the accused had, it

one or other of those

But if the accused pleads that his intention was an innocent one, it is for him to say what it was, as the burden of proving it is on him, the knowledge of that intent being specially within his knowledge [9] Where, however, it appears that the accused has been prejudiced by the omission to frame a charge and to specify the intent, the conviction must be set aside and a re-trial ordered [10]

[1] *Koilash Chandra Chakrabarty*, (1889) 16 Cal. 657; *Balmakand Ram* v. *Ghansamram*, (1894) 22 Cal. 391; *Premanundo Shaha* v.

down that entry into a house with the object of committing adultery will constitute this offence though the husband alone can prosecute. See *Bandhu*, (1894) Unrep. Cr. C. 689, which also lays down that the omission of the husband to prosecute for adultery does not

[4] *Vide* s. 445, sup.

[5] *Vide* s. 445, sup

[6] *Ramcharan Kurri*, (1866) Beng. L. R. Sup. Vol. 488, 6 W. R. (Cr.) 39, F. B.

[7] *Karali Prasad*, (1916) 20 C. W. N. 107,

[8] *Balmakand Ram* v. *Ghansamram*, sup.

[9] *Ishri*, sup

[10] *Jadav Mahton*, (1920) 2 P. L. T. 140.

(2) That he did so after making preparation for causing hurt, or assaulting, or wrongfully restraining some person, or for putting some person in fear of hurt, assault, or wrongful restraint.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or Magistrate of the first class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you on or about the——day of——, at——, committed lurking house-trespass (*or* house-breaking) by entering into (*or* unlawfully remaining in) the building in the possession of AB and used as a human dwelling (*or* for the custody of property) having made preparation for causing hurt to the said AB (*or* for assaulting any person or for wrongfully restraining any person, *or* for putting any person in fear of hurt *or* assault or of wrongful restraint), and that you thereby committed an offence punishable under s. 455 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Punishment for lurking house-trespass or house-breaking by night.

456. Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

Lurking house-trespass or house-breaking is punishable under s. 453; but [illegible]

they were convicted on a charge of lurking house-trespass [illegible] by night, it was held that as they were not guilty of the offence of criminal trespass they could not be convicted under this section.[1]

CASES.

Scaling a wall.—Effecting entrance into a house at night by scaling a wall amounts to house-breaking by night.[2]

Departure through a doorway.—The accused entered into a house at night and effected his departure with a vessel under his arm from the house after knocking down a person who stood in the doorway. It was held that the conviction for house-breaking by night was good.[3]

Entry to commit adultery.—Where a stranger, uninvited and without any right to be there, effected an entry in the middle of the night into the sleeping [illegible] of a woman, a member of a respectable household, and, when an attempt [illegible] escape, [illegible] ch

[1] *Jotharam Daray*, (1878) 2 Mad. 30.
[2] *Emdad Ally*, (1865) 2 W. R. (Cr.) 65.
[3] *Solai Kattayan*, (1892) 1 Weir 530.

an intent as was provided for by this section.[1] The accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her *hansli* (neck ornament). The evidence of the complainant clearly showed that the accused was not there with the consent or at the invitation or for the pleasure of the complainant. It was held that the accused was properly convicted under this section, it being for him to show that his intention was under the circumstances innocent.[2]

In a case where it was proved that the accused was found at night inside the complainant's house where he had gone for the purpose of visiting the latter's widowed daughter-in-law, a woman of loose character, with whose knowledge and consent he had in all probability entered the room, it was held that the accused had been wrongly convicted under this section as he had none of the intentions necessary to constitute the offence described in s. 451 and could hardly have had the intention of committing the offence described in s. 509.[3]

PRACTICE.

Evidence.—For lurking house-trespass by night prove (1) that the accused committed lurking house-trespass.[4]

(2) That the same was committed after sunset and before sunrise.

For house-breaking at night prove (1) that the accused committed house-breaking.[5]

(2) That the same was committed after sunset and before sunrise.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

The splitting up of one aggravated offence into separate minor offences is prohibited, *e.g.*, a conviction for lurking house-trespass and theft under this section and s. 380 instead of for lurking house-trespass in order to commit theft under s. 457.[6]

A conviction under this section may be made even though the accused is charged with the commission of an offence under s. 457.[7]

Charge.—A conviction under this section is not bad for want of the specifica- [illegible]

the accused had, it will be enough if it is shown that the intention must have been one or other of those specified in s. 441, though it may not be certain which it was.[8] But if the accused pleads that his intention was an innocent one, it is for him to say what it was, as the burden of proving it is on him, the knowledge of that intent being specially within his knowledge.[9] Where, however, it appears that the accused has been prejudiced by the omission to frame a charge and to specify the intent, the conviction must be set aside and a re-trial ordered.[10]

[1] *Koilash Chandra Chakrabarty*, (1889) 16 Cal. 657; *Balmakand Ram* v. *Ghansamram*, (1894) 22 Cal. 391; *Premanundo Shaha* v. [illegible]

[2] *Ishri*, (1906) 29 All. 46; *Mulla*, (1915) 37 All. 205. [illegible]

down that entry into a house with the object of committing adultery will constitute this offence though the husband alone can prosecute. See *Bandhu*, (1894) Unrep. Cr. C. 689, which also lays down that the omission of the husband to prosecute for adultery does not absolve the accused from criminal liability.

[3] *Lajje Ram*, (1898) P. R. No. 12 of 1898; *Mulkhi Ram*, (1919) P. L. R. No. 50 of 1919.

[4] *Vide* s. 443, sup.

[5] *Vide* s. 445, sup.

[6] *Ramcharan Kairi*, (1866) Beng. L. R. Sup. Vol. 488, 6 W. R. (Cr.) 39, F. B.

[7] *Karali Prasad*, (1916) 20 C. W. N. 107.

[8] *Balmakand Ram* v. *Ghansamram*, sup.

[9] *Ishri*, sup.

[10] *Jadav Mahton*, (1920) 2 P. L. T. 140.

(2) That he did so after making preparation for causing hurt, or assaulting, or wrongfully restraining some person, or for putting some person in fear of hurt, assault, or wrongful restraint.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or Magistrate of the first class.

Charge—*I (name and office of Magistrate, etc.)*, hereby charge you *(name of the accused)* as follows:—

That you on or about the——day of——, at——, committed lurking house-trespass (*or* house-breaking) by entering into (*or* unlawfully remaining in) the building in the possession of AB and used as a human dwelling (*or* for the custody of property) having made preparation for causing hurt to the said AB (*or* for assaulting any person or for wrongfully restraining any person, *or* for putting any person in fear of hurt *or* assault *or of wrongful restraint*), and that you thereby committed an offence punishable under s. 455 of the Indian Penal Code and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Punishment for lurking house-trespass or house-breaking by night.

456. Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with *imprisonment of either description for a term* which may extend to three years, and shall also be liable to fine.

COMMENT.

nishable under s. 453; but
Unless the intent necessary
he offence under this section
cannot be committed. Where the accused persons, execution creditors, broke open the complainant's door before sunrise with intent to distrain his property, for which

CASES.

Scaling a wall.—Effecting entrance into a house at night by scaling a wall amounts to house-breaking by night.[2]

Departure through a doorway.—The accused entered into a house at night and effected his departure with a vessel under his arm from the house after knocking down a person who stood in the doorway. It was held that the conviction for house-breaking by night was good.[3]

Entry to commit adultery.—Where a stranger, uninvited and without any right to be there, effected an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and, when an attempt was made to capture him, used great violence in his efforts to make good his escape, it was held that the Court should presume that the entry had been made with such

[1] *Jotharam Dutty*, (1878) 2 Mad. 30.
[2] *Fmdad Ally*, (1865) 2 W. R. (Cr.) 65.
[3] *Solni Kattayan*, (1892) 1 Weir 630.

absolve the accused from criminal liability under this section.[1] Where, on a charge under this section, it was proved to the satisfaction of the Court that the accused did enter the complainant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, and further that he did so without the husband's consent, and the accused was convicted, it was held that the conviction was proper. It was not necessary that the complainant should bring a specific charge of adultery.[2]

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night,[3] or house-breaking by night.[4]

(2) That the same was committed to commit theft, or an offence punishable with imprisonment.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

An attempt to commit an offence under this section is punishable under s. 511 and not under Chapter XII or XVII of the Code.[5]

A charge of house-trespass with intent to commit adultery can be entertained without a complaint by the husband or person having care of the woman.[6]

Separate convictions.—An accused person was convicted of house-breaking by night in order to commit an offence (mischief and assault) and also under ss. 426 and 352 for the offences of mischief and assault and punished separately for each offence. It was held that the sentences were legal [7] For further cases, see Comment on s. 71.

Offences committed in the same transaction.—Where offences under this section and s. 380 are committed in one transaction, it is very desirable that formal convictions under both sections be recorded, in order that, if the accused subsequently commits another theft, technical difficulties may not arise.[8]

Charge.—In drawing up a charge the offence intended with a view to which [illegible] ng by night and of house-trespass in respect of the same acts, it was held that the second head of the charge was superfluous, inasmuch as it involved the same intention substantially as the first, which intention ought not to be applied to support two different charges [9]

The charge should run thus :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused* as follows :—

Th[illegible] trespass [illegible] ing to [illegible] hour of [illegible] imprisonment, to wit the offence of——; and that you thereby committed an offence punishable under s. 457 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.

[1] *Bandhu*, (1894) Cr. R. No. 11 of 1894, Unrep. Cr. C. 689.

[2] [illegible] ce *Chatter* [illegible]

[3] *Vide* ss. 444, 456, sup.

[4] *Vide* ss. 446, 456, sup.

[5] *Harnam*, (1907) P. R. No. 17 of 1907

[6] *Subz Ali*, (1876) P. R. No 2 of 1877; *Bandhu*, sup.

[7] *Nirichan*, (1888) 12 Mad. 36.

[8] *Nga Pan Bee*, (1908) 2 B. L. T. 19; see also, *Sheobhajan Ahir*, (1920) 2 P. L. T. 125.

[9] *Khandu*, (1886) Cr. R. No. 50 of 1886, Unrep. Cr. C. 302.

The charge should run as follows :—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at—, committed lurking house-trespass by night [*or* house-breaking by night] by entering into the building belonging to [illegible]

hour

of the

the Court of Session (*or* the High Court)].

And I hereby direct that you be tried by the said Court (*in cases tried by Magistrate omit these words*) on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.

457. Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

"To support a conviction under s. 457...it is necessary to prove that the lurking house-trespass by night or house-breaking by night was committed 'in order to the committing of any offence punishable with imprisonment'; but the criminal intention which is thus made the essential element of the offence can, generally speaking, only be inferred from the circumstances of the case, and it is from those circumstances that the Court trying an offender must find whether the intention to commit some such offence as is contemplated by the section is made out, or not."[1]

CASES.

Where the door of a shop was found broken open, it was held that the conviction should have been for house-breaking by night, and not simply lurking house-trespass by night.[2]

A, with a view to support a fraudulent claim of title to a house, broke into it at night during the temporary absence of the owner, assaulted the owner's servant who was in charge of the house, and took forcible possession of it. It was held that A was guilty under this section as he intended to use criminal force to the servant in possession and, therefore, intended to commit an offence.[3] The accused, a previous convict, made his way into an open thorned enclosure in which goats and sheep were kept. He was disturbed and therefore ran away. It was held that on *these facts the accused could not be convicted of lurking house-trespass* under this section but only of attempted theft under ss. 379 and 511.[4]

Adultery.—Where the accused was convicted of an offence of house-breaking by night with intent to commit adultery, and the complainant, the owner of the house, not being the husband of the woman with whom the adultery was to be committed, and the accused not intending to commit any offence except adultery, it was held that the omission of the husband to prosecute for the adultery did not

[1] Per Rattigan, J., in *Sher Singh*, (1883) P. R. No. 14 of 1883.

[2] *Kenaram Bousee*, (1865) 4 W. R. (Cr.) 19.

[3] *Sellamuthu* v. *Pallamuthu*, (1911) 35 Mad. 186.

[4] *Ghasita*, (1918) P. R. No. 13 of 1919.

absolve the accused from criminal liability under this section.[1] Where, on a charge under this section, it was proved to the satisfaction of the Court that the accused did enter the complainant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, and further that he did so without the husband's consent, and the accused was convicted, it was held that the conviction was proper It was not necessary that the complainant should bring a specific charge of adultery.[2]

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night,[3] or house-breaking by night.[4]

(2) That the same was committed to commit theft, or an offence punishable with imprisonment.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

An attempt to commit an offence under this section is punishable under s. 511 and not under Chapter XII or XVII of the Code.[5]

A charge of house-trespass with intent to commit adultery can be entertained without a complaint by the husband or person having care of the woman.[6]

Separate convictions.—An accused person was convicted of house-breaking by night in order to commit an offence (mischief and assault) and also under ss. 426 and 352 for the offences of mischief and assault and punished separately for each offence. It was held that the sentences were legal.[7] For further cases, see Comment on s. 71.

Offences committed in the same transaction.—Where offences under this section and s. 380 are committed in one transaction, it is very desirable that formal convictions under both sections be recorded, in order that, if the accused subsequently commits another theft, technical difficulties may not arise.[8]

Charge.—In drawing up a charge the offence intended with a view to which trespass was committed should be entered in the charge.

Where the accused was convicted of house-breaking by night and of house-trespass in respect of the same acts, it was held that the second head of the charge was superfluous, inasmuch as it involved the same intention substantially as the first, [illegible] different charges[9]

[illegible] u (*name of the accused*

as follows :—

Th[illegible]

trespass

ing to [illegible]

hour of

imprisonment, to wit the offence of——; and that you thereby committed an offence punishable under s. 457 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment.—As to the Frontier District, see s. 448.

[1] *Bandhu*, (1894) Cr. R. No. 11 of 1894, Unrep. Cr. C. 689.

[2] *Kangla*, (1900) 23 All. 82. See *Chatter* [illegible]

[3] [illegible] of 1907

[4] *Subz Ali*, (1876) P. R. No. 2 of 1877; *Bandhu*, sup.

[5] [illegible]; see [illegible] 125. 1886.

Whipping.—In the case of a conviction of attempting to commit house-breaking by night with intent to commit theft, a sentence of whipping was annulled as being illegal.[1]

Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint.

458. Whoever commits lurking house-trespass by night, or house-breaking by night, having made preparation for causing hurt[1] to any person, or for assaulting[2] any person, or for wrongfully restraining[3] any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

COMMENT

This section is analogous to ss. 452 and 455. It only applies to the house-breaker who actually has himself made preparation for causing hurt to any person, etc., and not to his companions as well who themselves have not made such preparation.[2]

1. **'Having made preparation for causing hurt.'**—See s. 319, *supra*, as to the definition of 'hurt.'

2. **'Assault.'**—See s. 351, *supra*.

3. **'Wrongful restraint.'**—See s. 339, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night[3] or house-breaking by night.[4]

(2) That he did as above after having made preparation for causing hurt, or for assaulting, or for wrongfully restraining some person, or for putting some one in fear of hurt, assault or wrongful restraint.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, or Presidency Magistrate, or Magistrate of the first class.

Charge.—See s. 457, *infra*.

Punishment.—As to the Frontier District, see s. 448.

Grievous hurt caused whilst committing lurking house-trespass or house-breaking.

459. Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt[1] to any person or attempts[2] to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The offence under this section is an aggravated form of the offence described in the last section.

Scope.—This section and s. 460 provide for a compound offence, the governing incident of which is that either a 'lurking house-trespass' or 'house-breaking'

[1] *Yella valad Parshia*, (1866) 3 B. H. C. (Cr. C.) 37.
[2] *Ghulam*, (1923) 4 Lah. 399
[3] *Vide* s. 444.
[4] *Vide* s. 446.

must have been completed in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections The sections must be construed strictly, and they are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking.[1] The accused one early morning were disturbed by a watchman while engaged in making a hole in the wall of the house of the complainant. Immediately upon being so disturbed they attempted to make their escape, one of the accused firing off a pistol and the other two attempting to prevent their apprehension by using their sticks. The first accused was convicted under this section and the two others under s. 460. The former Chief Court of the Punjab quashed the conviction under these sections and recorded them under ss. 452 and 511.[2]

1. **'Grievous hurt.'**—The grievous hurt must be caused, or the attempt must be made, during the time that the house-breaking is being committed, and not after that offence is completed, and the offender has left the premises.[3] For the meaning of the term 'grievous hurt,' see s. 320, *supra*.

2. **'Attempts.'**—See s. 511, *infra*.

Premeditation to cause hurt, etc., not essential.—If in the commission of the lurking house-trespass or house-breaking a personal injury of the kind here mentioned is caused or attempted to be caused, it is immaterial that it was without premeditation and sudden.[4]

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass[5] or house-breaking.[6]

(2) That he caused grievous hurt, or attempted to cause death or grievous hurt, to some person.

(3) That he did as above whilst engaged in committing lurking house-trespass or house-breaking.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——*day of*——, *at*——, *while committing lurking* house-trespass or house-breaking caused grievous hurt to AB (*or* attempted to cause the death of AB *or* grievous hurt to AB) and that you thereby committed an offence punishable under s. 459 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As to the Frontier District, see s. 448.

All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.

460. If, at the time of the committing of lurking house-trespass by night or house-breaking by night,[1] any person guilty of such offence shall voluntarily[2] cause or attempt[3] to cause death[4] or grievous hurt[5] to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with transportation for life, or with

[1] [illegible]

[2] [illegible]

[3] [illegible]

[4] M. & M. 407.

[5] *Vide* s. 443, *sup.*

[6] *Vide* s. 445, *sup.*

imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section deals with the constructive liability of persons jointly concerned [illegible] or house-breaking by night in the course of [illegible] is committed. It is immaterial who causes [illegible] person jointly concerned in committing such house-trespass or house-breaking shall be punished in the manner provided in the section.[1]

This section when read with ss. 445 and 441 demands that the offence of house-breaking shall have been completed to bring an offender within its terms. The accused must be "guilty of such offence," *viz.*, house-breaking by night. The accused and another person attempted to break into a house by night for the purpose of committing theft, and were interrupted by the inmates, one of whom was killed by one of the accused. There was no evidence to show which of the accused caused the death. It was held that the accused could not be punished with transportation for life as the offence of house-breaking was attempted only and not committed.[2]

1. **'At the time of the committing of...house-breaking by night.'**—This expression "is to some extent vague, but...it must be limited to the time during which the criminal trespass continues which forms an element in house-trespass, which is itself essential to house-breaking and cannot be extended so as to include any prior or subsequent time."[3] The accused broke into the house of one T at night with intent to commit theft, armed with deadly weapons, left the house on an alarm being raised and in the courtyard stabbed R who tried to seize them, injuring him so that he died later on. They were pursued and captured. It was held that as the stabbing was done after the house-breaking was complete this section did not apply, but that the accused were guilty of offences under ss. 457, 458 and 326.[4] The accused was one of a party of four men who broke into the house of the complainant by night and, being discovered, were running away when a neighbour caught hold of the accused whereupon some of his companions inflicted certain injuries upon the neighbour of which he died on the spot. It was held that this section was not applicable as the offence of house-breaking by night had been completed when the neighbour arrived on the scene.[5]

A man who, in the commission of lurking house-trespass by night, voluntarily attempts to cause grievous hurt to the owner of the house who tries to capture him, is punishable under this section and not under ss. 457 and 324.[6]

2. **'Voluntarily.'**—See s. 39, *supra*.

3. **'Attempts.'**—See s. 511, *infra*.

4. **'Death.'**—See s. 46, *supra*.

5. **'Grievous hurt.'**—See s. 320, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused committed lurking house-trespass by night;[7] or house-breaking by night.[8]

[1] *Chatur*, (1911) 8 A. L. J. R. 574.
[2] *Saifudin*, (1874) P. R. No. 16 of 1874; *Jowala Singh*, (1880) P. R. No. 12 of 1880, explained in *Umar Din*, (1891) P. R. No. 12 of 1891.
[3] Per Plowden, J., in *Jaffir*, (1881) P. R. No. 2 of 1882.
[4] *Sed Rasul*, (1916) P. R. No. 27 of 1916
[5] *Muhammad*, (1921) 2 Lah. 342.
[6] *Lukhun Dass*, (1865) 2 W. R. (Cr.) 52.
[7] *Vide* s. 444, *sup.*
[8] *Vide* s. 446, *sup.*

(2) That he caused, or attempted to cause, death or grievous hurt.[1]

(3) That he did as above whilst engaged in committing lurking house-trespass by night or house-breaking by night.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at ——, jointly with certain other person, to wit——, committed lurking house-trespass by night [*or* house-breaking by night] by entering into the building belonging to AB, and used as a human dwelling, and that one of the said persons, to wit——, at the time of committing such offence voluntarily caused [*or* attempted to cause] death [*or* grievous hurt] to——, and that you thereby committed an offence punishable under s. 460 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Punishment.—As to the Frontier District, see s. 448.

Dishonestly breaking open receptacle containing property.

461. Whoever dishonestly,[1] or with intent to commit mischief,[2] breaks open or unfastens any closed receptacle[3] which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

This and the following section provide for the same offence. As soon as the receptacle is broken open or unfastened the offence is complete.

1. '**Dishonestly.**'—See s. 24, *supra*

2. '**Mischief.**'—See s. 425, *supra*.

3. '**Receptacle.**'—This may include not only a room, a part of a room or closet, etc., but a box or closed package.[2]

T, being an inmate of his uncle's house, broke open a chest and took out property from it. He was convicted of an offence under s. 457. It was held that he could not properly be convicted under that section, but should have been convicted under this section and s 378.[3]

PRACTICE.

Evidence.—Prove (1) that the receptacle was closed or fastened.

(2) That it contained property, or that the accused believed that it contained property.

(3) That the accused broke open or unfastened it.

(4) That he did so dishonestly, or with intent to commit mischief.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, dishonestly [*or* with intent to commit mischief] broke open [*or* unfastened] a certain closed receptacle, to wit—, which contained [*or* which you believed to contain] certain property, to wit——;

[1] See *Nur Dad* and *Fatta*, (1919) 1 L. L. J. 252.

[2] M. & M. 408.

[3] *Tasuduk Hossein*, (1874) 6 N. W. P. 301.

and that you thereby committed an offence punishable under s. 461 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment for same offence when committed by person entrusted with custody.

462. Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

This section deals with the same offence as is punishable under the preceding section. The punishment under it is higher as there is a breach of trust on the part of the person to whom the receptacle is entrusted.

PRACTICE.

Evidence.—Prove points (1) to (4) as for s. 461; and further:—

(5) That the accused was entrusted with such receptacle.

(6) That he was so entrusted with it, in a closed or unfastened state.

(7) That he had no authority to open the same.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, being entrusted with a certain closed receptacle, to wit——, which contained [or which you believed to contain] certain property, to wit ——, on or about the——day of——, at——, dishonestly [or with intent to commit mischief] broke open [or unfastened] the said receptacle, without having authority to open the same; and thereby committed an offence punishable under s. 462 of the Indian Penal Code, and within my cognizance [or within the cognizance of the Court of Session or the High Court].

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS.

Forgery.

463. Whoever makes any false document or part of a document,[1] with intent to cause damage or injury to the public or to any person,[2a] or to support any claim or title[2b], or to cause any person to part with property,[2c] or to enter into any express or implied contract,[2d] or with intent to commit fraud[2e] or that fraud may be committed, commits forgery.

Making a false document.

464. A person is said to make a false document—

First.—Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document,[1] with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed,[2a] or at a time at which he knows that it was not made, signed, sealed or executed [2b]; or

Secondly.—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly.—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration.

ILLUSTRATIONS.

(*a*) A has a letter of credit upon B for Rs. 10,000, written by Z. A, in order to defraud B, adds a cipher to the 10,000, and makes the sum 1,00,000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery

(*b*) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B, and thereby of obtaining from B the purchase money. A has committed forgery

(*c*) A picks up a cheque on a banker signed by B, payable to bearer, but without any sum having been inserted in the cheque A fraudulently fills up the cheque by inserting the sum of ten thousand rupees A commits forgery.

(*d*) A leaves with B, his agent, a cheque on a banker, signed by A, without inserting the sum payable, and authorizes B to fill up the cheque by inserting a sum

not exceeding ten thousand rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. B commits forgery.

(c) A draws a bill of exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as A draws the bill with intent to deceive the banker by leading him to suppose that he had the security of B, and thereby to discount the bill, A is guilty of forgery.

(f) Z's will contains these words—"I direct that all my remaining property be equally divided between A, B and C." A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(g) A endorses a Government promissory note and makes it payable to Z or his order by writing on the bill the words "Pay to Z or his order" and signing the endorsement. B dishonestly erases the words, "Pay to Z or his order" and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(h) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(i) Z dictates his will to A. A intentionally writes down a different legatee from the legatee named by Z, and, by representing to Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(j) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property. A has committed forgery.

(k) A without B's authority writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery, inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an express or implied contract for service.

Explanation 1[a].—A man's signature of his own name may amount to forgery.

ILLUSTRATIONS.

(a) A signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(b) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a bill of exchange drawn by B upon Z, and negotiate the bill as though it had been accepted by Z. A is [illegible] the bill upon the paper pursuant [illegible]

(c) A picks up a bill of exchange [illegible] t person of the same name. A endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable: here A has committed forgery.

(d) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate in collusion with [illegible] Z at a nominal rent and for a long period, and [illegible] he seizure, with intent to defraud A, and to [illegible] as granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(e) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors; and in order to give a colour to the transaction, wr[illegible] received, and a [illegible] made before A [illegible] first head of the definition.

Explanation 2[illegible].—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

ILLUSTRATION.

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

Punishment for forgery.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

[illegible] meaning of the Code.

The definition of forgery in the Code is not as simple and clear as it is in common law Forgery in England is not defined by statute. It is defined in common law as the fraudulent making (or alteration) of a writing to the prejudice of another man's right.[1]

Section 463.—Scope.—Section 463 "contemplates two classes of intents, and it is clear...that it is not an essential quality of the fraud mentioned in the section that it should result in or aim at the deprivation of property. If this be so, it cannot [illegible] t (s. 464), which is but a part of [illegible] criminality an intent different [illegible] s 463"[2]

Ingredients.—The elements of forgery are—

1. The making of a false document or part of it.
2. Such making should be with intent to
   (a) cause damage or injury to (i) the public, or (ii) any person; or
   (b) support any claim or title; or
   (c) cause any person to part with property; or
   (d) enter into any express or implied contract; or
   (e) commit fraud or that fraud may be committed.

1. 'Whoever makes any false document or part of a document.'—To constitute the offence of forgery the simple making of a 'false document' is sufficient. What amounts to the making of a 'false document' is explained in s. 464. The person who makes a 'false document' commits forgery. A person who is not the writer of a forged document cannot be charged with committing the substantive offence of forgery. If he has caused such a 'false document' to be made he will be guilty

[1] Blackstone, Vol. IV, p. 247.

[2] *Abbas Ali*, (1897) 25 Cal. 512, 521, F.B., overruling *Haradhan's case*, (1892) 19 Cal. 380

of abetment.[1] It is not necessary that the document should be published or made in the name of a really existing person.[2] But "it is essential that the false document, when made, must either appear on its face to be, or be in fact, one, which, if true, would possess some legal validity, or in other words must be legally capable of effecting the fraud intended."[3] A writing, which is not legal evidence of the matter expressed, may yet be a 'document' if the parties framing it believed it to be, and intended it to be, evidence of such matter.[4] Thus, forging a deed will amount to this offence, although a statute requires the deed in a particular form, or to comply with certain requisites, and the forged deed is not in the form, or does not comply with those requisites.[5]

The assertion of a false claim in a document will not constitute the document a false one, when it is executed by the party who purports to execute it and there is no intention of causing a belief that it was executed by some other person, real or fictitious. A, who was not the son, natural or adopted, of the deceased B, executed a deed of mortgage of certain properties of B in favour of C. In the body of the document A was described as the son of B, though no such description appeared in the signature. A was known to C for a long time, and A had no intention of causing it to be believed that the document was executed by any other person than himself. It was held that A was not guilty of making a 'false document.'[6]

"Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other."[7] Every forgery is a counterfeit.[8] But every concoction of a document is not forgery. Supposing A says to B he has got a promissory note from B, and threatens to sue him if he does not pay the money due upon it. B finds that the document in possession of A purports to be a copy of a promissory note by B. If B had never given a promissory note, A cannot be convicted of forgery or of uttering a forged document, but of cheating he may be.

If the false document is incomplete in such a material way as no one will be deceived there will be no conviction for forgery. Where the accused drew a bill upon the treasurer of the Navy payable to blank or order, and signed it in the name of a navy surgeon, it was held that forging an instrument payable to blank or order was not sufficient, there must be a payee.[9] The instrument should be complete. But if a forged document is not wholly void for want of certain form the maker of it will be guilty of forgery.[10]

2a. 'Intent to cause damage or injury to the public or to any person.'—When a false document is made, with 'intent to cause damage or injury to the public or to any person,' it is not necessary to prove that in making the document the accused knew that the document might injure, but it must be proved that it was his intention that it should injure another.[11]

As to the meaning of the word 'injury,' see s. 44, *supra*; of 'public,' s. 12; [illegible] of 'person,' s. 11 [illegible] matter [illegible] ould [illegible] fact

instituted, is a reasonable one.[12]

[1] *Haidar Ali*, (1912) 17 C. W. N. 354.
[2] *Vide* Explanation 1.
[3] 2 Bishop 503; Collet's Comments on the Indian Penal Code, quoted in *Jawala Ram*, (1894) P. R. No. 12 of 1895.
[4] *Sheefait Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. (A. Cr. J.) 12.
[5] *Thomas Lyon*, (1813) R. & R. 255; *James Mackintosh*, (1800) 2 Leach 883.
[6] *Adaikalammai* v. *Raman*, (1908) 32 Mad. 90.
[7] Per Bramwell, B., in *John Smith*, (1858) 8 Cox 32, 37.
[8] Per Byles, J., in *ibid.*
[9] *Richards*, (1811) R. & R. 193; *Daniel Randall*, (1811) R. & R. 195; *Richard Pateman*, (1821) R. & R. 455; *Butterwick*, (1839) 2 M. & Rob. 196.
[10] *Thomas Lyon*, sup.
[11] *Feda Hossein*, (1881) 10 C. L. R. 184.
[12] *Ahmed Ali*, (1925) 42 C. L. J. 215.

2b. 'Support any claim or title.'—Even if a man has a legal claim or title to property, he will be guilty of forgery if he counterfeits documents in order to sup- [illegible] l, transfer, or otherwise [illegible] ions (*f*), (*g*), (*h*) and (*i*). [illegible] claim to property. It [illegible] n to a woman as the [illegible] g the claimant's child, or a claim to be admitted to attendance at a law class in a college, or to be admitted to a university or other examination, or a claim to the possession of immoveable or any other kind of property."[2]

2c. 'To cause any person to part with property.'—"It is not...necessary to constitute a forgery under s. 463 that the 'property' with which it is intended that the false document shall cause a person to part, should be in existence at the time when the false document was made. For example, if A gave an order to B to buy the material for making and to make a silver tea service for him, and C, before the tea service was made or the materials for making it had been bought, were to make a false letter purporting, but falsely, to be signed by A, authorising B to deliver to D the tea service when made, C would have committed forgery within the meaning of s. 463 by making that false document with intent to cause B to part with property, namely, the tea service, when made."[3] A written certificate has been held to be 'property' within the meaning of this section.[4]

2d. 'To enter into any express or implied contract.'—The false document under this clause must be to enable the person making it to enter into any express or implied contract. Creation of contractual rights by false documents is covered by this clause.

2e. 'Intent to commit fraud.'—"The offence (of forgery) is complete if a document, false in fact, is made with intent to commit a fraud, although it may not have been made with any one of the other intents specified in s 463."[5]

"By *fraud*, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other is immaterial."[6] It has been held in a Bombay case that the term 'fraud' is used in this section in its ordinary and popular acceptation.[7] Stephen[8] says: "Whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive, or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end...A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this. Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage

[1] *Dhanum Kazee*, (1882) 9 Cal. 53.

[2] Per Edge, C. J., in *Sashi Bhushan*, (1893) 15 All. 210, 217; *Kotamraju Venkatrayadu*, (1903) 28 Mad. 90, 98, F. B., *Khandusingh*, (1896) 22 Bom. 768.

[3] Per Edge, C. J., in *Sashi Bhushan*, sup., p. 216.

[4] *Ibid.*

[5] Per Sir Arnold White, C. J., in *Kotamraju Venkatrayadu*, sup., p. 93.

[6] Per Blanc, J., in *Haycraft* v. *Creasy*, (1801) 2 East 92, 108; followed with approval in *Tukal Narayan*, (1886) 13 Bom. 515n., 517, which is followed in *Lalit Mohan Sarkar*, (1894) 22 Cal. 313.

[7] *Balkrishna Vaman*, (1913) 15 Bom. L. R. 708, 2 Bom. Cr. C. 115.

[8] History of Criminal Law, Vol. II, p. 121. This extract is quoted with approval in several Indian cases.

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The expression "intend to defraud" implies conduct coupled with intention to deceive and thereby to injure; in other words, "defraud" involves two conceptions, namely, deceit and injury to the person deceived; that is, infringement of some legal right possessed by him, but not necessarily deprivation of property. The addition of a name to the list of attesting witnesses of an instrument which need not in law be attested is held not to amount to making a false document.[4]

It is a necessary part of this offence that any damage or injury should be actually suffered or that any fraud should be perpetrated. From the intention that the false document should deceive others into a belief that it is genuine it may generally be inferred that there was an intention to damage or injure.[5]

Deprivation of property, actual or intended, does not constitute an essential element of an intention to defraud.[6] An intent to defraud may be inferred from the wilful use of a forged instrument to support a genuine claim.[7]

Intent to defraud any particular person not necessary.—A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction; and such an intention is a necessary inference which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one meaning it to be taken as such, and knowing it to be forged.[8] It is not required, in order to constitute in point of law an intent to defraud that the party committing the offence should have had present in his mind an intention to defraud a particular person, if the consequence of the act would necessarily or possibly be to defraud any person; but there must, at all events, be a possibility of some person being defrauded by the

[1] Per Bannerji, J., in *Muhammad Saeed Khan*, (1898) 21 All 113, 115.

[2] *Kotamraju Venkatrayadu*, (1905) 28 Mad 90, 96, F B. The majority of the Court have expressed their non-concurrence with the case of *Srinivasan*, (1902) 25 Mad. 726. See Weir 332.

[3] *Manika Asari*, (1915) M W N 278.

[4] *Surendra Nath Ghosh*, (1910) 12 C. L. J. 277, 289, 14 C. W. N. 1076, *Ahmed Ali*, (1923) 42 C. L. J. 215

[5] M & M 416.

[6] *Abbas Ali*, (1897) 25 Cal. 512, F.B., *Kotamraju Venkatrayadu*, sup.

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[8] *Dhunum Kazee*, (1882) 9 Cal. 53.

forgery.[1] It is not necessary that there should have been some person defrauded. A man may have an intent to defraud and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his [illegible]

Cases.—**Intent to defraud.**—If a person have the authority of another to write the name of that other to an acceptance, it is no forgery; neither is it if he had no such authority, provided that he had fair ground for considering that he had such authority, and did so consider, and wrote the acceptance, not meaning to defraud or injure any one.[3] Even if there is no previous authority of the person whose name is put on a bill of exchange, still if that person has been informed of it at the time and he does not repudiate it, it will not amount to forgery.[4] But if A puts the [illegible] to be [illegible] gery.[5] [illegible] write [illegible] of exchange for a larger amount, with intent to defraud either the acceptor or any other person, this is forgery.[6] A forged cheque on the W Bank was presented for payment at the S Bank, where the supposed drawer never kept cash. It was held that this was sufficient evidence of an intent to defraud the partners of the S Bank, although there was no probability of their paying the cheque, even if it had been genuine.[7]

In a case of forgery, the fact that the prisoner had given guarantees to his bankers, to whom he paid a forged note, to a larger amount than the note, was held not to negative an intent to defraud.[8] If a person knew the acceptance of a bill of exchange to be forged, and uttered it as true, and believed that his bankers, to whom he uttered it, would advance money on it, which they would not otherwise, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act, and a person is not the less guilty of forgery because he may intend ultimately to take up the forged bill, and may suppose that the party whose name is forged will be no loser, and the fact that the bill has been since paid by the accused will make no difference, if the offence has once been complete at the time of the uttering.[9] The accused was convicted on an indictment at common law for forging and uttering a diploma of the College of Surgeons. The jury found that the accused forged the document with the general intent to induce the belief that it was genuine and that he was a member of the College, and he showed it to certain persons with intent to induce such belief in them; but that he had no intent in forging or in uttering to commit any particular fraud or specific wrong to any individual. It was held that the conviction was wrong as it was not proved that the act was done with intent to defraud.[10]

Copy.—The offence of forgery may be committed by a person who fabricates a false document purporting to be a copy of another document for the purpose of the same being used in evidence. The accused, in a suit for possession of land to support his pedigree, put in a deed of dower, and a deed of security purporting to be copies of the original documents filed in a previous suit, but it was found that

[1] *Hermann Marcus*, (1846) 2 C. & K. 356; *Trenfield*, (1858) 1 F. & F. 43; *Mary Mazagora*, (1815) R. & R. 291.

[2] Per Maule, J., in *Charles Nash*, (1852) 2 Den. Cr. C. 493, 21 L. J. (M. C.) 147.

[3] *Parish*, (1837) 8 C. & P. 94.

[4] *Smith*, (1862) 3 F. & F. 504.

[5] *Forbes*, (1835) 7 C. & P. 224.

[6] *John Hart (Minter)*, (1836) 7 C. & P. 652.

[7] *Crowther*, (1832) 5 C. & P. 316.

[8] *Charles James*, (1836) 7 C. & P. 553.

[9] *Geach*, (1840) 9 C. & P. 499.

[10] *Henry Hodgson*, (1858) Dears & B. 3.

should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud." "Where, therefore, there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud, and if a document is fabricated with such intent, it is a forgery."[1] The majority of the Judges of the Madras High Court in a full bench case[2] seem to be of opinion that an intention to secure a benefit or advantage to the party deceiving by means of the deceit constitutes an intention to defraud. Sir Arnold White, C. J., while observing that it was not necessary to decide this point, said "that either an intention to secure a benefit or advantage on the one hand, or cause loss or detriment on the other, by means of deceit, is an intent to do fraud." He also observed: "Intending to defraud means, of course, something more than deceiving. A tells B a lie and B believes him. B is deceived but it does not follow that A intended to defraud B. But, as it seems to me, if A tells B a lie intending that B should do something which A conceives to be to his own benefit or advantage, and which, if done, would be to the loss or detriment of B, A intends to defraud B." The object for which the deceit is practised has to be considered. The advantage intended to be secured or the harm intended to be caused need not have relation to property or be such as is implied in the term 'dishonestly' but it must be something to which the party perpetrating the deceit is not entitled either legally or equitably. Where the accused altered a document without the authority of the executant after its execution, and it was proved that the alteration was made to prevent other people from setting up a claim to property which was admittedly in the possession of the accused, the object cannot be said to be dishonest and the man is not guilty of forgery.[3]

The expression "intend to defraud" implies conduct coupled with intention to deceive and thereby to injure; in other words, "defraud" involves two conceptions, namely, deceit and injury to the person deceived; that is, infringement of some legal right possessed by him, but not necessarily deprivation of property. The addition of a name to the list of attesting witnesses of an instrument which need not in law be attested is held not to amount to making a false document.[4]

It is a necessary part of this offence that any damage or injury should be actually suffered or that any fraud should be perpetrated. From the intention that the false document should deceive others into a belief that it is genuine it may generally be inferred that there was an intention to damage or injure.[5]

Deprivation of property, actual or intended, does not constitute an essential element of an intention to defraud.[6] An intent to defraud may be inferred from the wilful use of a forged instrument to support a genuine claim.[7]

Intent to defraud any particular person not necessary.—A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction; and such an intention is a necessary inference which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one meaning it to be taken as such, and knowing it to be forged.[8] It is not required, in order to constitute in point of law an intent to defraud that the party committing the offence should have had present in his mind an intention to defraud a particular person, if the consequence of the act would necessarily or possibly be to defraud any person; but there must, at all events, be a possibility of some person being defrauded by the

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forgery.[1] It is not necessary that there should have been some person defrauded. A man may have an intent to defraud and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend with his knowledge forges his name to a cheque either to try his credit, or to imitate his handwriting, there would be no intent to defraud, though there would be parties who might be defrauded; but where another person has no account at his bankers, but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded.[2]

Cases.—Intent to defraud.—If a person have the authority of another to write the name of that other to an acceptance, it is no forgery; neither is it if he had no such authority, provided that he had fair ground for considering that he had such authority, and did so consider, and wrote the acceptance, not meaning to defraud or injure any one.[3] Even if there is no previous authority of the person whose name is put on a bill of exchange, still if that person has been informed of it at the time and he does not repudiate it, it will not amount to forgery.[4] But if A puts the name of B on a bill of exchange as acceptor without B's authority, expecting to be able to meet it when due, or expecting that B will overlook it, this is forgery.[5] Similarly, if a person having the blank acceptance of another, be authorised to write on a bill of exchange for a certain limited amount, and he writes on it a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, this is forgery.[6] A forged cheque on the W Bank was presented for payment at the S Bank, where the supposed drawer never kept cash. It was held that this was sufficient evidence of an intent to defraud the partners of the S Bank, although there was no probability of their paying the cheque, even if it had been genuine.[7]

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[5] *Forbes*, (1835) 7 C. & P. 224.

[6] [illegible] 652.

[7] [illegible]

[8] [illegible]

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[illegible] 12 C. L. J. [illegible] li, (1925)

[6] *Abbas Ali*, [illegible] 12, F.B., *Kotamraju Venkatrayudu*, sup.

[7] *Samuel Hopley*, (1915) 11 Cr. App. R. 248.

[8] *Dhunum Kazee*, (1882) 9 Cal. 53.

'Fraudulently': 'intent to commit fraud, etc.'—"Possibly a distinction may be drawn between doing a thing 'with intent...that fraud may be committed' (s. 463) and doing a thing 'fraudulently' (s. 464). Such a distinction seems to be recognised in s. 239 of the Code. But to my mind no distinction can be drawn between doing a thing 'with intent to commit a fraud' (s. 463) and doing a thing 'fraudulently' (s. 464). Although the words 'with intent to commit a fraud' are not expressly defined, I think they mean the same thing as 'fraudulently,' *i.e.*, to say, 'with intent to defraud.' It follows that if it is established that a person does a thing 'with intent to commit a fraud' he does it with one of the intents specified in s. 463, and he also does it 'fraudulently' within the meaning of s. 464. It also follows, as it seems to me, that the offence is complete if a document, false in fact, is made with intent to commit a fraud, although it may not have been made with any one of the other intents specified in s. 463."[1]

'Makes.'—The simple making of a false document constitutes forgery.[2] "The 'making' of a document, or part of a document, does not mean 'writing' [illegible] the words 'signs' 'seals,' or 'executes' or 'makes any mark' 'denoting the execution, etc.,' seems to me very clearly to denote that this is its true meaning. What constitutes a false document, or part of a document, is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document, or part of a document, knowing that the seal or signature is not his, and that he gave no authority to affix it. In other words, the falsity consists in the document, or part of a document, being signed or sealed with the name or seal of a person who did not in fact sign or seal it."[3] Stokes[4] in reference to this case says: "Why then were 'make' and 'made' used as well as 'signs,' 'executes,' 'signed,' 'executed'?" In an English case it has also been held that the taking of a positive impression on glass by photography is a making although such impression is evanescent, and cannot be printed or engraved from until it has been converted into a negative.[5] The Bombay High Court has distinguished this case. Where the accused counterfeited marks on a tree, it was held that this amounted to making a false document.[6]

The meaning given to the word 'making' in English law is very wide.

Making a document untrue in certain particulars for the purpose of deceiving is not sufficient, unless it is shown to have been made fraudulently or dishonestly.[7] Making a false document does not consist in writing without doing anything towards its execution.[8]

In England it has been held that it is forgery to make a deed fraudulently, with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed.[9]

'Signs, seals or executes.'—Signing or sealing a document completes its execution. Putting a seal to a genuine signature to a document which is invalid without a seal is a forgery.[10] This offence may be complete though no use whatever has been made or attempted to be made of the document.[11]

[1] Per Arnold White, C. J., in *Kotamraju Venkatrayudu*, (1905) 28 Mad. 90, 93, F.B.

[2] *Shefiat Ally*, (1868) 10 W. R. (Cr.) 61, 2 Beng. L. R. (A. Cr. J.) 12.

[3] Per Garth, C. J., in *Rizwat Ali*, (1881) 7 Cal. 352, 355.

[4] See Vol. I, p. 268.

[5] *Peter Rinaldi*, (1863) L. & C. 330.

[6] *Krishtappa Khandappa*, (1923) 27 Bom. L. R. 599, 8 Bom. Cr. C. 41.

[7] *Guddappa*, (1879) 1 Weir 542.

[8] *Lim Hoe*, (1894) 1 U. B. R. (1892-1896) 279.

[9] *William Rusen*, (1869) L. R. 1 C. C. R. 200.

[10] *Collins*, (1844) 1 Cox 57.

[11] Mad. H. C. Pro.

both the copies contained two more names of witnesses than the original. It was hel [illegible]
of [illegible]
ins [illegible]
me [illegible]
a copy of a forgery does not constitute forgery unless the maker of the copy was authorised to make the copy.[4]

The accused was convicted of forgery on the ground that he sent an imperfect copy of his diary to the Superintendent of Police. The High Court reversed the conviction on the ground that *the two lines not embodied in the copy sent were* evidently interpolations in the original diary, subsequently struck through with the pen; and that no forgery could be established unless it was proved that those interpolations were extant in the diary and had *not been struck through at the* time the copy was made.[5]

Section 464, clause 1.—The first clause says that a person makes a false document if he

1. dishonestly or fraudulently makes, signs, seals or executes a document, or part of a document, or makes any mark denoting the execution of a document; or

2. does as above with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed

(*a*) by or by the authority of a person by whom or by whose authority it was not so made, signed or executed, or

(*b*) at a time at which he knows that it was not made, signed, sealed or executed.

1. 'Dishonestly or fraudulently makes, signs, seals or executes a document, etc.'—A person is said to do a thing 'fraudulently' if he does that thing with intent to defraud, but not otherwise (s. 25). This "word is used in ss. 471 and 464 together with the word 'dishonestly' and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word dishonestly and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part."[6] "Those decisions...which proceed on the ground that an act is not fraudulent unless it causes or is intended to cause loss or injury to some one would seem to take too narrow a view of the meaning of the word 'fraudulently' as used in the Code."[7]

The making of a document untrue in certain particulars for the mere purpose of deceiving, does not amount to making a false document. It must be shown that it was made with such an intention as is implied in the term 'fraudulently' or in the term 'dishonestly.'[8]

"To execute false valuable securities in order to render inoperative genuine valuable securities, is an act which is,...an act done with a fraudulent intent. *It does not...cease to be fraudulent merely* because the genuine document may by a distinct act of fraud be withheld from the rightful owner. The true description of such a transaction is that fraud is committed in order to counteract fraud, a description which is of no avail to the person by whom the false documents are made."[9]

[illegible] ruling *Haradhan*, (1892) 19 Cal. 380, which [illegible] Cr. C. 627. [illegible] *Venkatra-* [illegible] contra, [illegible] 103. [illegible]

[illegible] Per Plowden, J., in [illegible] *Muhammad*, (1884) P. R. No. 4 of 1885.

imprinted on trees and intended to be used as evidence that the trees had been passed for removal by the Ranger of a forest, it was held that he was guilty of making a false document.[1]

Entries.—The accused made certain entries in his ledger, which consisted of rough loose sheets, showing that certain sums of money had been paid to the prosecutor, which, in fact, had not been repaid. It was held that he was guilty of forgery.[2] A beat constable who wrote in his note-book the signature of a headman whose village he had not visited was held thereby not to have committed this offence.[3] Where the accused was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts, instead of making this entry as requested, he entered in a language not known to the complainant that the sum had been paid to the complainant, it was held that he had committed not forgery but an attempt to cheat.[4] The accused sold for Rs. 40 a bullock to the complainant who paid him one rupee as earnest money and promised to pay the balance at a certain time. An entry to this effect was made in the accused's account book and was thumb-marked by the complainant. Subsequently a clause was added by the accused on the credit side of the account book without the sanction of the complainant which said that if the amount was not paid as agreed upon, the creditor would take one and half times the principal, including interest. It was held that no false document had been made by the accused within the meaning of section 464.[5]

The accused transferred the whole of his property in favour of his wife but before registering the sale-deed mortgaged the property to F. The sale-deed was, however, registered after the mortgagee had made all necessary enquiry at the Registration Office. After the registration of the sale-deed the mortgage deed was also registered. The accused was charged for cheating the mortgagee. It appeared during the trial that the mortgage-deed filed by the complainant bore on it an [illegible] as he must be presumed to know the [illegible]ly could not have been absent from his mind when he forged the endorsement that he was thereby attempting to defraud the mortgagee of his money.[6]

The accused made unauthorised entries in books shewing certain donees of land as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shown as full proprietors. The deeds of gift made no mention of the *shamilat* and it was therefore a moot point whether the gifts covered a share in the *shamilat* or not and *prima facie* the new entries made by the accused were correct. It was held that as it could not be said that the accused (who acted apparently *bona fide*) made the entries with intent to defraud, or dishonestly, he did not make a false document.[7]

Unauthorised signature.—A petition praying that a fishery lease might be transferred from A to B, and purporting to be signed by A and B, was presented to the Deputy Commissioner by A. B was not present but his son was, and admitted having signed his father's name. He was subsequently prosecuted, although no attempt was made to show that he had acted fraudulently and without his

[1] *Krishtappa Khandappa*, (1925) 27 Bom. L. R. 599, 8 Bom. Cr. C 41.

[2] (1865) 1 Mad. Jur. 11, 1 Ind. Jur. N. S. 46.

[3] *Nga Aung Ba*, (1899) 1 U. B. R. (1897-1901) 356.

[4] *Kunju Nayar*, (1888) 12 Mad. 114; *Balwant*, (1892) Cr. R. No. 15 of 1892, Unrep. Cr. C. 595; *Jawala Ram*, (1895) P. R. No. 12 of 1895.

[5] *Badan Singh*, (1922) 3 Lah. 373.

[6] *Abdul Rashid Khan*, (1913) 12 A. L. J. R. 104.

[7] *Muhammad Sirdar*, (1914) P. R. No. 25 of 1914.

Forgery at common law must be of some writing or document, and, therefore the putting the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the *original*, is not a forgery at common law, but is cheating.[1] Under the Code this will amount to forgery.

2-a. 'With the intention of causing it to be believed that such document...was made...by the authority of a person by whom or by whose authority he knows that it was not made..., etc.'—The making a false document should be *for one of the two purposes* specified in this clause. The document should not have been made, etc., by the authority of the person by whom it is alleged to have been made or if it is made by his authority then it must not be at a time at which it is alleged that it was made, signed, etc.

2b. 'At a time at which he knows that it was not made, signed, sealed or executed.'—These words are to be read distributively and are not governed by the preceding words 'by or by the authority, etc.'[2] Antedating a document constitutes forgery.[3] It is forgery to make a deed fraudulently with a false date when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed.[4]

Cases.—Clause 1.—False document should have been actually made.—Where a person gave orders for the printing of certain receipt forms similar to those used by a certain company, and corrected the proofs of the same, it being his intention to use the receipt forms in order to commit a fraud, it was held that he could not be convicted of forgery until one of the printed forms had been converted by him into [illegible] until he had done some act [illegible] into a document, all that was done consisted in the mere preparation for the commission of an offence.[5] But this case has not been followed by the Allahabad High Court in *R.* v. *MacCrea.*[6]

The mere fact that a document bearing a certain date was written on paper bearing an embossed stamp with a figure denoting a later date was held not suffi- [illegible] a charge of forgery in the absence of evidence that the paper [illegible] [7] [illegible] tendered [illegible] eating and convicted. It appeared that the brother of the accused, G. R. Martindale, had an account with the Bank and the signature on the cheque was only Martindale. The evidence was that he made an alteration in the date on the cheque in the presence of the shop-keeper and the *poddar* as though he were the drawer but made no representation about G. R. Martindale. It was held that inasmuch as the accused had no intention of inducing in the minds of the shop-keeper and the *poddar* the belief that the cheque had been signed by his brother and had no such intention in regard to the Bank, the cheque in question was not a false document and consequently the charge of forgery failed; that in the circumstances of the case there was dishonest concealment of facts on the part of the accused and he was guilty of cheating.[8] Where the accused counterfeited letters or marks

[4] *William Ritson*, (1869) L. R. 1 C. C. R. No. 38 of 200.
[5] *Riasat Ali*, (1881) 7 Cal. 352.
[6] (1893) 15 All. 173.
[7] *Sesha Charlu*, (1891) 1 Weir 540.
[8] *Martindale*, (1924) 29 C. W. N. 447.

[illegible] (Cr.) 23; But see (1903) 8

imprinted on trees and intended to be used as evidence that the trees had been passed for removal by the Ranger of a forest, it was held that he was guilty of making a false document.[1]

Entries.—The accused made certain entries in his ledger, which consisted of rough loose sheets, showing that certain sums of money had been paid to the prosecutor, which, in fact, had not been repaid. It was held that he was guilty of forgery.[2] A beat constable who wrote in his note-book the signature of a headman whose village he had not visited was held thereby not to have committed this offence.[3] Where the accused was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts, instead of making this entry as requested, he entered in a language not known to the complainant that the sum had been paid to the complainant, it was held that he had committed not forgery but an attempt to cheat.[4] The accused sold for Rs. 40 a bullock to the complainant who paid him one rupee as earnest money and promised to pay the balance at a certain time. An entry to this effect was made in the accused's account book and was thumb-marked by the complainant. Subsequently a clause was added by the accused on the credit side of the account book without the sanction of the complainant which said that if the amount was not paid as agreed upon, the creditor would take one and half times the principal, including interest. It was held that no false document had been made by the accused within the meaning of section 464.[5]

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The accused made unauthorised entries in books shewing certain doncs of land as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shown as full proprietors. The deeds of gift made no mention of the *shamilat* and it was therefore a moot point whether the gifts covered a share in the *shamilat* or not and *prima facie* the new entries made by the accused were correct. It was held that as it could not be said that the accused (who acted apparently *bona fide*) made the entries with intent to defraud, or dishonestly, he did not make a false document.[7]

Unauthorised signature.—A petition praying that a fishery lease might be transferred from A to B, and purporting to be signed by A and B, was presented to the Deputy Commissioner by A. B was not present but his son was, and admitted having signed his father's name. He was subsequently prosecuted, although no attempt was made to show that he had acted fraudulently and without his

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[4] *Kunju Nayar*, (1888) 12 Mad. 114; *Balwant*, (1892) Cr. R. No. 15 of 1892, Unrep.

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[5] *Badan Singh*, (1922) 3 Lah. 373.

[6] *Abdul Rashid Khan*, (1913) 12 A. L. J. R. 104.

[7] *Muhammad Sirdar*, (1914) P. R. No. 25 of 1914.

father's authority, and was convicted of fabricating false evidence. It was held that the conviction was bad because the writing of B's name by his son did not constitute a false entry and there was no intention that it should appear in evidence in any proceeding.[1] A, who was not the son, natural or adopted, of the deceased B, executed a deed of mortgage of certain properties of B in favour of C. In the body of the document A was described as the son of B, though no such description appeared in the signature. A was known to C for a long time, and A had no intention of causing it to be believed that the document was executed by any other person than himself. It was held that A was not guilty of making 'a false document' within the meaning of s. 464. The assertion of a false claim in a document will not constitute the document a false one, when it is executed by the party who purports to execute it and there is no intention of causing a belief that it was executed by some other person, real or fictitious.[2]

Personation at an examination.—A falsely represented himself to be B at a University examination, got a hall ticket in B's name, and headed and signed answer papers to questions with B's name. It was held that A had committed the offence of forgery and cheating by personation.[3]

Vakalatnamah.—The signing of a vakalatnamah in the name of co-decree-holders [illegible] Vakil with instructions to file a [illegible] paying that the case may be struck off the file, is held to be a forgery.[4]

Signing a petition in the name of another.—Where A signed B's name to a petition presented by C to a Mamlatdar, requesting his summary assistance, under Bombay Regulation XVII of 1827, for recovery of rents from B's tenants, it was held that even if A had no authority from B to sign his name, and even if A wished to deceive the Mamlatdar into the belief that it was B himself who had signed the petition, still, if there had been no intention to defraud anybody, or it no wrongful gain or wrongful loss could have been caused to A or B, A's act did not constitute forgery. Avoidance of litigation is no wrongful loss to Government.[5]

Fabricating a letter or certificate of recommendation for a post.—The accused, who was a copyist in the Sub-divisional Office at B, applied for a clerkship then vacant in that office. An endorsement on his application, recommending him for the post and purporting to have been made by the Sub-divisional Officer of B, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Sub-divisional Officer at B, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Sub-divisional Officer, having some suspicions as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post office the accused fabricated a third document, purporting to be a letter from the Sub-divisional Officer to the postmaster asking him to stop the despatch of the demi [illegible] formerly with regard [illegible] said that he falsely made it either dishonestly or fraudulently within the [illegible] of s. 464.[6] The accused applied to the Superintendent of Police at Poona for employment in the Police force. In support of his application he presented two

[1] *Po Shin*, (1906) 4 L. B. R. 45. [illegible] decision is doubted in *Rash Behari* [illegible] *nk*, (1894)
[2] *Adaikalammal* v. *Raman*, (1908) 32 Mad [illegible] *n*, (1906)
90. [illegible] *lar facts*
[3] *Appasami*, (1889) 12 Mad. 151. [illegible] attempt
[4] *Gyanee Ram*, (1866) 6 W. R. (Cr.) 78.
[5] *Bhawanishankar*, (1874) 11 B. H. C. 3. to cheat.
[6] *Abdul Hamid*, (1886) 13 Cal. 349 A

certificates which he knew to be false. One of these certificates was a wholly fabricated document, whilst the other was altered by several additions made subsequently to the issue of the certificate. It was held that the accused was guilty of offences under ss. 463 and 471.[1] Where a private candidate for the Matriculation examination of the University of Madras, for the purpose of being admitted to the examination, forwarded to the Registrar of the University, as required by the bye-laws, a certificate that he was of good character and that he had completed his twentieth year which purported to be signed by the Head Master of a recognized school but was in fact not signed by him, but was signed by the candidate in his own writing, it was held that the certificate was a forged document within the meaning of ss. 467 and 464.[2] A submitted to the proper authority an application for an appointment in the Land Records Department. This application contained false statements and to it was attached a forged certificate. It was held that A had attempted to obtain wrongful gain and that he had acted 'dishonestly.'[3]

English case.—The Corporation of the Trinity House were in the habit of examining persons voluntarily submitting to an examination, touching their nautical skill, and granting them certificates to act as masters. In order to enable persons to be examined and procure such certificates, it was necessary to produce to the examiners certificates of service, sobriety, and good conduct at sea, for not less than six years. The accused forged certificates for the purpose of inducing the examiners to pass him. It was held that he had committed forgery.[4]

Fabricating a receipt for a debt written off by a creditor.—The accused, in order that he might obtain the annulment of an order adjudicating him an insolvent, and thereafter that he might be in a position to tender for municipal contracts, produced before the receiver in insolvency a document which purported to be a receipt from a creditor for payment of debt which the creditor had in fact written off as irrecoverable. It was held that in respect of the use of this receipt the accused was guilty under this section read with s. 471.[5]

Giving a false name and address in a certificate of purchase.—A person lawfully entitled to possess arms and ammunitions signing the prescribed certificate of purchase of the same in the name of another with an address not his own, and thereby deceiving the gunsmith and the Government and defeating the object of the certificate, commits forgery. The act of the accused was not 'dishonest' but he acted 'fraudulently.'[6]

Fabricating an order purporting to have issued from a superior to a subordinate officer.—One Piari, the wife of Amir, left her husband's house. Amir put in a petition at the Police station asking that a search might be made for the missing woman, and he also employed a pleader, one Ali Zohad, to assist him in discovering the whereabouts of Piari. Ali Hassan, the son of Ali Zohad, and a clerk employed in the office of the District Superintendent of Police, forged two orders purporting to be orders of the District Superintendent of Police, the first intimating that the woman Piari was with one Sibni, the wife of Ghisu, weaver, and that the Sub-Inspector should be directed to hand her over to the petitioner (Amir), and the second directing the Sub-Inspector of Kydganj to hand the woman over to the petitioner. It was held that in fabricating these two documents Ali Hassan had [illegible] made the docu- [illegible] is custody was found to have been tampered with in this way, that a page, apparently containing unfavourable remarks to the constable, had been taken out, and a new page with

[1] [illegible]

[2] [illegible] 90, 1 Weir 3338, F. B.

[3] *Nga Ba Thein*, (1922) 4 U. B. R. 174

[4] *Francis Toshack*, (1849) 4 Cox 38.

[5] *Abdul Ghafur*, (1920) 43 All. 225.

[6] *Causley*, (1915) 43 Cal. 421.

[7] *Ali Hasan*, (1906) 28 All. 358.

favourable remarks, purporting to have been written and signed by various superior officers of Police, had been inserted in its place, the intent being to favour the chances of his promotion; it was held that this interpolation amounted to forgery, but that, inasmuch as it was not proved that the constable himself prepared and inserted the false page, he was rightly convicted of abetment only.[1]

But a person consenting to act under a moukhtearnamah and attaching his name in token of such consent, does not become a maker of the *moukhtearnamah* or a forger if it turns out to be forged.[2]

Second clause.—This clause requires dishonest or fraudulent cancellation or alteration of a document in any material part without lawful authority after it has been made or executed by a person who may be living or dead.

The alteration must be in a material part of the document. Thus the interpolation of the name of a person as an attesting witness to a document not required by law to be attested subsequent to its execution and registration is not an alteration of the document in a material part.[3]

Where the date in a bond was altered, even though the alteration was not required to bring the claim within limitation[4], and where a document was deliberately tampered with to support a just claim in Court and to counteract a fraud perpetrated by the opposite party,[5] this offence was held to have been committed. But where the vendees of a plot of land altered the number of which the land was described in the deed of sale, because such number was not the right number, and used it as evidence in a suit; the alteration of the deed was held not to amount to forgery. The Court said: "The identity of the property which the deed of sale purported to convey could not possibly be affected by the alteration of the figures, and the substitution of one number for the other could not possibly defraud any one or have the effect of causing wrongful loss or wrongful gain to any person. If the object of the alteration were to make it appear that the property intended to be conveyed by the sale-deed was other than that which it actually did purport to [illegible] of the property [illegible] ation cannot fall under the definition of making a false document.[6] Similarly, where the date of a [illegible] within [illegible] was [illegible] the [illegible] used [illegible] did not intend to support a false claim by a false bond.[7] A promissory [illegible] pressed no time for payment, an[illegible] the words "on demand" were added [illegible] by the payee against the maker it [illegible] effect of the note as it originally stood, and was therefore immaterial, it did not affect the validity of the instrument.[8]

A Mukhtear who appeared for the plaintiff in an ejectment suit *before a* Rent Court, in open Court but without the permission of the Court, or even of the officer of the Court in whose custody the record was, took the plaint in the case and altered it so as to represent the plaintiff as claiming ejectment of the defendant from one field more in addition to *those mentioned originally* in the plaint. It did not appear whether the plaintiff was or was not entitled to eject the defendant *from that field, but inasmuch as* the alteration was made openly and the prosecution

[1] *Muhammad Saeed Khan*, (1868) 21 All. 113; *Ramgopal Dhur*, (1868) 10 W. R. (Cr.) 7.

[2] *Burjo Barich*, (1866) 5 W. R. (Cr.) 70.

[3] *Surendra Nath Ghosh*, (1910) 14 C. W. N. 1076, 12 C. L. J. 277.

[4] *Ram Narain*, (1881) P. R. No. 14 of 1881.

[5] *Gobinda Mal*, (1895) P. R. No. 6 of 1895.

[6] *Fateh*, (1882) 5 All. 217, 220.

[7] *Mir Ekrar Ali*, (1880) 6 Cal. 482.

[8] *Aldous v. Cornwell*, (1868) L. R. 3 Q. B 573

had not established that it was made fraudulently or dishonestly, it was held that upon those facts the Mukhtear could not properly be convicted of forgery.[1]

Third clause—This clause requires that a person must fraudulently or dishonestly cause any person to sign, seal, execute, or alter a document knowing that such person could not by reason of (*a*) unsoundness of mind, or (*b*) intoxication, or (*c*) deception know the contents of the document or the nature of the alteration.

Where the accused obtained a genuine signature upon a false document, by inserting the document in a heap of papers placed for signature before the person signing it, it was held that the accused had not committed an offence under this section, on the ground that no deception was practised on the person signing it to prevent him from knowing the nature of the document.[2] It must be shown that the accused practised deception, so as to prevent a person from knowing the nature of the document, before the accused can be found guilty. Where the accused, a *mohurrir*, in a Registry Office, was charged with making false endorsements of registry on the back of certain deeds which endorsements were signed by the Registrar, it was held that, before he could be convicted of forgery, it must be shown that the Registrar, in consequence of deception practised upon him by the accused, did not know the contents of the document he was signing.[3]

3. **Explanation 1.**—There may be a sufficient falsity in a man's merely signing his own name, if he do this in order that it may be mistaken for the signature of another person of the same name. If a bill of exchange payable to A or order, set into the hand of another person of the same name as the payee, and such person, knowing that he was not the real person in whose favour it was drawn, indorse it, he is guilty of forgery.[4]

It is a false document if the offender makes it falsely in the name of any other person, although that name happens also to be the offender's own name. A man who makes a promissory note in his own name without any false description or addition and with an honest intention, if he afterwards uses or attempts to use the note, pretending that it is signed by another person of the same name, does not by this false representation make the promissory note 'a false document'. It was a genuine document when he signed it and does not become false by his subsequent [illegible]

[illegible]

and authentic when it is false and deceptive.[5]

4. **Explanation 2.**—"As to the charge of forgery it is wholly immaterial whether the name forged is that of a fictitious person who never existed or of a real person. It is as much a forgery in the one case as in the other provided the fictitious name is assumed for the purpose of fraud in the particular case under trial...There is, however, no doubt that an intention to defraud is an essential ingredient; but it is sufficient to show that there was an intention to defraud generally. Whether there was an intention to defraud or not is a question of fact to be determined with reference to the special circumstances of each case."[6]

As to how far personating the true man or assuming a fictitious character will affect this offence, the following principles, as laid down in *Dunn's case*,[7] are briefly summarised by East.[8] "First, that if a person give a note or other security as his own note or security, and the credit thereupon be personal to himself

[1] *Bisheshar Dayal*, (1905) 25 A. W. N. 93.
[2] *Nujeebutoollah*, (1868) 9 W R. (Cr.) 20.
[3] *Dwarkanath Ghose*, (1873) 20 W. R. (Cr.) 49.
[4] *Mead* v. *Young*, (1790) 4 T R 28.
[5] M. & M. 415
[6] Per Muttusami Ayyar and Parker, JJ., in *Pera Raju*, (1889) 13 Mad. 27, 31; *Sheefait Ally*, (1868) 10 W. R. (Cr.) 61; 2 Beng. L. R. (A. Cr. J.) 12.
[7] (1765) 1 Leach 57, 59.
[8] *Pleas of the Crown, Vol. II*, 961.

without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery; for in that case it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view. [illegible] either really exis[illegible] credit, or induce [illegible] then a false instr[illegible] be the same, the [illegible] sence of him who lent his money upon it, if the imposter and the party whose name is made use of were both strangers to him; for then he could not know that such [illegible] ame he assumed, and therefore the other [illegible] of these propositions was followed in a [illegible] payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin in the presence of the prosecutor upon a bank at which he, the accused, had no account, and gave it to the prosecutor as his own cheque drawn in his own name.[1] But if a person authorise another to sign a note in his name, dated at a particular place, and made payable at a banker's; and the person, in whose name it is drawn, represent it to be the name of another person, with intent to defraud, and no such person as the note and the representation import exists, this is forgery.[2] Signing a bill in an assumed name is a forgery, if the name was assumed to defraud the person to whom such bill is given, though such person would equally have taken the bill had the accused used his real name.[3]

Cases.—Document in the name of a fictitious person.—The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4 and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta: to have then requested the postal authorities at Calcutta by a letter signed Robert S. Wilson, to have the money orders redirected to him as above at Rajam: to have similarly requested the Postmaster at Rajam to pay the money orders to his clerk, Seshgiri Rau: to have subsequently received the value of money orders made out in favour of Robert S. Wilson from the Postmaster at Rajam signing receipts as Seshgiri Rau: Robert S. Wilson and Seshgiri Rau were alleged to be fictitious persons, and it was also alleged that the accused had no book on English idioms ready to be despatched to purchasers: it was held that the above allegations supported charges of cheating and forgery.[4] Where certain persons signed a bail bond with names which were not their own, it was held that the persons were not guilty of an offence under this section as they had before signing the bond informed the Magistrate that their names were the names they afterwards [illegible] intended [illegible] or fictitious other than the accused.[5]

Document made to conceal a previous dishonest, or fraudulent, or negligent act.—The Calcutta High Court has laid down that if the intention with which a false document is made is to conceal a fraudulent or dishonest act which has been previously commit[illegible] an intention to commit fraud; and if the [illegible] ing of a false document with that intentio[illegible] gery.[6] It has also held

[1] *Martin*, (1879) 5 Q. B. D. 34.

[2] *Parkes & Brown*, (1796) 2 Leach 775, 2 East P. C. 963, 965.

[3] *John Francis*, (1811) R. & R. 209; *Robert Peacock*, (1814) R. & R. 278; *Samuel Whiley*, (1805) R. & R. 90; *Thomas Bonhen*, (1813) R. & R. 260.

[4] [illegible] (1890) 13 Mad. 27.

[illegible] 8 M. L. T. [illegible] Cal. 313. [illegible] 9.

that the making of false entries in a book or register by any person in order to conceal a previous fraudulent or dishonest act falls within the purview of s. 477-A inasmuch as the intention is to defraud.[1] In a subsequent case, however, the same Court held that the alteration of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation was not an offence either under s. 465 or s. 477-A, there having been no intent to commit fraud. The cases of *Lolit Mohan Sarkar* and *Rash Behari Das* were distinguished on the ground that the entry in this case showed that the accused was liable and it was a statement of the true position of affairs, whereas in those cases the accounts were framed in such a way as to conceal liability and to present an untrue state of affairs.[2]

The Madras High Court is of the same opinion. It has held that a debtor who forges a release to screen himself from liability to pay the debt is guilty of forgery, because he intended by the forgery to cover a dishonest purpose.[3] Where a process-server prepared and filed into Court a false *attakshi* with forged signatures with a view to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty for a period of seven days, it was held that he was guilty of offences under ss. 468 and 471.[4]

The Bombay High Court had also held, adopting the Calcutta view, that a man who deliberately makes a false document with false signatures in order to shield and conceal an already perpetrated fraud is himself acting with intent to commit fraud. It is a fraud to take deliberate measures in order to prevent persons already defrauded from ascertaining the fraud practised on them and thus to secure the culprit who practised the fraud in the illicit gains which he secured by the fraud. In this case a village Kulkarni misappropriated certain sums which the *rayats* had paid to him for irrigation cesses. To prevent the *rayats* from complaining and to protect the fraud, he forged with the help of the accused certain *challans* showing that the sums had been paid over to the Government Treasury. The accused was paid Rs. 25 for the work. He was, on these facts, charged with the offence of forgery. The Sessions Judge acquitted him on the ground that the forgery was committed to conceal the fraud which had already been fully committed, whereas s. 463 required that forgery should be "with intent to commit fraud or that fraud may be committed." It was held, setting aside the order of acquittal, that the offence of forgery was complete although it was effected to conceal a fraudulent or dishonest act previously committed.[5]

A falsification of a record made in order to conceal a previous act of negligence, not amounting to fraud, does not amount to forgery.[6]

But the Allahabad High Court has ruled that falsifications of records made in order to conceal previous acts of fraud,[7] or negligence,[8] do not amount to forgery, as no one would be defrauded or injured by them. Following these decisions it has decided that a clerk who, after committing criminal breach of trust, makes false entries in an account book, with the intention of concealing such offence, does not commit forgery.[9] Similarly, where a public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents, with the intention of screening himself from punishment, it was held that such fabricated documents, having not been made with the intent specified in s. 463, were not forgeries.[10] With respect to a charge under s. 465 the prisoner's immediate and more probable intention,

[1] *Rash Behari Das*, (1908) 35 Cal. 450, dissenting from *Jiwanand*, (1882) 5 All. 221. *Girdhari Lal*, (1886) 8 All. 653, and *Abdul Hamid*, (1886) 13 Cal. 349, 351.

[2] *Jyotish Chandra Mukerjee*, (1909) 36 Cal. 455

[3] *Sabapati*, (1888) 11 Mad. 411.

[4] *Kamat-hinatha Pillai*, (1919) 42 Mad. 558.

[5] *Balkrishna Vaman*, (1913) 15 Bom. L. R. 708, 2 Bom. Cr. C. 115.

[6] *Shankar*, (1880) 4 Bom. 657.

[7] *Jageshur Pershad*, (1873) 6 N. W. P. 56.

[8] *Lal Gumul*, (1870) 2 N. W. P. 11

[9] *Jiwanand*, sup.

[10] *Mazhar Hussin*, (1883) 5 All. 553.

without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery; for in that case it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view. But, secondly, that if a note be given in the name of another person either really existing or repre[illegible] credit, or induce a trust which [illegible] then a false instrument, and [illegible] be the same, though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the imposter and the party whose name is made use of were both strangers to him; for then he could not know that such impostor was not really the person whose name he assumed, and therefore the other would be equally deceived." The first of these propositions was followed in a case where the accused, Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin in the presence of the prosecutor upon a bank at which he, the accused, had no account, and gave it to the prosecutor as his own cheque drawn in his own name.[1] But if a person authorise another to sign a note in his name, dated at a particular place, and made payable at a banker's; and the person, in whose name it is drawn, represent it to be the name of another person, with intent to defraud, and no such person as the note and the representation import exists, this is forgery.[2] Signing a bill in an assumed name is a forgery, if the name was assumed to defraud the person to whom such bill is given, though such person would equally have taken the bill had the accused used his real name.[3]

Cases.—Document in the name of a fictitious person.—The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4 and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta: to have then requested the postal authorities at Calcutta by a letter signed Robert S. Wilson, to have the money orders redirected to him as above at Rajam: to have similarly requested the Postmaster at Rajam to pay the money orders to his clerk, Seshgiri Rau: to have subsequently received the value of money orders made out in favour of Robert S. Wilson from the Postmaster at [illegible] Seshgiri Rau: Robert S. Wilson and Seshgiri Rau were [illegible] so alleged that the accused had no book [illegible] purchasers: it was held that the above allega[illegible] of cheating and forgery.[4] Where certain persons signe[illegible]n, it was held that the persons [illegible] they had before signing the bond informed the Magistrate that [illegible] the names they afterwards signed to the bail bond and that, therefore, they could not be held to have intended to cause the Magistrate to believe that the bail bond was signed by any person real or fictitious other than the accused.[5]

Document made to conceal a previous dishonest, or fraudulent, or negligent act.—The Calcutta High Court has laid down that if the intention with which a false document is made is to conceal a fraudulent or dishonest act which has been previously committed, that intention cannot be other than an intention to commit fraud; and if the intention is to commit fraud, the making of a false document with that intention will come within the definition of forgery.[6] It has also held

[1] *Martin*, (1879) 5 Q. B. D. 34.

[2] *Parkes & Brown*, (1796) 2 Leach 775, 2 East P. C. 963, 965.

[3] *John Francis*, (1811) R. & R. 209; *Robert Peacock*, (1814) R. & R. 278; *Samuel Whiley*, (1805) R. & R. 90; *Thomas Bontien*, (1813) R. & R. 260.

[4] *Pera Raju*, (1889) 13 Mad. 27.

[5] *Venkaraju Venkatasami*, (1910) 8 M. L. T. 124, [1910] M. W. N. 232.

[6] *Lalit Mohan Sarkar*, (1894) 22 Cal. 313, 327; *Das*, (1909) U. B. R. (P. C.) 29.

that the making of false entries in a book or register by any person in order to conceal a previous fraudulent or dishonest act falls within the purview of s 477-A inasmuch as the intention is to defraud.[1] In a subsequent case, however, the same Court held that the alteration of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation was not an offence either under s. 465 or s. 477-A, there having been no intent to commit fraud. The cases of *Lolit Mohan Sarkar* and *Rash Behari Das* were distinguished on the ground that the entry in this case showed that the accused was liable and it was a statement of the true position of affairs, whereas in those cases the accounts were framed in such a way as to conceal liability and to present an untrue state of affairs.[2]

The Madras High Court is of the same opinion. It has held that a debtor who forges a release to screen himself from liability to pay the debt is guilty of forgery, because he intended by the forgery to cover a dishonest purpose.[3] Where a process-server prepared and filed into Court a false *attakshi* with forged signatures with a view to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty for a period of seven days, it was held that he was guilty of offences under ss. 468 and 471.[4]

The Bombay High Court had also held, adopting the Calcutta view, that a man who deliberately makes a false document with false signatures in order to shield and conceal an already perpetrated fraud is himself acting with intent to commit fraud. It is a fraud to take deliberate measures in order to prevent persons [illegible] paid Rs. 25 for the work. He was, on these facts, charged with the offence of forgery. The Sessions Judge acquitted him on the ground that the forgery was committed to conceal the fraud which had already been fully committed, whereas s. 463 required that forgery should be "with intent to commit fraud or that fraud may be committed." It was held, setting aside the order of acquittal, that the offence of forgery was complete although it was effected to conceal a fraudulent or dishonest act previously committed.[5]

A falsification of a record made in order to conceal a previous act of negligence, not amounting to fraud, does not amount to forgery.[6]

But the Allahabad High Court has [illegible] in order to conceal previous acts of fraud, [illegible] as no one would be defrauded or injure[illegible] has decided that a clerk who, after committing criminal breach of trust, makes false entries in an account book, with the intention of concealing such offence, does not commit forgery.[9] Similarly, where a public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents, with the intention of screening himself from punishment, it was held that such fabricated documents, having not been made with the intent specified in s. 463, were not forgeries.[10] With respect to a charge under s. 465 the prisoner's immediate and more probable intention,

[1] *Rash Behari Das*, (1908) 35 Cal. 450, [illegible] 455.

[2] *Sabapati*, (1888) 11 Mad. 411.

[3] *Ramatchinatha Pillai*, (1919) 42 Mad. 553.

[4] *Balkrishna Vaman*, (1913) 15 Bom. L. R. 708, 2 Bom Cr. C. 115.

[5] *Shankar*, (1880) 4 Bom 657.

[6] *Jageshur Pershad*, (1873) 6 N W. P. 56.

[7] *Lal Gunul*, (1870) 2 N. W. P. 11

[8] *Jiwanand*, sup.

[9] *Mazhar Husain*, (1883) 5 All. 553.

and not his remoter and less probable intention, should be attributed to him. Where the intention is to conceal a fraud which has been previously committed, it is not the kind of intention which that section refers to.[1] Where the accused in order to save himself from the consequences of misappropriations made by him, made false entries in the accounts, it was held that he could not be convicted of forgery.[2]

The Rangoon High Court has adopted the view of the Madras High Court. Where a Bench Clerk received a sum of money paid in as fine and misappropriated it, and made a false receipt to cover up such misappropriation, it was held that the offence came under the provisions of ss. 467 and 471.[3]

Joint act.—If several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.[4] Each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone, in the absence of others.[5] Thus, the makers of the paper and plate respectively for the purpose of forging a note, afterwards filled up by a third person, are principals in the forgery with that person.[6]

Abetment.—A person taking an active part in the preparation of a document, but no part in the forgery of the name of the executant, does not commit forgery, but simply abets the offence.[7] To prepare in conjunction with others a copy of an intended false document, and to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such false document do not constitute forgery, or an attempt to commit it, but would amount to abetment.[8]

PRACTICE.

Evidence.—Prove (1) that the accused made, signed, sealed, or executed the document, or any part of it, or made a mark denoting execution.

(2) That he did as in (1) with the intention of causing it to be believed that such document was made, signed, sealed, or executed by, or by the authority of another person; or (2) that it was executed at a particular time.

(3) That such another person did not so execute, or did not authorize such execution, or that such execution was not at that particular time.

(4) That the accused knew that it was not so executed, either by such person, or by the authority of such person, or at that time.[9]

(5) That he did as in (1) and (2) dishonestly or fraudulently, or with intent (*a*) to cause damage or injury, or (*b*) to support any claim or title, or (*c*) to cause a person to part with property, or (*d*) to cause any person to enter into any express or implied contract, or (*e*) to commit a fraud, or that a fraud might be committed.

Or prove (1) the making or executing of the document by some one.

(2) That the accused afterwards altered such document by cancellation or otherwise.

(3) That such alteration was in a material part of the document.

(4) That the accused had no lawful authority to make such alteration.

(5) That he did so dishonestly, or fraudulently, or with intent, etc., as in (5) above.

Or prove (1) that the accused caused a person to sign, seal, execute, or alter the document.

(2) That such person when doing as in (1) was ignorant of the contents of the document, or of the nature of the alteration.

[1] *Girdhari Lal*, (1886) 8 All. 653.
[2] *Shiya-ud-din Ahmad*, (1922) 20 A. L. J. R. 682.
[3] *Nga Ba Sein*, (1924) 3 B. L. J. 113.
[4] *John Bingley*, (1821) R. & R. 446.
[5] *Robert Kirkwood*, (1831) 1 Mood. 304.
[6] *Jonathan Dade*, (1831) 1 Mood. 307.
[7] *Kashi Nath Nask*, (1897) 25 Cal. 267
[8] *Padala Venkatasami*, (1881) 3 Mad. 4.
[9] *Ramgopal Dhur*, (1868) 10 W. R. (Cr). 7.

(3) That such ignorance was due to (*a*) unsoundness of mind, or (*b*) intoxication, or (*c*) a deception practised upon him.

(4) That the accused knew of such ignorance, and the reason thereof.

(5) That he, when causing such person to sign, etc., acted dishonestly or fraudulently, or with intent, etc., as in (5) above.

Where it is alleged on behalf of the prosecution that a deed is forged, it is not sufficient for the prosecution to prove that it is improbable that the deed is genuine, but it must prove for a certainty that the deed is forged.[1]

[illegible]

between his handwriting and that of some fragmentary pieces of writing upon which the charge was based, it was held that the prosecution should make an attempt to show that the accused was the only man in the office who could have written the forged document.[2] It is dangerous to come to a conclusion on the questions of forgery on a mere comparison of the writing in a disputed document with the writings in admitted documents. One of the most useful tests in considering a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered. If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all. The judicial mind has constantly taken advantage of the characteristic peculiarities of individuals when a question has been raised whether their writings have been forged, such peculiarities being most commonly manifested in the formation of an idea or in the mode of spelling particular words.[3]

A conviction for forgery can seldom be based solely on non-resemblance of handwriting.[4]

A person is not entitled to give evidence as an expert in handwriting if his only knowledge on the subject is acquired in the course of a case.[5]

Non-admissibility of a civil judgment in a criminal trial.—In a suit by A against the obligors of a bond, the Court held, for the reasons stated in its judgments, that the signatures of the obligors were not genuine, and directed the prosecution of A on a charge of forgery. On the trial of A before a jury this judgment of the civil Court [illegible] on by [illegible] could not be admitted.[6]

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Complaint.—No Court shall take cognizance of any offence described in s. 463 when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate.[7] If the prosecution is confined to offences connected with a document committed prior to its production in Court, such prosecution is within the law and requires no sanction.[8] The offences connected with forgery, which are referred to in s. 195, Criminal Procedure Code, are offences committed by parties to proceedings. That a witness does not fall within this

[1] *Bayaji Natha*, (1897) Unrep. Cr. C. 917.

[2] *Srikant*, (1904) 2 A. L. J. R. 444. See *Venkata Row*, (1913) 36 Mad. 159.

[3] *Bhoma Lal* v. *Vincent*, (1922) 3 P. L. T. 653.

[4] *Sagarmal Agarwalla*, (1924) 40 C. L. J. 135.

[5] *Rickard*, (1918) 26 Cox 318.

[6] *Gopun Chunder Ghose*, (1880) 6 Cal. 217.

[7] Section 195 (1) (*c*), Criminal Procedure Code. See *Noor Mahomed* v. *Kaikhosru*, (1902) 4 Bom. L. R. 268; *Gulabchand*, (1925) 27 Bom. L. R. 1039.

[8] *Lalta Prasad*, (1912) 10 A. L. J. R. 294.

description is laid down by the Allahabad High Court,[1] but that he does come under it is the opinion of the Bombay High Court.[2]

A Sub-Registrar is not a Court, and, therefore, his sanction is not necessary for a prosecution for forgery in respect of a forged document presented for registration in his office.[3] But the Income-Tax Collector is a Court, and his sanction is necessary.[4]

Autrefois acquit.—The prisoner was charged with having forged leases A and B bearing the same date and adduced in evidence by him in the same suit. No mention of any charge as to lease B was made in the order of commitment, and the prisoner having been acquitted on an indictment for forging lease A, it was *held* that the plea of *autrefois acquit* was inadmissible on a subsequent trial of the prisoner for forging lease B.[5]

Joint trial.—The joint trial of the scribe and attesting witnesses of an alleged forged document for giving false evidence in support of that document is illegal, and vitiates the trial.[6]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, forged a certain document, to wit——(*describe it*), with intent to cause damage or injury to AB, (*or* to support a certain claim or title, to wit——; *or* to cause AB to part with certain property, to wit——, *or* to enter into a certain contract with AB with regard to (*mention the object*) or with intent to commit fraud (*state the deception*)); and that you thereby committed an offence punishable under s. 465, and within the cognizance of the Court of Session (*or the High Court*).

And I hereby direct that you be tried by the said Court on the said charge.

Forgery of record of Court or of public register, etc.

466. Whoever forges a document,[1] purporting to be a record or proceeding of or in a Court of Justice,[2] or a register of birth, baptism, marriage[3] or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant[4] in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power-of-attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

To bring his act under this section or s. 471 the elements of fraud or dishonesty, as explained in the Code, must be present in the mind of the person accused.[7]

Scope.—This section "is not intended to apply to cases where a public officer, or a person acting for a public officer, whose duty it is to make entries in a public book, knowingly makes a false entry, but to cases where a certificate or other document is forged by some unauthorized person with a view to make it appear that it was duly issued by a public officer. As, for instance, where a man forges a marriage certificate duly issued by the officer who ought to have issued it."[8] But the former Chief Court of the Punjab held that whoever, whether a public servant or a

[1] *Mathura Das*, (1893) 16 All. 80, 83.
[2] *Devji Bhavani*, (1893) 18 Bom. 581; *Bhau Vyankatesh*, (1925) 27 Bom. L. R. 607.
[3] *Tulja*, (1887) 12 Bom. 36.
[4] *Punamchand Manekhal*, (1914) 16 Bom. L. R. 446, 2 Bom. Cr. C. 199, F. B., overruling *Kalidas Revadas*, (1906) 8 Bom. L. R. 447. See also *Nataraja Iyer*, (1912) 36 Mad. 72.
[5] *Dwarkanath Dutt*, (1867) 7 W. R. (Cr.) 15.
[6] *Gunucant*, (1910) 13 N. L. R. 35.
[7] *Heily*, (1901) 5 C. W. N. 609.
[8] Per Garth, C. J., in *Juggun Lall*, (1880) 7 C. L. R. 356, 361.

private individual, so tampers with a public register, as to commit forgery, is punishable under this section.[1] Intent to defraud is, however, essential.[2]

1. **'Document.'**—See s. 29, *supra*.

2. **'Court of Justice.'**—See s. 20, *supra*.

3. **'Register of...marriage.'**—This section applies to the forging of a document purporting to be a Register of marriage, although the Register is a private one and not one kept by the public servant as such, *e.g.*, a Register of Marriages of Mahomedans kept by a *Kazi*.[3]

4. **'Document purporting to be made by a public servant.'**—A document is a document purporting to be made by a public servant, notwithstanding the illegibility of the seal and signature on it, if it appears on the face of it to have come from a public servant.[4]

'Public servant.'—See s. 21, *supra*.

Copy.—Where a person who is bound to give a true copy of any document gives a true copy of such document, he cannot be legally convicted of the offence of forgery punishable under this section, merely because the original of which he gives a true copy contains a statement which is false, and is known or believed by him to be such.[5]

CASES.

Fraudulent intent must only exist in the mind of the forger.—A person who, at the request of another sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being, however, in reality no such suit in existence) is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any other person than the person fabricating the document.[6]

Alteration in a certificate.—The alteration of name and age in an educational certificate and the use thereof by the person altering to obtain an official appointment, which the officer appointing would have withheld if he had known of the alterations, constitute, in the absence of satisfactory explanation, offences under ss. 476 and 471.[7]

Alteration in Government correspondence.—A Government *tumar* (correspondence), in which accused Nos. 2 and 3 were interested, was kept by a Mamlatdar at the house of his clerk. During the absence of the clerk from his house, accused No. 1, another clerk in the Mamlatdar's office, removed the *tumar* without anybody's consent. In the company of accused Nos. 2 and 3 he went with it to a neighbouring town to show it to the pleader of accused Nos. 2 and 3 in connection with some proceeding. Accused No. 1 left the *tumar* with the pleader and went away. Later he brought the *tumar* back and stealthily replaced it from where it was taken. It was afterwards discovered that some papers had disappeared from the *tumar*, whilst others had either been mutilated or altered. It was held that accused No. 1 was guilty of theft as he had removed the *tumar* without the consent of its custodian and accused Nos. 2 and 3 were guilty of abetment of theft; and that accused Nos. 2 and 3 were also guilty of offences under this section and s. 193 in respect of the alteration of the document.[8]

[1] *Mul Singh*, (1895) P. R. No. 13 of 1895.
[2] *Hari Chand*, (1903) P. L. R. No. 8 of 1904.
[3] *Bacha Miah*, (1891) 1 Weir 541.
[4] *Prosunno Bose*, (1866) 5 W. R. (Cr.) 96.
[5] *Marigowda*, (1891) Cr. R. No. 42 of 1891, Unrep. Cr. C. 583.
[6] *Haradhan Maiti*, (1887) 14 Cal. 513, F. B.
[7] *Nga Pye*, (1904) 2 L. B. R. 316.
[8] *Vallabhram Ganpatram*, (1925) 27 Bom. L. R. 1391, 8 Bom. Cr. C. 157.

PRACTICE.

Evidence.—Prove (1) that the accused forged the document.[1]
(2) That the document *forged* is one of the kinds specified in this section.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, forged the document, to wit——, which purported to be a record (*or* proceeding of a Court of Justice, *etc.*), and that you thereby committed an offence punishable under s. 466 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Forgery of valuable security, will, etc.

467. Whoever forges a document[1] which purports to be a valuable security[2] or a will,[3] or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, moveable property[4] or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

The offence described in this section is an aggravated form of the offence described in the last.

To support a conviction under this section, the forged document must be one of those mentioned in the text.[2] It must be shown that the document is a false document within the meaning of s. 464, and that it was forged by the accused with some intent mentioned in s. 463. It is not sufficient that some possible intent may be inferred from the facts but it is necessary that such intent should be established by evidence.[3] A mere fraudulent preparation of a deed of sale, with intent to cause injury to certain persons, does not amount to forgery of a valuable security unless that document be a false document.[4]

1. **'Forges a document.'**—See s. 29, *supra*, as to 'document'. The fraudulent alteration of a collectorate *chellaun* is forgery of a document within the meaning of this section.[5] Forgery of a document, even if the person for whom it is forged has no intention of using it, is an offence under this section.[6]

2. **'Valuable security.'**—See s. 39, *supra*. An unregistered document, though not a valuable security until the registration is completed, still purports to be a valuable security within the meaning of this section.[7] Similarly, two documents with forged signatures, one of which was intended to be filled up as a promissory

[1] *Vide* s. 465, supra.
[2] (1864) 1 W. R. (Cr. L.) 9.
[3] *Kailas Chandra Das*, (1892) 6 C. W. N. 382; not followed in *Somasundaram Pillai*, (1909) 6 M. L. T. 266, the facts of which are stated under s. 474, *infra*.
[4] (1866) 5 W. R. (Cr. L.) 5.
[5] *Hurish Chunder Bose*, (1864) W. R. (Gap. No.) Cr. 22.
[6] *Surat Bahadur*, (1924) 1 O. W. N. 362.
[7] *Kashi Nath Neek*, (1897) 25 Cal. 207, *Ramasami*, (1888) 12 Mad. 148; *Govind Ramappa*, (1889) Unrep. Cr. C. 467.

note and the other as a receipt, but the spaces for particulars of the amount, the name of the person in whose favour the documents were executed, the date and place of execution and the rate of interest were not filled in, were held to be valuable securities.[1] But a *sanad* conferring a title of dignity on a person is not a valuable security.[2] A blank paper, or a bond barred by limitation, is not a document of the kind described in this section.[3] But forgery may be committed of a promissory note on an unstamped paper even though a statute prohibits the stamp to be annexed afterwards[4] or of a *hundi*.[5] It is no objection to the charge of forgery that the instrument is not available by reason of some collateral objection not appearing upon the face of it.[6] The accused was found in possession of two documents; one was a registered conveyance in respect of certain lands from A to the wife of the accused; the second purported to be a conveyance in respect of the same land from the same vendor to the accused himself, but this was not registered. The accused requested a school-boy to have the registration endorsement from the former copied on to the latter and was thereupon arrested and charged under this section read with s. 116 and under s 474. At the trial A deposed that he never executed the second conveyance, but as regards the first he said that he had executed it in favour of accused's wife but that the accused was in possession of the lands and had also paid him the consideration money. The High Court held that as it was not shown that the second document was made with any of the intents mentioned in s. 463 or that it was intended to be fraudulently or dishonestly used, a conviction under any of the above sections was not maintainable.[7] Accused No. 1 was the creditor of a person for Rs. 38. To pay off his debt, the debtor got out the sum from his father by a postal money order drawn in his name. When the money order arrived at the place, accused No. 1 received the money direct from the postman and had the acknowledgment signed by accused No 2 under the representation that accused No 2 was the payee Neither accused informed the debtor of the money order or the receipt of the money. It was held that the accused were guilty of forging a valuable security, *e.g*, the money order acknowledgment, an offence punishable under this section.[8]

Material alteration of an incomplete document.—An agreement in writing, which purported to be entered into between five persons, was signed by only two of them; it was altered by the addition of some material terms by the accused who was one of the two executants without the consent or knowledge of the other executant and was not signed by the other parties to the agreement. The accused was in possession of the instrument which was altered by him. It was held that the accused was guilty of the offence of forgery of a valuable security under s. 467, or of being in possession of a forged document under s 474.[9]

3. **'Will.'**—See s. 31, *supra*.

4. **'Moveable property.'**—See s. 22, *supra*. The forging of a document which purports on the face of it to be a copy only, and which, even if a genuine copy, would not authorize the delivery of moveable property, is not punishable under this section.[10]

PRACTICE.

Evidence.—Prove (1) that the accused committed forgery.[11]

(2) That the document forged is one of the kinds mentioned in this section.

[1] *Jawahir Thakur*, (1916) 38 All. 430.

[2] *Jan Mahomed*, (1884) 10 Cal. 584.

[3] *Rughoonundun Puttronuvees*, (1871) 15 W. R. (Cr.) 10.

[4] *Jogidas Babu*, (1921) 24 Bom. L. R. 382.

[5] *Ramaswami Ayyar*, (1917) 41 Mad. 589.

[6] *Naro Gopal*, (1868) 5 B. H. C. (Cr. C.) 99.

[7] *Jogidas Babu*, (1921) 24 Bom. L. R. 56.

[8] *Ramaswami Ayyar*, (1917) 41 Mad. 589.

[9] *Jogidas Babu*, (1921) 24 Bom. L. R. 56.

[10] *Naro Gopal*, (1868) 5 B. H. C. (Cr. C.) 99.

[11] *Vide* s. 465, sup.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

But when the valuable security is a promissory note—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint.—The word 'forgery' is used as a general term in s. 463, and that section is referred to in a comprehensive sense in s. 195 of the Criminal Procedure Code so as to embrace all the species of forgery afterwards provided for as to punishment and this includes a case falling under this section.[1]

Punishment.—Where the forged documents are alternative drafts of any document they do not call for separate punishment.[2]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, forged a certain document purporting to be a valuable security, to wit——, [*or* a will made by——; *or* an authority to adopt given by——to, *or* an authority, given to——to make or transfer a certain valuable security, to wit——] with intent——; and that you thereby committed an offence punishable under s. 467 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge. The charge must set out the intention of the accused.[3]

Forgery for purpose of cheating.

468. Whoever commits forgery, intending that the document[1] forged shall be used for the purpose of cheating,[2] shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

Forgery, though a substantive offence, partakes of the nature of an attempt. It is usually an act done in furtherance of some other criminal design. If it can be proved that the purpose of the offender in committing the forgery is to obtain property dishonestly, or, if his guilty purpose comes within the definition of cheating, he is punishable under the present section. The intention of the forger *may be fairly inferred in most cases from the contents of the forged documents.*[4]

If the cheating is complete, and the subsequent forgery is for the purpose of concealing that offence, this section does not apply.[5]

To establish fraudulent intention under this section it is not essential to prove pecuniary advantage.[6]

1. **'Document.'**—See s. 29, *supra*. A hammer for marking sleepers is a document within the meaning of this section.[7]

2. **'Cheating.'**—See s. 415, *supra*.

CASES.

Falsification of account-books with a view to deception.—Where a person's object was to deceive his employer by falsifying account-books which were in his custody, such deception being likely to cause deception to his employer, it was held that he had committed an offence of forgery with intent to cheat under this section, and not one under s. 465.[8]

[1] *Tulja*, (1887) 12 Bom. 36, 41; *Teni Shah* v. *Bolahi Shah*, (1909) 14 C. W. N. 479

[2] *Surai Bahadur*, (1924) 1 O. W. N. 362.

[3] *Haidar Ali*, (1912) 17 C. W. N. 354.

[4] M. & M. 418.

[5] *Hurmuth Rai*, (1876) P.R. No. 15 of 1876.

[6] *Madhavlal Chaganlal*, Crim. App. for Rev. No. 195 of 1920 (Unrep. Bom.)

[7] *Joseph*, (1924) 3 Rang. 11.

[8] *Banessur Biswas*, (1872) 18 W. R. (Cr.) 46.

Making of a false register.—Forgery of a school attendance register, for the purpose of obtaining a Government grant, is punishable under this section.[1]

Making a false attakshi.—Where a process-server prepared and filed into Court a false *attakshi* with forged signatures with a view to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty for a period of seven days, it was held that he was guilty of offences under this section and s. 471.[2]

Preparation of a false bill.—The accused, a Talati, prepared a full week's bill for distribution of doles in his village, while staying out of the village, on the basis of the bill for the foregoing week, in utter ignorance of what had happened in the village and in order to avoid the trouble of going to their village personally. The bill was sent to the Circle Inspector, who, on comparing it with the original register kept at the village, found that no doles had been distributed for four out of the seven days of the week. It was held that the accused was not guilty of an offence under this section as he had no criminal intention to commit fraud which was requisite to complete the offence of forgery under this section.[3]

PRACTICE.

Evidence.—Prove (1) that the document is a forgery.

(2) That the accused forged the document.[4]

(3) That he did as above intending that the forged document would be used for the purpose of cheating.[5]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Complaint—Complaint in writing of the Court, before which the offence is committed, or of some other Court to which such Court is subordinate, is necessary.[6] An offence under s. 463 mentioned in clause (*c*) of *s.* 195, Criminal Procedure Code, covers an offence under this section, the object of mentioning s. 463 in s. 195, Criminal Procedure Code, being to include all cases of forgery whatever the nature of the fraudulent intention may be.[7]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, forged a certain document, to wit——, intending that it shall be used for the purpose of cheating and that you thereby committed an offence punishable under s. 468 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Forgery for purpose of harming reputation.

469. Whoever commits forgery, intending that the document[1] forged shall harm the reputation[2] of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

The making of a false document for the purpose of injuring the reputation of any person is punishable under this section For instance if A. with the intention

[1] *Kuppana Pillai*, (1885) Weir (3rd Edn.) 330.

[2] *Ramatchinatha Pillai*, (1918) 42 Mad. 558.

[3] *Madhavlal Chaganlal*, Crim. Appl. for Rev No. 195 of 1920, per Shah and Crump, JJ., decided on September 9, 1920. (Unrep. Bom.).

[4] *Vide s.* 465, supra.

[5] *Vide s.* 417, supra.

[6] Crim. Pro. Code, *s.* 195 (1) (*c*)

[7] *Ramammal*, (1911) 36 Mad. 387.

of harming B's reputation or knowing that what he does is likely to have this effect, writes a letter in imitation of B's handwriting purporting to be addressed to a confederate in some disgraceful or dishonest transaction and shows this letter to other persons, he commits this offence.

1. **'Document.'**—See s. 29, *supra*.

2. **'Harm the reputation.'**—See s. 199, *infra*. A person, who forged a draft petition, with the intention of using it as evidence and which contained false statements calculated to injure the reputation of another person, was held guilty of this offence.[1]

PRACTICE.

Evidence.—Prove (1) that the document in question is a forgery.[2]

(2) That the accused forged it.

(3) That he did so intending that the document forged would harm the reputation of some one, or knew that it was likely to be used for that purpose.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Forged document.

470. A false document made wholly or in part by forgery is designated "a forged document."

Using as genuine a forged document.

471. Whoever fraudulently or dishonestly uses as genuine any document[1] which he knows or has reason to believe to be a forged document,[2] shall be punished in the same manner as if he had forged such document.

COMMENT.

The use of a forged document which is contemplated by this section is such use as causes wrongful gain or wrongful loss. That is to say, the section applies to the case of a person who appears before some other person, or before a Court with a document and endeavours to induce that person or Court to do some act which he or it would not do if it was known to be a forgery.[3] Where in a judicial enquiry under s. 202, Criminal Procedure Code, against a person accused of having forged a document, the accused stated before the enquiring Magistrate that the document was genuine, it was held that he could not be said to have used the document so as to make himself amenable to the provisions of this section even though he knew the document to be a forged one.[4]

Ingredients.—Under this section there must be—

1. Fraudulent or dishonest use of a document as genuine.
2. Knowledge or reasonable belief on the part of the person using the document that it is a forged one.

1. **'Fraudulently or dishonestly uses as genuine any document.'**—The use of a document as genuine must be fraudulent or dishonest. "The word 'fraudulently' is used in ss. 471 and 464 together with the word 'dishonestly' and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word

[1] *Sherfat Ally*, (1868) 10 W. R. (Cr). 61, 2 Benz. L. R. (A. Cr. J.) 12.
[2] *Vide* s. 465, sup.
[3] *Asimuddi Sheikh*, (1907) 11 C. W. N. 838, 5 C. L. J. 454.
[4] *Ibid.*

dishonestly and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part."[1]

If the Court is satisfied that the accused uttered the forged document as a true one, meaning it to be taken as such, and at that time knew it to be forged, the Court ought to find, as a necessary consequence of law, that the accused intended to defraud.[2]

'Uses.'—To constitute a 'use' within the meaning of s. 471 it is not necessary that the forged document should be used as evidence in a Court. It is sufficient that it is used in order that it may ultimately appear in evidence or used dishonestly or fraudulently.[3] It is not necessary that the Court should accept the document produced before it or filed in Court. If a person puts forward a document as supporting his claim in any matter, whether that document is acted upon by the Court, or used in evidence, is immaterial for the purpose of constituting use of the document by the party within the meaning of this section.[4]

The use of a forged document will be fraudulent and dishonest under this section, even though the document itself is unnecessary for the case of the party who uses it, and though, in fact, he has a perfectly good title without it.[5]

The use of the document must be for one of the purposes mentioned in s 463. Thus an involuntary production of a document in Court in obedience to an order to produce it is no use of it.[6] In such a case it is immaterial even if the person producing the document has deposed as a witness to its genuineness. The giving of false testimony with a fraudulent intention by itself cannot amount to a fraudulent user of a document with reference to which that evidence is given. A mere statement that a document is genuine does not amount to using it as genuine.[7] These two cases are dissented from by the Calcutta High Court.[8] The mere filing of a list of documents, some of which are forged ones, in Court, without tendering the documents in evidence, does not constitute user of it.[9] The filing of forged documents with a plaint is user of them.[10] The filing of a forged document as the basis of a plaint or as a necessary sequel to the pleas in the plaint constitutes a user of it.[11] Similarly, putting in of a document in the course of the hearing is a user.[12] The presentation of a forged document for registration, and obtaining registration is a using of that document.[13]

A presented a document for registration before a Sub-Registrar alleging that S had executed it. S having denied execution, the Sub-Registrar reported the matter to the District Magistrate. The District Magistrate ordered a judicial enquiry, and the Deputy Magistrate who was conducting the same called upon A to state whether the document was genuine or forged. A appeared and stated that the document was genuine, but the Deputy Magistrate held otherwise. A was, thereafter, tried and convicted under this section It was held that A was not guilty as it was impossible to say that he 'used' the document.[14] The accused was charged with having fraudulently or dishonestly used a document which purported to be a receipt granted to him by the manager of a ward's estate for certain papers and which receipt was alleged to be false. Subsequently, some of the papers mentioned in the receipt were on search found in the estate office, while the other papers

[1] Per Maclean, C. J., in *Abbas Ali*, (1897) 25 Cal. 512, 521, F. B.

[2] *Hill*, (1838) 8 C. & P. 274.

[3] *Ramappa Hebbara*, (1890) 1 Weir 550.

[4] *Bansi Sheikh*, (1923) 51 Cal. 469.

[5] *Dhanum Kazee*, (1882) 9 Cal. 53; *Bansi Sheikh*, sup.; *Daya Ram*, (1885) P. R. No. 16 of 1885.

[6] *Ramammal*, (1911) 36 Mad. 387.

[7] *Muthiah Chetty*, (1911) 36 Mad. 392.

See also *Mobarak Ali*, (1912) 17 C. W. N. 94.

[8] *Mohit Kumar*, (1925) 52 Cal. 881.

[9] *Ambika Prasad Singh*, (1908) 35 Cal. 820.

[10] *Idu Jokiha*, (1917) 3 P. L. J. 386.

[11] *Mobarak Ali*, (1912) 17 C. W. N. 94.

[12] *Bati Jha*, (1911) 39 Cal. 463.

[13] *Azimoodeen*, (1869) 11 W. R. Cr. 15.

[14] *Arimuddi Sheikh*, (1907) 11 C. W. N. 838, 5 C. L. J. 454.

had not been searched for. It was held that those facts were not sufficient to show that the user of the document was fraudulent or dishonest or that the accused had committed any offence.[1] The accused, who was the plaintiff in a rent suit, himself filed a *kabulayat* which was forged and which purported to be filed by the complainant, the defendant in the rent suit. It was held that the act constituted a user within the meaning of this section.[2]

The accused was told to produce copies of the revenue records in support of his complaint of trespass and he knowingly produced forged copies as genuine. It was held that this was not an involuntary production of a document in Court and that the accused was guilty of an offence under this section.[3] A person tendering, during the course of a Police investigation, a forged document to the investigating officer, and thereby causing that officer to do something which he would otherwise not have done, is guilty of having used a forged document within the meaning of this section.[4]

'Document.'—A hammer for marking sleepers is a document within the meaning of this section.[5]

Conditional uttering.—A conditional uttering of a forged instrument is as much a crime as any other uttering. Where a person gave a forged acceptance to the manager of a banking company where he kept an account, saying that he hoped this bill would satisfy the bank as a security for the debt he owed, and the manager replied that that would depend on the result of inquiries respecting the acceptors, it was held that this was a sufficient uttering.[6]

2. **'Knows or has reason to believe to be a forged document.'**—The person using the document must have specific knowledge that the document is a forgery. The words 'knows or has reason to believe to be a forged document' are of general application. The mere fact that a pleader's suspicions ought to have been aroused by the sight of a forged document is not *prima facie* evidence that he knew, or had reason to believe, the document to be forged. A pleader is under no higher obligation than any other agent would be, and to justify his prosecution it should be shown that he had been a party to the concoction of the document, or that he had the knowledge that it was concocted.[7]

The accused purchased one-ninth share of 437 *kanals* 12 *morlas* land, this one-ninth share being set out in the deed as amounting to 48 *kanals* 12 *morlas*. Eleven years after, this deed was presented to the Patwari by the accused with a request that he should enter up mutation "according to the terms set out in the deed," the deed being previously tampered with so as to make the one-ninth share appear to be a two-ninths share, but the other recitals and figures in the deed remained untouched. It was not established that the accused had himself made the alteration. The Patwari entered up mutation of 97 *kanals* 4 *morlas*, that is, two-ninths share. On the mutation coming before the Tahsildar for sanction, the alteration in the deed came to light. It was held that though the accused had used the deed as a genuine document, it was not shown that he had so used it fraudulently or dishonestly knowing or having reason to believe it to be a forged document; and that the alteration made in the deed did not, in the face of the figures given therein, make it a sale of anything more than 48 *kanals* 12 *morlas*.[8]

'Reason to believe.'—See s. 26, *supra*.

Copy.—A person may be convicted of using as genuine a document which he knows to be forged, though, he in the first instance produced only a copy of

[1] *Ram Prosad Maity*, (1908) 8 C. L. J. 317, 12 C. W. N. 1113.
[2] *Asrabuddin Sarkar* v. *Kalidayal Mullick*, (1914) 19 C. W. N. 125.
[3] *Ishar Das*, (1924) 6 Lah. 50.
[4] *Sajanlall Burwass*, (1920) 2 U. P. L. R. (P.) 42.
[5] *Joseph*, (1924) 3 Rang. 11.
[6] *Cooke*, (1838) 8 C. & P. 582.
[7] *Ranchhoddas Nagardas*, (1896) 22 Bom. 317.
[8] *Karim Dad*, (1913) P. R. No. 25 of 1913.

it.[1] Where a person took copies of a forged document and put these copies for- [illegible] that this was a use by him of [illegible] was held that it is doubtful [illegible] document. But it is otherwise where the offender used the copy knowing or having reason to believe that the entries in the original documents were forgeries and intending to use them for fraudulent purposes. A certified copy of a forged document is not a forged document.[3] The making of a copy of a forgery does not constitute forgery unless the maker of the copy was authorised to make the copy.[4] The accused was told to produce copies of revenue records in support of his complaint of trespass and he knowingly produced forged copies as genuine. It was held that this was not an involuntary production of a document in Court and that he was, therefore, guilty of an offence under this section.[5]

CASES.

Alteration in a document without a fraudulent intent.—The creditors of a Police Constable applied to the District Superintendent of Police that Rs. 2 might be deducted monthly from the debtor's pay until the debt was satisfied. Upon an order being passed, directing that the deduction asked for should be made, the debtor produced a receipt purporting to be a receipt for Rs. 18, the whole amount due. It subsequently appeared that the receipt was one for Rs. 8, which the debtor had altered by the figure "1" so as to make it appear that the receipt was for Rs. 18. It was held that the real intent in the prisoner's mind being to induce his superior officer to refrain from the illegal act of stopping a portion of his salary, the Court, in a criminal case, ought not to speculate as to some other intent over and above this that might have presented itself to him, that it did not necessarily follow that he contemplated setting up the altered receipt to defeat his creditors' claim; and that, therefore, he ought not to have been convicted under this section.[6]

The accused made a change in a document so that it may be taken in evidence. The document related to certain transactions which the Settlement Officer could not take into consideration but would not have been bound by what it stated. In fact the accused's case was ruined. It was held that the accused acted improperly but not dishonestly and could not be convicted of an offence under this section.[7]

Certificate.—The accused applied to the Superintendent of Police at Poona for employment in the Police force. In support of his application he presented two certificates which he knew to be false. One of these certificates was a wholly fabricated document, whilst the other was altered by several additions made subsequently to the issue of the certificate. It was held that the accused was guilty of offences under s. 463 and this section.[8] Where the accused used a forged certificate of competency as an engine room first tindal, he was held guilty under this section and s. 463.[9]

Plaint.—The accused gave his pleader a copy of a document which had been falsified by an interpolation being made in it for the purpose of its being used in the trial of his suit. It was held that he was guilty not of an attempt to commit an offence under this section but of the offence itself.[10]

Fabrication of receipts.—Where it was found that four forged receipts for the payment of rent, used by the prisoner, had been fabricated in lieu of genuine receipts which had been lost, it was held that, with reference to the definitions of the terms

[1] *Nujum Ali*, (1866) 6 W. R. (Cr.) 41.
[2] [illegible]
[3] [illegible]
[4] [illegible] 783.
[5] [illegible]
[6] [illegible]
[7] *Kali Din*, (1919) 17 A. L. J. R. 872.

'dishonestly' and 'fraudulently' in ss. 24 and 25, the prisoner had not committed this offence.[1] This case seems to lay down bad law in the light of several cases noted under ss. 24 and 25.

A declared insolvent wishing to obtain some contract work was asked to produce an order to the effect that he was solvent. In order to obtain the necessary certificate of solvency he produced before the Official Receiver a forged receipt showing that he had paid up a certain debt which the creditor had written off as a bad debt. It was held that the intention of the accused was by means of deceit to obtain a wrongful gain for himself, so that he had acted dishonestly, and was therefore guilty of an offence under this section.[2] Where a Bench Clerk received a sum of money paid in as fine and misappropriated it, and made a false receipt to cover up such misappropriation, it was held that the offence came under the provisions of s. 467 and this section.[3]

Diary.—False alteration of a police diary by a Head Constable will fall under this section as the forgery of a document made by a public servant.[4]

Sanad.—The accused, in order to obtain a recognition from a Settlement Officer that they were entitled to the title of 'loskur,' filed a *sanad* before that officer purporting to grant that title. This document was found not to be genuine. The Sessions Judge convicted the accused under this section and s. 464 It was held that even supposing the accused had used the document knowing it not to be genuine, they could not be found guilty as the intention of the accused was not to cause wrongful gain or wrongful loss to any one, their intention being to produce a false belief in the mind of the Settlement Officer that they were entitled to the dignity of 'loskur' and that this could not be said to constitute 'an intention to defraud.'[5]

Decree.—Where the accused, a pleader's clerk, altered the date in the copy of a decree in order to hide his fault in not filing the execution petition in time and filed it with the copy of the altered decree, it was held that the accused was not guilty under s. 467, the copy of the decree not being a valuable security, but was guilty of the offences under s. 193 and this section[6]

Attakshi.—A process-server made an *attakshi* with false signatures in order to defraud a District Munsiff into excusing his delay in returning processes and his absence from duty. It was held that he was guilty under s. 468 and this section.[7]

Uttering.—English cases.—If A exhibits a forged receipt to B, a person with whom he is claiming credit for it, this is an uttering.[8] Delivering a box containing, among other things, forged stamps to the party's own servant that he might carry them to an inn to be forwarded by a carrier to a customer in the country, was an uttering.[9] But showing a man an instrument the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, was not uttering.[10] Where the accused placed a forged receipt for poor rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, fraudulently to induce the prosecutor to advance money to a third person, it was held that this was an uttering.[11] The accused, being the Secretary of an enrolled benefit society of which his wife was a member, and having received a sum of money belonging to the members with directions to pay it into a certain savings bank, uttered what purported to be a bank pass-book containing a false entry of the receipt of the money, knowing it to be forged, in order to induce the members

[1] *Sheo Dayal*, (1885) 7 All. 459.
[2] *Abdul Ghafur*, (1920) 43 All. 225.
[3] *Nga Ba Sein*, (1924) 3 B. L. J. 113.
[4] *Rughoo Barrick*, (1869) 11 W. R. (Cr.) 44.
[5] *Jan Mohamed*, (1884) 10 Cal. 584. Is it not supporting a claim to a title to which he is not legally entitled?
[6] *Godlavedu Balayya*, (1902) 1 Weir 551.
[7] *Kamatchinatha Pillai*, (1918) 42 Mad. 558.
[8] *Radford*, (1844) 1 Den. 59.
[9] *Thomas Collicott*, (1812) R. & R. 212.
[10] *John Shukard*, (1811) R. & R. 200.
[11] *William Jon*, (1858) 6 Cox I; *William Fitchie*, (1857) Dears. & B. 175.

of the Society to believe that he had paid the money into the bank when he had not done so. It was held that he was guilty of uttering a forged writing.[1] Where the accused forged a bill payable to his own order, and uttered it without endorsement as a security for a debt, he was held guilty of uttering.[2] Where a person presented a bill of exchange for payment with a forged endorsement upon it of a receipt by the payee, and the clerk to whom he presented it objected to a variance between the spelling of the payee's name in the bill and the endorsement, upon which the person altered the endorsement into a receipt by himself for the drawer, it was held that the act of presenting the bill to the clerk previous to his objection was sufficient to constitute the offence of uttering the forged endorsement.[3]

If an engraving of a forged note be given to a party as a pattern or specimen of skill, the party giving it not intending that the particular note should be put in circulation, it is not uttering.[4]

PRACTICE.

Evidence.—Prove (1) that the document was a forged one.[5]

(2) That the accused used such document.

(3) That he used it as a genuine one.[6]

(4) That he knew, or had reason to believe, that it was a forged one.[7]

In a case in which [illegible] a lease which he knew [illegible] it was held that it wa[illegible] word, but it was sufficient if it was inserted with his knowledge.[8]

In a case for uttering forged bills, the guilty knowledge of the accused was proved by producing other forged bills on the same house in the possession of the accused.[9] If the possession of other forged instruments is offered in evidence to prove a guilty knowledge, there must be regular evidence that such instruments were forged.[10] Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.[11] See also ill. (c) to s. 159 of the Indian Evidence Act

(5) That he used it dishonestly or fraudulently.[12]

In deciding whether there has been a 'using as genuine' of the document, the Court will advert to the nature of the document. Some documents, such as receipts, are intended to remain in the holder's possession, other documents, such as cheques or promissory notes, must be tendered to the persons who are to pay them. Whatever the document, the dealing with it by the accused person must be such as to satisfy the Court that he intended to defraud, but it is not necessary that wrongful gain or wrongful loss should actually be caused by the use.[13]

On an indictment for uttering a forged will, which, together with writings [illegible] marks which had [illegible] who had examined [illegible] ssible on the part of the prosecution.[14]

[1] *William Moody*, (1862) L. & C. 173.
[2] *John Birkett*, (1805) R. & R. 86.
[3] *Arscott*, (1834) 6 C. & P. 408.
[4] *Harris*, (1836) 7 C. & P. 428.
[5] *Vide* s. 465, sup.
[6] *Jaha Bux*, (1867) 8 W. R. (Cr.) 81; *Muker Srinivasa Padyachi*, (1889) 1 Weir 550.
[7] *Bholay Pramanick*, (1872) 17 W. R. (Cr.) 32.
[8] *Hemoruddi Mundul*, (1868) 9 W. R. (Cr.) 22.
[9] *George Hough*, (1806) R. & R. 120. See *Edward Ball*, (1807) R. & R. 132; *Colclough*, (1882) 15 Cox 92.
[10] *Samuel Millard*, (1813) R. & R. 245.
[11] *Makin v. Att-Genl. for New South Wales*, [1894] A. C. 57.
[12] *Kishen Pershad*, (1870) 2 N. W. P. 202.
[13] M. & M. 419.
[14] *Thomas Williams*, (1838) 8 C. & P. 434.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by the same Court as that by which the forgery is triable.

When the forged document is a promissory note of the Government of India—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint.—Complaint in writing of the Court before which the offence is committed, or some other Court to which such Court is subordinate is necessary.[1] No such complaint is required for the prosecution of a person in respect of a forged document when he is not a party to the proceeding in which the forged document is produced.[2]

Forger cannot be punished separately for using the forged document.—A person who, being himself the forger thereof, has used as genuine a forged document, cannot be punished as well under this section for the use as under s. 466[3] or s. 467[4] for the forgery.

Sections 471 and 474.—Convictions under this section and s. 474 cannot stand together.[5]

Sections 471 and 196.—The using of a forged document is punishable under this section and not under s. 196.[6]

Separate charges.—The accused was charged with using as genuine eleven forged receipts which were put in by him in sets on three separate occasions, each set with a written statement in three suits pending against him. A charge was framed against him in respect of the using of each set of receipts, and he was tried on those three charges and convicted and sentenced. On appeal, it was contended that a separate charge should have been framed in respect of each of the documents as the using of each document constituted a distinct and separate offence and that consequently the trial was illegal and should be set aside, the accused having been tried for more than three offences in one and the same trial. It was held that as the 'using' charged was the putting in of each set of documents with the respective written statements in three suits, and as there was nothing to show that any of the documents had been used at any other time, there was only one using in respect of each set of documents and that there was, therefore, no valid ground for questioning the conviction.[7]

Punishment.—The offence of uttering forged documents requires to be punished with the severest punishment allowed by law.[8] If a document is used fraudulently and dishonestly and if it purports to be a valuable security, the punishment provided by s. 467 and not that provided by s. 465 will be that to which the accused will be liable under this section.[9]

Charge.—This section does not specify the punishment, but declares that using a forged document shall be punished like forgery, and a charge for using a forged document should make mention of it coupled with one or other of ss. 465, 466, or 467, according to the nature of the document forged.[10] The definition of forgery should not be entered in the charge: simply describing the offence as one of using a forged document is sufficient.[11]

The charge should run thus:—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

[1] Criminal Procedure Code, s. 195 (1) (c)

[2] *Kondeti Obalesu*, (1914) 26 M.L.J.220.

[3] *Umrao Lal*, (1900) 23 All. 84; *Pirbhu Dial*, (1913) P. L. R. No. 52 of 1913. P. W. R. (Cr.) No. 45 of 1913. See *Badri Prasad*, (1912) 10 A. L. J. R. 473, where it is held that an accused person can be convicted at the same trial of forging a document and using that document as forged and the charges under ss. 467 and 471 may be regarded as alternative.

[4] *Pirbhu Dial*, sup.

[5] *Nuzur Ali*, (1873) 6 N. W. P. 39.

[6] *Kherode Chunder Mozumdar*, (1880) 5 Cal 717.

[7] *Raghu Nath Das*, (1893) 20 Cal. 413.

[8] *Mohesh Chunder Sircar*, (1865) 3 W. R. (Cr.) 13.

[9] *Sagarmal Agarwalla*, (1924) 40 C. L. J. 135.

[10] (1864) 1 W. R. (Cr. L.) 10; (1865) 3 W. R. (Cr. L.) 8; *Gangaram Maiji*, (1869) 6 B. H. C. (Cr. C.) 43; *Tikaram Lohar* (1893) 8 C. P. L. R. (Cr.) 1.

[11] (1867) 8 W. R. (Cr. L.) 7.

That you, on or about the ——day of——, at——, fraudulently (*or* dishonestly) used as genuine a certain document, to wit——, which you knew, or had reason to believe, at the time you used it, to be a forged document; and that you thereby committed an offence punishable under ss. 465 and 471 of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467.

472. Whoever makes or counterfeits[1] any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession[2] any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

The making or possession of instruments such as plates for engraving bank notes, for forging valuable securities, etc., where the purpose for which such instruments are intended to be used is known, is the offence here punished. In the Chapter of offences relating to Coin and Government Stamps, there are similar provisions. This section and the section following are akin to ss. 235, 255 and 256.

1. **'Counterfeits.'**—See s. 28, *supra*.

2. **'Possession.'**—See s. 27, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused made or counterfeited the seal, plate, etc., or that he had such seal, etc., in his possession, and that he knew it to be counterfeit.

(2) That such seal, etc., was made in order to produce impressions.

(3) That he intended to use such seal, etc., for the purpose of committing forgery.

(4) That such forgery was punishable under s. 467.

Counterfeit seals and forged documents were found in the prisoner's possession; and as he could give no satisfactory information as to how he became possessed of them, it was inferred that he kept them with the intention of using them fraudulently.[1]

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, made (*or* counterfeited) a seal, (*or* plate *or* instrument) for making an impression, intending that the same shall be used for the purpose of committing any forgery punishable under s. 467 of [illegible] seal (*or* plate, *or* instrument) [illegible] ose of committing any forgery] and that you thereby committed an offence punishable under s. 472 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

[1] *Kudo Soonder Deb*, (1865) 2 W. R. (Cr.) 5.

Making or possessing counterfeit seal, etc., *with intent to* commit forgery punishable otherwise.

473. *Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this Chapter other than section 467, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

COMMENT.

If the forgery is not of such a serious nature as is punishable under s. 467, then it will be punishable under this section.

Where counterfeit seals and forged documents were found in the prisoner's possession, and he could give no satisfactory information as to how he became possessed of them, it was inferred that he kept them with the intention of using them fraudulently.[1]

Where the accused was in possession of a counterfeit stamp for making an impression by letters or marks on trees in order to indicate that the trees had been passed for removal by the Ranger of a forest, it was held that he was guilty of an offence under this section.[2]

PRACTICE.

Evidence.—Prove points (1) to (3) as for s. 472; and further:—

(4) That such forgery was punishable under any section of this Chapter.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Separate offences.—Where several seals of different descriptions were found in the possession of the accused with intent to commit forgery, it was held that there was a complete and separate offence committed in respect of every seal found, and that the accused could be legally convicted of a separate offence in regard to each seal, unless it appeared that several such seals were in their possession for the purpose of committing one particular forgery.[3]

Charge.—See s. 472, *supra*.

Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.

474. *Whoever has in his possession*[1] *any document,*[2] *knowing the same to be forged, and intending that the same shall fraudulently*[3] *or dishonestly*[4] *be used as genuine, shall, if the document is one of the description mentioned in section 466 of this Code, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and, if the document is one of the description mentioned in section 467, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

[1] *Kisi Soonder Deb*, (1865) 2 W. R. (Cr.) 5.
[2] *Krishnappa Khandappa*, (1922) 27 Bom. L. R. 599, 8 Bom. Cr. C. 41.
[3] *Gokuck Chunder*, (1870) 13 W. R. (Cr.) 1.

COMMENT.

Persons who have in their possession forged documents of any description knowing that they are forged, are guilty of this offence if they intend that the document shall be used for a fraudulent or dishonest purpose. It does not signify whether such fraudulent use will be by themselves or by other person to whom they may dispose of the documents for the purpose of such fraudulent use. It may be reasonably inferred that a person in whose possession several forged documents are found has an intention to use them fraudulently, unless he can give satisfactory information as to how he became possessed of them and as to the purpose for which he retains them in his possession.[1]

This section resembles ss. 242, 243 and 259.

1. **'Possession.'**—See s. 27, *supra*. Where a person took a forged document into a Court in connection with a case, but did not actually use it, although he intended to do so, if necessary, he was held guilty of an offence under this section.[2] A document alleged to have been executed by one M was found in the possession of the accused. It was found that M did not execute the document and that it was executed in the presence of the accused for their benefit. It was contended by the accused that as the property comprised in the document belonged to them by virtue of certain other documents executed in the name of M *benami* for them, the document was not dishonest or fraudulent. It was held that as it was executed and registered to confirm their alleged title and to enable them to deal with the property to the detriment of persons dealing with them in regard to that property, the document was fraudulent and a forgery.[3]

2. **'Document.'**—See s. 49, *supra*

3. **'Fraudulently.'**—See s. 45, *supra*.

4. **'Dishonestly.'**—See s. 44, *supra*

PRACTICE.

Evidence.—Prove (1) that the document was a forged one.[4]

(2) That the accused had it in his possession.

(3) That he knew it to be forged when he had it in his possession.

(4) That he intended that it should be used as a genuine document.

(5) That he intended as above dishonestly or fraudulently.

Prove also whether the forged document is one of the description mentioned in s. 466 or 467.[5]

It is not sufficient for a conviction to say that the prisoner might possibly have used an altered document; the guilty intent must be proved, not inferred.[6]

But where forged documents are found in the possession of the accused and he could not give satisfactory information as to how he became possessed of them it was inferred that he kept them with the intention of using them.[7]

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material.

475. Whoever counterfeits[1] upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document[2] described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be

[1] M. & M. 421.

[2] *Hatim Moonshee*, (1867) 8 W. R. (Cr.) 11

[3] *Somasundaram Pillai*, (1909) 6 M. L.T.266.

[4] *Vide* s. 465, sup.

[5] *Abaji Ramchandra*, (1891) 16 Bom. 165.

[6] *Lokenath Shaha*, (1864) W. R. (Gap. No.) Cr. 12.

[7] *Kisto Soonder Deb*, (1865) 2 W. R. (Cr.) 5.

forged on such material, or who, with *such intent*, has in his possession[3] any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT:

The commencement of the forgery of bank notes and other similar securities, where it has proceeded to the length which is described in this section, is treated as a substantive offence and punished. Also the possession of the prepared material, etc., is punished.

This section supplements the provisions of s. 472.[1]

The document must be of a nature mentioned in s. 467.[2]

1. **'Counterfeits.'**—See s. 28, *supra*.
2. **'Document.'**—See s. 29, *supra*;
3. **'Possession.'**—See s. 27, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused counterfeited upon or in the substance of any material, a device or mark.

(2) That such device or mark is used for the purpose of authenticating any document described in s. 467.

(3) That the accused intended to use such device or mark for the purpose of giving the appearance of authenticity to some document.

(4) That such document was forged or was thereafter to be forged.

Or prove—

(1) That the accused was in possession of the papers referred to in the charge;

(2) that the device or mark was counterfeited on them;

(3) that the marks were such as are used for the purpose of authenticating any document described in s. 497; and

(4) that the accused intended that the marks should be used for the purpose of giving the appearance of authenticity to documents, either then forged or thereafter to be forged.[3]

As to the admissibility in evidence of other forged documents, see *Abaji Ramachandra*[4] and *Parbhudas Ambaram*.[5]

Procedure.—*Not* cognizable—Warrant—Bailable—*Not* compoundable—Triable by Court of Session.

Complaint.—Complaint in writing of the Court before which the offence is committed, or some other Court to which such Court is subordinate is necessary.[6]

Charge.—In the trial of an accused person on a charge under this section, the charge should be so framed as to specify distinctly that part of the section which is applicable to the case, and should distinctly specify the particular papers bearing a counterfeit mark or device which the accused was alleged to have had in his possession with the intent mentioned in the section.[7]

The charge should run thus:—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

[1] M. & M. 421.

[2] *Rughoonundun Puttronuvees*, (1871) 15 W. R. (Cr.) 19.

[3] *Abaji Ramchandra*, (1891) 16 Bom. 165; *Rughoonundun Puttronuvees*, sup.

[4] (1890) 15 Bom. 189.

[5] (1874) 11 B. H. C. 90.

[6] See Criminal Procedure Code, s. 195 (1) (c).

[7] *Abaji Ramchandra* sup.

That you, on or about the——day of——, at——, counterfeited upon (*or* in the substance of) any material, to wit——, a device (*or* mark), to wit——, used for the purpose of authenticating any document, [*or* that you were in possession of any material, to wit——, upon] (*or* in the substance of) which any device (*or* mark) was used for the purpose of authenticating a document, intending that such device (*or* mark) shall be used for the purpose of giving the appearance of authenticity to some document then forged (*or* [illegible] that you thereby committed an offence pun[illegible] Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.

476. Whoever counterfeits[1] upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document[2] other than the documents described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession[3] any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT:

This section is similar to the last section, but as the document, the counterfeit of which is made punishable, is not of so much importance as in the last, the punishment is not so severe.

1. 'Counterfeits.'—See s. 28, *supra*.
2. 'Document.'—See s. 29, *supra*.
3. 'Possession.'—See s. 27, *supra*.

PRACTICE:

Evidence.—Prove the same points as for s. 475, showing in (2) that such device or mark is used for the purpose of authenticating any document other than the document described in s. 467.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint—Complaint in writing of the Court before which the offence is committed, or some other Court to which such Court is subordinate is necessary.[1]

Fraudulent cancellation, destruction, etc., of will, authority to adopt, or valuable security.

477. Whoever[1] fraudulently or dishonestly,[2] or with intent to cause damage or injury[3] to the public[4] or to any person,[5] cancels, destroys or defaces, or attempts to cancel, destroy or deface, or secretes or attempts to secrete any documents[6] which is or purports to be[7] a will,[8] or an authority to adopt a son, or any valuable security,[9] or commits

[1] Criminal Procedure Code, s. 195 (1) (c).

mischief[10] in respect to such document, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENT.

This section applies when the document tampered with or destroyed is either a will, or an authority to adopt, or a valuable security. Owing to the great importance of documents of this kind the punishment provided is severe.

1. **'Fraudulently.'**—See s. 25, *supra*.
2. **'Dishonestly.'**—See s. 44, *supra*.
3. **'Injury.'**—See s. 24, *supra*.
4. **'Public.'**—See s. 12, *supra*.
5. **'Person.'**—See s. 11, *supra*.
6. **'Document.'**—See s. 29, *supra*.
7. **'Purports to be.'**—These words make the law of India upon this matter what it has in a long succession of cases been held to be in England, namely, that the absence of a stamp is insufficient to deprive the document of its character of a valuable security in the view of penal law.[1]
8. **'Will.'**—See s. 31, *supra*.
9. **'Valuable security.'**—See s. 30, *supra*.

Tearing up of a lease,[2] a promissory note,[3] or a rough account showing a liability on the part of the prisoner,[4] amounts to the destruction of a valuable security, within the meaning of this section, even though the document may not be stamped, and is therefore inadmissible to enforce any legal claim. A person tearing to pieces a registered conveyance was guilty under this section although the document was invalid for want of consideration.[5]

10. **'Mischief.'**—See s. 425, *supra*.

PRACTICE.

Evidence.—Prove (1) that the document in question is, or purports to be, a will, or an authority to adopt, or a valuable security.

(2) That the accused has cancelled, destroyed, defaced, or secreted the same or has attempted to do so, or that he has committed mischief in respect of it.

(3) That he did as above fraudulently or dishonestly or to cause damage or injury to the public, or to some person.[6]

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Sections 467 and 477.—Where the act of the accused which constitutes forgery is the same as the act which amounts to fraudulent destruction or defacement or cancellation of the document, he cannot be convicted of separate offences under ss. 467 and 477.[7]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

[1] *(1873)* 7 M. H. C. App. 26.
[2] *Nittar Mundle*, (1865) 3 W. R. (Cr.) 38.
[3] *Madurai*, (1888) 12 Mad. 54.
[4] *Ramasami*, (1888) 12 Mad. 148, 154.
[5] *Kotha Goundan*, (1890) 1 Weir 554.
[6] (1875) 4 W. R. (Cr. L.) 2.
[7] *Pirbhu Dial*, (1912) P. L. R. No. 52 of 1912, P. W. R. (Cr.) No. 45 of 1913.

That you, on or about the——day of——, at——, fraudulently [or dishonestly, or with intent to cause damage or injury to AB (or to the public)] cancelled [or destroyed, or defaced, or attempted to cancel, destroy, deface, or secreted, or attempted to secrete, or committed mischief, in respect of] a document, to wit——, which is [or purported to be] a will [or an authority to adopt, or valuable security], and that you thereby committed an offence punishable under s. 474 of the Indian Penal Code, and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

477-A. Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant,[1] wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security[2] or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Falsification of accounts.

Explanation.—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.

COMMENT.

This section makes the falsification of books and accounts punishable even though there is no evidence to prove misappropriation of any specific sum on any particular occasion

Object.—This section was introduced by Act III of 1895, s. 4. It is intended to meet a glaring defect in the law which was proved to exist in *Shama Churn Sen's case*[1] in which a man was charged with defrauding a bank to the extent of three lakhs of rupees. He was acquitted because it could not be shown that the three lakhs had been abstracted upon any one particular occasion or in any particular sums. The present section is intended to meet such cases and to make the falsification of books punishable even though no particular sum of money or particular occasion can be shown It is, with some verbal alterations, the same in substance, as s. 1 of the Falsification of Accounts Act, 1875,[2] which runs thus :—

"That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding

[1] Calcutta case. Unreported.

[2] 38 & 39 Vic., c. 24.

of the Patents, Designs and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable.

COMMENT.

A trade-mark is some symbol, consisting in general of a picture, label, word, or words, which is applied or attached to a trader's goods, so as to distinguish them from similar goods of other traders, and to identify them as his goods, or as those of his successors in the business in which they are produced or put forward for sale.

A mark to be a trade-mark must be a mark used for denoting that the goods are the manufacture or the merchandise of a particular person.[1] A trade-mark must be some visible and concrete device or design affixed to goods to indicate that they are the manufacture of the person whose property the trade mark is.[2] "The right which a manufacturer has in his trade mark is the exclusive right to use it or the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured."[3] A man may mark his own manufactures, either by his name, or by using for the purpose any symbol or emblem, however unmeaning in itself, and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description.[4] "A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe, that the goods which he is selling are the manufacture of another person."[5] It is immaterial whether the deception arises from the use of a name which is, as it happens, the name of the defendant, or whether it arises from the use of any other description which in a sense may be accurate of that which he sells. For, if the article which he sells is come to be known in the market as meaning something made by somebody other than himself it is impossible for him to sell it *simpliciter* by that name, although it be his own, without misleading purchasers.[6]

When a manufacturer has no exclusive right to manufacture a certain article or even articles of a particular brand, all that he can claim is that no other manufacturer should so mark such articles as to pass them off as the former's when they are not.[7]

In India there is no system of registration of trade-marks, nor is there any provision for a statutory title to a trade-mark so that the rights of parties setting up rival claims to the ownership of a trade-mark is determined in accordance with the principles of the English common law.[8] A trade-mark may be acquired by adoption and user upon a vendible article. If a photographer applies a trade-mark to photographs which he sells, the provisions of this section are as applicable to such trade-mark as they are to trade-marks on other goods and vendible articles.[9] A person may to some extent appropriate to his own use a name suggested by his trade, without infringing the law relating to trade-marks or trade descriptions.[10]

1. 'Mark.'—The section deals with trade-marks and not with cases analogous to those of trade-marks. The Bombay High Court has held that the general

[1] *Anookool Chunder Nundy*, (1900) 27 Cal. 770.

[2] *Anath Nath Dey*, (1912) 40 Cal. 281.

[3] Per Lord Cranworth, in *Leather Cloth Co.* v. *American Leather Cloth Co.*, (1865) 11 H. L. C. 523, 533, 534.

[4] Per Lord Kingsdown, in *ibid*, p. 538.

[5] Per Lord Langdale, in *Perry* v. *Truefitt*, (1842) 6 Beav 66, 73.

[6] *Valentine Meat Juice Co.* v. *Valentine Extract Co., Ltd.*, (1900) 83 L. T. 259. See *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, [1907] A. C. 430; *Eno* v. *Dunn*, (1890) 15 App. Cas. 322.

[7] *Anath Nath Dey*, sup.

[8] *The British American Tobacco Co.* v. *Mahboob Buksh*, (1910) 15 C.W.N. 250.

[9] *Klier* v. *Ahuja*, (1907) 13 Burma L. R. 336.

[10] *Bakullah Mallik*, (1905) 31 Cal. 411.

resemblance or get up, irrespective of the circumstance that the registered trade-mark is different, does amount to conterfeiting a trade mark.[1] Similarly, the Calcutta High Court has laid down that the expression 'trade-mark' must not be confined to the trade-mark of the complaining party registered in England, but must include the whole design and label.[2] The former Chief Court of Lower Burma was of a contrary opinion.[3]

"Property in a trade-mark is...the right to the exclusive use of some mark, name, or symbol in connexion with a particular manufacture, or vendible commodity; consequently, the use of the same mark in connexion with a different article is not an infringement of such right of property. If, therefore, the trade-mark contains in itself a clear and distinct description of the commodity to which it is affixed, it is not pirated by the use of a mark which, although in other respects simular, does not contain or give the same description, and which is impressed upon an article which is not of the nature or quality so described."[4] "There can be no right to the exclusive ownership of any symbol or mark universally in the abstract. Thus, an iron-founder who has a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed on cotton or woollen goods; for the property in a trade-mark consists in the exclusive right to the use of that mark as applied to some particular manufacture" or vendible commodity.[5]

Importer of goods may have his own mark.—A distinctive mark may be adopted by a person who is not the manufacturer but the importer of goods, and he will acquire property in that mark as indicating all goods which bear it have been imported by him. Where the complainants, importers of hand-made sugar, used a distinctive mark denoting that the sugar contained in the bags so marked had been imported by them, (their customers accepting the mark as a guarantee that the sugar was hand-made), and the accused were found as having used the same mark whereby the complainants had established a special trade, it was held that the accused were guilty of using a false trade-mark.[6]

Property mark.

479. A mark used for denoting that moveable property belongs to a particular person is called a property mark.

COMMENT.

The distinction between 'trade-mark' and 'property-mark' is not recognized in English law.

Using a false trade mark.

480. Whoever marks any goods or any case, package or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon,[1] in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not,[2] is said to use a false trade mark.

[1] *Ganpat Sitaram Mukadam*, (1914) 16 Bom. L. R. 78, 2 Bom Cr C. 177.

[2] *Nilmoney Nag* v. *Durga Pada*, (1915) 19 C. W. N. 957.

[3] *Pelley* & *Son* v. *Stephen Ah Kyun*, (1903) 2 L. R. B. 159; *Stephen Ah Kyun* v. *James Pelley*, (1904) 10 Burma L. R. 84.

[4] Per Lord Chancellor Westbury in *Leather Cloth Co.* v. *American Cloth Co.*, (1864) 38 L. J. Ch. 199, 201, on appeal, (1865) 11 H. L. C. 523.

[5] Per Lord Westbury, in *Hall* v. *Barrows*, (1863) 33 L. J. Ch. 204, 207-8.

[6] *Latif*, (1916) 39 All. 123.

COMMENT.

This section says what constitutes the user of a false *trade-mark*.

Ingredients.—This section has two essentials.—

1. Marking any goods or any case, package, or receptacle, containing goods; or using any case, package, or receptacle, with any mark thereon.

2. Such marking or using must be in a manner reasonably calculated to cause it to be believed that the goods so marked, or the goods in the marked *receptacle*, are the manufacture or merchandise of a person whose manufacture or merchandise they are not.

1. 'Whoever marks any goods or any case, package or other receptacle containing goods, etc.'—If the goods of a manufacturer have from the mark he has used come to be known by a particular name, the adoption by a rival *trader of* any mark which would cause his goods to bear the same *name* in the market may be as much a violation of the rights of that rival as an actual copy of his device. In such cases dissimilarity of the rival marks is not a complete defence.[1] The word 'goods' includes books.[2] On a complaint alleging that the accused printed and sold an unauthorized edition of a book with the contents, outer cover and title page being exactly the same as in the authorized edition, it was held that in order to bring the case under this section the question would be whether the accused had marked the book he was selling in a manner reasonably calculated to cause it to be believed that it was the manufacture or merchandise of, or that it belonged to, a person whose manufacture or merchandise it was not, or to whom it did not belong.[3]

2. 'In a manner reasonably calculated to cause it to be believed, etc.'—The test of the infringement of a trade-mark is whether the acts alleged as an infringement are likely to mislead the public into dealing with the alleged infringer under the belief that they are dealing with a person who first used the mark.[4] How is this to be tested? Lord Herschell says: "The eye must be the judge in such a case as this...and...the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other."[5] More "differences in detail do not prevent the two designs being essentially the [illegible] man's trade-mark, in a manner liable to mislead the [illegible] ewing either that the device or inscription upon [illegible] and capable of being understood by different p[illegible] a person who carefully and intelligently examined and studied it might not be misled."[7] Thus, it is by no means necessary that there should be absolute identity. What degree of resemblance is necessary from the nature of things, is a matter incapable of definition *a priori*. All that the Court of Justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. Actual physical resemblance of the two marks is not the sole question for consideration.[8]

1 [illegible] R. R. 31.

[illegible] sup.

4 *Hall* v. *Barrows*, (1863) 33 L. J. Ch. 204; *Leather Cloth Co.*, v. *The American Leather Cloth Co.*, (1865) 11 H. L. C. 523; *Tapidas Durlabdhas*, (1907) 9 Bom. L. R. 732.

5 *Hecla Foundry Co.* v. *Walker, Hunter & Co.*, (1889) 14 App. Cas. 550, 555.

6 Per Lord Herschell in *John Harper & Co.* v. *Wright & Butler &c., Ltd.*, [1896] 1 Ch. 142, 147.

7 Per Lord Selborne in *Singer Manufacturing Co.* v. *Loog*, (1882) 8 App. Cas. 15, 18.

8 *Seixo* v. *Provezende*, (1865) L. R. 1 Ch. 192, 196; *Johnstone* v. *Ewing*, (1882) 8 App. [illegible] *F. Redda-* [illegible] *Chand* [illegible] *Saing*, [illegible] (1907) [illegible] 1 Weir [illegible] was considerable resemblance [illegible] got up of the complainant's mark yet the High Court set aside the conviction holding that the [illegible] fitly decided [illegible] *aheb*, [1912] [illegible] *Mukadam*, [illegible] C. 177.

'A person whose manufacture or merchandise they are not.'—It is good law as well as common sense that no man has a right to put off his goods for sale as the goods of a rival trader, and with that object to use names, marks, letters or other indications by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person's. Still less is he entitled to use marks containing a falsehood on their face for the purpose of deceiving purchasers and palming off upon them an article other than that which they believed they were contracting to buy.

CASES.

Calendars.—The complainant, a descendant of Shri Chandu, used to prepare calendars bearing the name of "Shri Chandu Panchang" at Jodhpur and sent each year the copy of such calendar to the publishers in different parts of India allowing them to use the name of "Shri Chandu Panchang" to denote calendars prepared in Jodhpur by the descendants of Chandu. These calendars had acquired the reputation that they were prepared by those descendants and under their authority. The defendant, a publisher in Bombay, published a calendar and used the words "Shri Chandu Panchang" on the cover, although it was not prepared by the descendants of Chandu. The complainant, thereupon, proceeded against the defendant under this section. It was held that the defendant's act could not come under this section, for the title "Shri Chandu Panchang" could not fall within the definition of 'trade-mark' under s. 478.[1]

Labels.—The complainants, the Holland Bombay Trading Co., used to import white shirtings bearing the mark "H. B. T. C. 40,000," a label with a design of a lion and snake and an oval stamp containing written in it the words "Sole Importers, Holland Bombay Trading Company, Limited," and a buff heading The accused had in their possession for purposes of sale some packages of white shirtings bearing the mark H. P. F. C. 40,000, a label with two lions and two snakes [illegible] complainants had a property in their mark) that the accused had used a false trade-mark and were liable to conviction under ss. 482 and 486.[2] The complainant had for many years carried on business as a vendor of ground coffee. He sold this in cylindrical tin boxes, each containing one pound of coffee. On the outside of the cylindrical portion of each box he had affixed a paper label on which was printed, *inter alia*, a picture of a railway engine and carriage. Over the lid and round each [illegible] and on this, in the [illegible] The accused sold [illegible] shade of pink, and a label on which was printed a picture of a steamer, the pink band purporting to be a facsimile of the accused's signature in the same position as that in which the complainant's fascimile signature appeared on his boxes. It was held that on the complainant's boxes the chief trade-mark was the picture of a railway train; that he might have a trade-mark in his facsimile signature, but the trade-mark could not reasonably be held to be infringed by the use of a signature of another person of a very different name; and that consequently a prosecution based on the use of what purported to be a facsimile of the accused's name could not succeed. It was held, further, that the band round the boxes vertically did not constitute a

[1] *Radha Krishna* v. *Kissonlal Shridhar*, (1901) 3 Bom. L. R. 883, 26 Bom. 289.

[2] *Holland Bombay Trading Co.* v. *Buktear Mull*, (1903) 8 C. W. N. 421.

trade-mark as defined in the Penal Code, and such band was merely a part of the 'get-up' of the boxes.[1]

Gold bars.—The mere fact that a bank imported and sold gold bars with a particular mark impressed upon them, a mark which was not originally theirs, but belonged to a bank that had ceased to exist, and where there was no proof of any transfer or assignment of the mark, or that the new bank succeeded the other in the sense either that it was a continuation of that bank under another name, or that it succeeded to the business or acquired the good-will of that bank, was held not to be sufficient to establish that the mark was the trade-mark of the new bank.[2]

General name cannot be the subject of a trade-mark.—The appellants, who sold fish-hooks in boxes similar to those of the respondents with a design of one fish with its head and tail turned up, were held not to have infringed the trade-mark of the respondents, who also sold fish-hooks with the design of two fish crossed, with their heads and tails turned up. It was held further that where the public had chosen a name for its own use such as "mash marks" (fish mark), that fact could not be held to prevent other persons from applying a mark to fish-hooks, which might be generally known by the same term.[3]

Use of the same receptacle.—A sold illuminant kerosine oil of his own refining in tins originally issued with oil of the same description by B and bearing B's trade-mark. The tins had been altered in minor particulars, and paper labels indicating the true manufacturer of the oil had been fixed. The bodies of the tins, however, on which B's trade-mark appeared remained unaltered. It was held that A had committed this offence.[4] According to an agreement between Oil Companies it [illegible] Company could use the tins of another Company, provided the [illegible]

[illegible]

of this agreement the Burma Oil Company [illegible] Company (U. S.) by putting on the cap the [illegible] sight tins of kerosine oil, but only two of the [illegible] tin caps and the other six had plain tin caps. [illegible] purchaser that the tins contained oil of the Burma Oil Company and the [illegible] agreed upon was the price of the Burma Oil Company as prevailing in the market. It was held that although the accused was guilty of using a false trade-mark so far as the six tins with plain caps were concerned, yet in the absence of a conspiracy between the purchaser and the accused, the accused could not be convicted of using a false trade-mark, as he had acted without intent to defraud.[5]

Using a false property mark.

481. Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

COMMENT.

This section defines the offence of using a false property-mark.

A property mark is intended to denote ownership over all moveable property belonging to a person whether it is all of one kind or of different kinds. So long as

[1] *Stephen Ah Kyun* v. *James Petley*, (1903) 10 Burma L. R. 84.

[2] *Anookool Chunder Nundy*, (1900) 27 Cal. 776. See *Dahyabhai Chakasha*, (1904) 6 Bom. L. R. 513.

[3] *Bakaullah Mallik*, (1904) 31 Cal. 411.

[4] *Po Saing*, (1907) 4 L. B. R. 192.

[5] *Abdul Rashid*, (1918) 16 A. L. J. R. 476.

the person owns moveable properties his property-mark impressed upon them remains his, though any particular article out of it may after such impression pass out of his hands and cease to be his.[1]

The function of a property mark to denote certain ownership is not destroyed because any particular property on which it was impressed has ceased to be of that ownership.[2]

Ingredients.—This section requires two essentials :—

1. Marking any moveable property or goods or any case, package or receptacle containing goods; or using any case, package or receptacle, with any mark thereon.

2. Such marking or using must be in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or the property or goods contained in such receptacle belonged to a person to whom they did not belong.

1. 'Marking any moveable property or goods, etc.'—"The term 'moveable property' was intended by the Legislature to include a class or category of properties falling under one ownership, not merely the parts of it which may pass from the hands of the owner into other hands. The class is stable, though the units are ambulatory. The class may be likened to a chain with a multitude of links some of which from time to time drop off but there are others left or those extinct are replenished by fresh links to keep the chain going. So long as the chain remains, the moveable property represented by it is there, though its component parts fluctuate. The term 'moveable property'...was intended to include collective class nouns," *i.e.*, nouns that express a number of objects of the same class collected together."[3]

2. 'In a manner reasonably calculated to cause, etc.'—See Comment on s. 481, p. 1012

Trade-mark and Property-mark.—The term 'property-mark' is one unknown to English law, and the description of its wrongful use as given in s. 481 would, in most cases, if not in every possible case, be within the scope of English law, viewing the wrong either as a crime or a civil injury The distinction in the Penal Code between a 'trade-mark' and a 'property-mark' is, that the former denotes the manufacture or quality of the goods to which it is attached, and the latter denotes the ownership of them; or more briefly, the former concerns the goods themselves, the latter the proprietor of them From s 481 it may be gathered that the result of this distinction is to secure greater precision of definition, rather than to extend the law of trade-marks as [illegible] be the maker or manufactu[illegible] put them up and he uses a [illegible] thus have the benefit of his skill in selection, then, in the terminology of the Penal Code, the mark would be a property and not a trade-mark. but if the main purpose of the mark were to indicate the quality ofthe goods, then even though A was not the maker of them, it would be a trade-mark and not a property-mark. On the other hand, a mark may be applied to a natural product as distinguished from a manufactured one and though such mark would then probably be called in Indian law a property-mark, it would be equally protected by English law as a trade-mark.

Punishment for using a false trade mark or property mark.

482. Whoever[1] uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[1] *Dahyabhai Chaluska*, (1904) 6 Bom. L. R. 513.

[2] Per Chandavarkar, J., in *ibid*, p. 515.

[3] *Ibid.*

COMMENT.

The use of false trade-mark (with 'intent to defraud') constitutes the offence under this section. *If the maker of an article puts on it the trade-mark of another* maker and he does this with the intention that purchasers may be induced to believe *that the article was made by such other maker, he commits this offence.* It will be no defence to show that the article is in every respect equal or even superior to similar articles made by the other maker, *if the offender intended to practise deception* and used the mark for this purpose. Where the trade-marks are so different *that no one would be misled,* no offence is committed.

1. **'Whoever.'**—This word means the same thing as 'every person who' and shews that the provisions *of the section apply to persons generally. In law* a corporation is a person. A limited company or a corporation is liable for using a false trade-mark or property-mark.[1]

Statutory application.—See the Bombay Abkari Act (V of 1878), s. 46 (e).

PRACTICE.

Evidence.—For using a false trade-mark prove (1) that the accused marked the goods in question, or some case, package, or receptacle containing goods; or that he used some case, package, or receptacle bearing some mark.

(2) That the accused did as above in a manner reasonably calculated to cause it to be believed that the goods so marked, or the goods contained in the receptacle so mark[illegible] fortune or merchandise of some person.

(3) [illegible] ise of that person.

For using a false property mark prove [illegible] d marked moveable property or goods in question, or some case, package, or receptacle containing moveable property or goods; or that he used some case, package, or receptacle bearing some mark.

(2) That the accused did as above in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or the property or goods contained in the receptacle so marked, belonged to some person.

(3) That such property or goods do not belong to that person.

Onus.—*An important alteration of principle has been made* in regard to offences under this section. Ordinarily, *it is incumbent on the prosecution* to prove that the person charged had acted with intent to defraud; under this section *it is incumbent on the person charged to prove that he acted innocently* or that he acted without intent to defraud.

Procedure.—*Not cognizable*—*Warrant*—Bailable—Compoundable when [illegible] by the Court before which the prosecution is pending—Triable [illegible] strate of the first or second class.

Merchandise Marks Act IV of 1889, the former of which provides for unintentional contravention of the law relating to marks and description, and the latter for forfeiture of goods when a person is *convicted* under this section. They run as follows:—

8. Where a person is accused under s. 482 *of the Indian Penal Code of* using false trade-mark or property-mark by reason of his having applied a mark to any *goods, property of receptacle* in the manner mentioned in s. 480 or s. 481 of that Code, as the case may be, or under 6 of this Act of applying to goods any false trade description, or under s. 485 of the Indian Penal Code of making any die, plate or other instrument for *the purpose of counterfeiting a trade-mark or* property-mark and proves—

[1] *Seena M. Haniff & Co.* v. *Liptons Ltd.,* (1914) 7 L. B. R. 306.

(*a*) that in the ordinary course of business he is employed, on behalf of other persons, to apply trade marks or property-marks, or trade descriptions or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade-marks or property-marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other things by way of profit or commission dependent on the sale thereof, and

(*b*) that he took reasonable precautions against committing the offence charged, and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(*d*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied, he shall be acquitted.

9. (1) When a person is convicted under s. 482 of the Indian Penal Code of using a false trade-mark, or under s. 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade-mark applied thereto, or under s. 487 or s. 488 of that Code of making, or making use of, a false mark, or under s. 6 or s. 7 of this Act of applying a false trade description to goods or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or is acquitted on proof of the matter or matters specified in s. 486 of the Indian Penal Code or s. 7 or s. 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(2) When a forfeiture is directed on a conviction, and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(3) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

Civil action.—When a *bona fide* dispute exists between the parties as to the right to use a trade-mark, action should be taken before a civil and not before a criminal Court [1]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, used a certain false trade-
. . . . . .
. . . . . .
that such goods were the manufacture (*or* property) of AB ; and that you thereby committed an offence punishable under s. 482 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Counterfeiting a trade mark or property-mark used by another.

483. Whoever counterfeits[1] any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[1] *Surja Prasad* v. *Mohabir Prasad*, (1907) 11 C. W. N. 887.

COMMENT.

Where the trade-mark of the complainant's goods contains a name to which *there might be no right of exclusive use, and another person using a similar trade-mark with the same name is charged with selling goods marked with a counterfeit mark, a material circumstance that has to be considered in the case is what the general effect of the trade mark adopted by the accused is and whether an incautious purchaser would be led to believe that he is buying the complainant's goods.*[1]

1. **'Counterfeit.'**—See s. 28, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused counterfeited the mark in question.
(2) *That such mark is the trade mark or property mark of some person.*
(3) *That it was so used by that person.*

Procedure.—*Not cognizable*—*Warrant*—*Bailable*—*Compoundable* when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, counterfeited a trade mark or property mark, to wit——, used by AB, and that you thereby committed an offence punishable under s. 483 of the *Indian Penal Code, and within my* cognizance.

And I hereby direct that you be tried on the said charge.

Counterfeiting a mark used by a public servant.

484. Whoever counterfeits[1] any property mark used by a public servant,[2] or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENT.

The offence under this section is an aggravated form of the offence described in the preceding one. An enhanced punishment is, therefore, given where a property mark used by a public servant is counterfeited.

1. **'Counterfeit.'**—See s. 28, *supra.*

2. **'Public servant.'**—See s. 21, *supra.*

PRACTICE.

Evidence.—Prove (1) that the accused counterfeited the property mark, or some other mark in question.
(2) That such mark is used by some public servant.
(3) *That it was used to denote that the property had been manufactured by a particular person ; or at a particular time or place ; or that the property was of a particular quality, or had passed through a particular office, or was entitled to some exemption.*

[1] *Nallaya Pillai,* (1895) I Weir 556.

Or prove :—

(1) That the accused used the property mark, or some other mark in question.

(2) and (3) as above.

(4) That he used the mark as genuine.

(5) That when he used it he knew the same to be counterfeit.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Charge—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, counterfeited any mark (*or* property-mark), to wit——, used by a public servant, to wit——, to denote that some property was manufactured by AB [*or* at a particular time or place, to wit——, *or* that the property is of a particular quality, to wit——, or has passed through a particular office, to wit——, *or* that it is entitled to a certain exemption, to wit——,] [*or* used as genuine a mark, to wit——knowing the same to be counterfeit], and that you thereby committed an offence punishable under s 484 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [*by* the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Making or possession of any instrument for counterfeiting a trade mark or property mark.

485. Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The making or possession of instruments for counterfeiting a trade-mark or property-mark is hereby punished. This section resembles ss. 235, 256 and 472.

As to the definition of "possession," see s. 27, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused made, or had in his possession, the die, plate, or instrument in question.

(2) That such die, etc., was for the purpose of counterfeiting a trade-mark or property-mark.

Or prove—

(1) That the accused had in his possession the trade-mark or property-mark in question.

(2) That he possessed such trade-mark or property-mark for the purpose of denoting that goods bearing such mark were the manufacture or merchandise of some person, or that they belonged to some person.

(3) That such goods were not the manufacture or merchandise of that person or that they did not belong to that person.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

See ss. 8 and 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, sold (*or* exposed, *or* had in possession for sale, etc.), certain goods, *to wit*——, *a counterfeit trade-mark* [*or* property-mark], to wit——, affixed to [*or* impressed upon] the said goods, to denote that they were the manufactures of AB; *and that you thereby committed* an offence punishable under s. 486 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Selling goods marked with a counterfeit trade mark or property mark.

486. Whoever[1] sells, or exposes, or has in possession[2] for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark[3] or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(*b*) *that, on demand made by or on behalf of the prosecutor,* he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

Object.—This section saves from punishment persons dealing with goods bearing false trade-marks if they are able to prove that after taking reasonable precautions they had no ground to suspect the genuineness of the mark, and that they gave all the information in their power as to the source from which the goods were obtained or that otherwise they had acted innocently in the matter. Thus they are saved from punishment, and it becomes possible to trace the goods to the importer. Section 17 of the Merchandise Marks Act may be compared with this section. See the Appendix where it is set out in full.

Scope.—This section does not extend to persons who act as commission agents and intermediaries only between the importers and manufacturers and ordered out goods marked with a counterfeit trade-mark, which is seized on the way and which never reaches their place of business.[1]

1. '**Whoever.**'—This word includes a limited liability company or a corporation.[2]

2. '**Possession.**'—See *s.* 27, *supra.*

3. '**Counterfeit trade-mark**' is one by means of which resemblance to a genuine one is intended to deceive and to lead a purchaser to imagine that the counterfeit is in reality the genuine article.[3] A general resemblance constitutes

[1] *Hargobind* v. *Greaves, Cotton & Co., Bombay,* (1902) P. R. No. 32 of 1902.
[2] *Seena M. Haniff & Co.* v. *Liptons Ltd.,* (1914) 7 L. B. R. 306.
[3] *Hargobind* v. *Ralli Bros.,* (1902) P. R. No. 32 of 1902.

infringement.[1] A representation that the goods of the manufacture of A are those of B need not be made orally or in writing, but it may be made by the manner in which the goods are made up by the wrapper or by the name or design. The counterfeit is itself a representation.[2]

Where a person sold books with a counterfeit property-mark, it was held that he was guilty of an offence under this section.[3]

[illegible] ed to here- were [illegible] or s. 486.[4]

As to meaning of the word 'counterfeit,' see s. 28, *supra*.

Statutory application.—See the Bombay Abkari Act (V of 1878), s. 46 (*d*); Madras Abkari Act (I of 1886), s. 57 (*d*).

PRACTICE.

[**Evidence.**—Prove (1) that the accused sold, or exposed or had in possession for sale or some purpose of trade or manufacture, the goods or things in question.

(2) That such goods or things had some trade-mark or property-mark affixed to, or impressed upon, them, or had some trade-mark or property-mark affixed to, or impressed upon, some case, package, or other receptacle in which they were contained.

(3) That such trade-mark or property-mark was counterfeit.

Where a person is charged with the commission of an offence under this section and the facts mentioned in the first paragraph thereof are proved, there are two alternative defences open to the accused: the first being that indicated by clauses (*a*) and (*b*) of the section read together, and the second being that indicated by clause (*c*). The first defence presupposes that the person charged believed the trade-mark in question to be a genuine one. The second defence pre-supposes that the person charged did not know that the trade-mark in question was the trade-mark of any firm or person.[5]

Onus.—The onus is not on the complainant to show that the accused acted dishonestly, but on the accused to bring himself within the exception.[6]

Procedure.—Not cognizable—Summons—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first or second class.

In *Dowlat Ram's case*[7] Maclean, C. J., said: "It seems to me that when a case of this class (counterfeiting a trade-mark) is brought into a criminal Court, if the Magistrate is of opinion that there is a *bona fide* dispute as to whether the complainant has any trade-mark at all or whether the accused is or is not entitled to use the mark he is using, I say, if the Magistrate is satisfied that there is this *bona fide* dispute, he should not deal with the matter as a criminal matter, but leave it to the complainant to maintain, if he can, in a civil Court the right which he claims. If after the decision of the civil Court it be found that he has a trade-mark, and that the accused is fraudulently counterfeiting that trade-mark, the case

[1] *Ganpat Sitaram Muladam*, (1914) 16 Bom. L. R. 78, 2 Bom. Cr. C. 177; contra, *Petley & Sons* v. *Stephen Ah Kyun*, (1903) 2 L. B. R. 159; *Stephen Ah Kyun* v. *James Petley*, (1903) 10 Burma L. R. 84

[2] *Tapidas Durlabhdas*, (1907) 9 Bom. L. R. 732.

[3] *Kunai Das Bairagi* v. *Radha Shyam Banack*, (1898) 26 Cal. 232.

[4] *Matilal Premsuk* v. *Kanhai Lal Dass*, (1905) 32 Cal. 969.

[5] *Ilahi Bakhsh*, (1897) 17 A. W. N. 99

[6] *Holland Bombay Trading Co.* v. *Bulteer Mull*, (1903) 8 C. W. N. 421.

[7] (1905) 35 Cal. 431, 436.

could then be properly brought into a criminal Court under the section (s. 486) to which I have referred."

Jurisdiction.—A Magistrate has jurisdiction to try an offence under this section, although the sale, or the trade, or the manufacture, be not intended to take place within the jurisdiction of a Court in which the complaint is lodged. Possession of certain tins of clarified butter at Howrah, bearing a counterfeit trade-mark, though intended for sale in Rangoon, was held to constitute an offence committed at Howrah.[1]

Limitation.—Prosecution should be instituted within one year from the discovery of the offence.[2]

Forfeiture.—See s. 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

Making a false mark upon any receptacle containing goods.

487. Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud,[1] be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT.

The fraudulent making of false marks of any description on goods for the purpose of deceiving public servants such as custom officers, is punishable under this section. Thus, importation of contraband goods under false marks will come under the purview of this section. This section, therefore, is more comprehensive than ss. 482 and 486.

1. **'Intent to defraud.'**—See ss. 45 and 486, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused made some mark upon some case package, or other receptacle containing goods.

(2) That such mark was a false mark.

(3) That he did so in a manner reasonably calculated to cause some public servant or some other person to believe (*a*) [illegible] which it did not contain, or (*b*) that it did no
(*c*) that the goods contained in such receptacl
from the real nature or quality thereof.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Forfeiture.—See s. 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

[1] *Yusuf Mahomed Abaruth* v. *Bansidhar Sinugi*, (1898) 25 Cal. 630

[2] *Ruppell* v. *Ponnusami Tevan*, (1899) 22 Mad. 458.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, made a false mark, to wit——, upon a case, to wit——, (*or* package *or* other receptacle containing goods) in a manner reasonably calculated to cause a public servant, to wit——, (*or* AB) to believe that such case contains goods, to wit——, which it does not contain [illegible] of Session or the High Court).

And I hereby direct that you be tried [by the said Court (*in cases tried by Magistrate omit these words*)] on the said charge.

Punishment for making use of any such false mark.

488. Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud,[1] be punished as if he had committed an offence against that section.

COMMENT.

This section punishes the making use of a false mark. The last section punished the making of such a mark.

1. **'Intent to defraud.'**—See ss 15 and 486, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused made use of some mark upon some case, package, or receptacle containing goods.

(2) and (3) same as for s. 487.

Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first or second class

Forfeiture.—See s. 9 of the Merchandise Marks Act, 1889, set out in the Appendix.

Charge.—See s. 487, *supra*.

Tampering with property mark with intent to cause injury.

489. Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury[1] to any person,[2] shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENT.

This section punishes the tampering with of a property-mark. Criminal intention or knowledge on the part of the accused is required under it.

1. **'Injury.'**—See s. 44, *supra*.

2. **'Person.'**—See s. 11, *supra*.

PRACTICE.

Evidence.—Prove (1) that the mark in question is a property mark.

(2) That the accused removed, destroyed, or defaced, or added to, such mark.

(3) *That he did so intending thereby to cause injury to some person; or that he did so knowing that he might thereby cause injury to some person.*

Procedure.—*Not cognizable*—Summons—*Bailable*—*Not compoundable*—Triable by Presidency Magistrate, *or Magistrate of the first or second class.*

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, removed (*or* destroyed, defaced *or* added to) a property mark, to wit——, intending [*or* knowing it to be likely), that you may thereby cause injury to AB, and that you thereby committed an offence punishable under s. 489 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Of Currency-Notes and Bank-Notes.

Counterfeiting currency-notes or bank-notes.

489-A. Whoever counterfeits,[1] or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—For the purposes of this section and of sections *489B*, *489C* and *489D*, the expression "*bank-note*" *means a* promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to, or as a substitute for, money.

COMMENT.

This section is similar to ss. 231 and 255.

Object.—*Sections* 489A, 489B, 489 C and 489D *were introduced* by the Currency Notes Forgery Act (XII of 1899), s. 2, in order to provide more adequately for the protection of currency-notes and bank-notes from forgery. Under the Indian *Penal Code, which* was passed prior *to the existence of a paper currency in India,* currency-notes were not protected by any special provisions, but merely by the general provisions applying to the forgery of valuable securities. *Before these* sections were introduced, charges for forging currency-notes had to be preferred *under s. 467, for uttering them,* under *s. 471,* and for making or possessing counterfeit plates, under s. 472. The provisions of s. 467 afforded sufficient means of dealing both with forgery generally and with forgery of currency-notes. But it was at times difficult to obtain a conviction under the other *sections.*

1. '**Counterfeits.**'—See s. 28, *supra.*

PRACTICE.

Evidence.—Prove (1) that the note in question is a currency-note or bank note.

(2) That the accused counterfeited it, or knowingly performed any part of the process of counterfeiting it.

A conviction under this section cannot be maintained unless it is proved that the accused really intended to counterfeit and either did counterfeit or perform any part of the process of counterfeiting.[1]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, counterfeited (*or* knowingly performed a part of the process of counterfeiting to wit——), a currency-note (*or* a bank-note) (*state the value of the note*), and thereby committed an offence punishable under s. 489-A of the Indian Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

Using as genuine forged or counterfeit currency-notes or bank-notes.

489-B. Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section provides against trafficking in forged or counterfeit notes. It resembles ss. 239, 241 and 258.

PRACTICE.

Evidence.—Prove (1) that the currency-note or bank-note in question was forged or counterfeited

(2) That the accused sold to, or bought or received from, some person, or trafficked in, or used as genuine, such currency-note or bank-note.

(3) That when he did so he knew or had reason to believe that it was forged or counterfeited.

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of—, at——, sold to AB (*or* bought from AB, etc.), a forged (*or* counterfeit) currency-note, to wit——, knowing (*or* having reason to believe), the same to be forged (*or* counterfeit), and that you thereby committed an offence punishable under s. 489-B of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Possession of forged or counterfeit currency-notes or bank-notes.

489-C. Whoever has in his possession[1] any forged[2] or counterfeit[3] currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

[1] *Meeru*, (1917) 10 B. L. T. 255.

COMMENT.

This section deals with the mere possession of a forged or counterfeit currency-note or bank-note. It resembles ss. 242, 243 and 259.

1. 'Possession.'—See s. 27, *supra*.

2. 'Forged.'—See ss. 463, 464 and 470, *supra*.

3. 'Counterfeit.'—See s. 28, *supra*.

PRACTICE.

Evidence.—Prove (1) that the currency-note or bank-note in question was forged or counterfeited.

(2) That the accused was in possession of it.

(3) That he at the time of his possession knew, or had reason to believe, that it was forged or counterfeited.

(4) That he intended to use it as genuine or that it might be used as genuine.

Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Charge.—I *(name and office of Magistrate, etc.,)* hereby charge you *(name of the accused)* as follows :—

That you, on or about the——day of——, at——, had in your possession a forged *(or counterfeit)* currency-note *(or bank-note)*, to wit——, knowing *(or having* reason to believe) the same to be forged *(or* counterfeit) and intending to use the same as genuine or that it may be used as genuine, and that you thereby committed an offence punishable under s. 489-C of the Indian Penal Code, and within the cognizance of the Court of Session *(or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.

489-D. Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession,[1] any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting[2] any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

This section is analogous to ss. 233, 234, 256, 257 and 485. It was introduced into the Code by Act XII of 1899.

1. 'Possession.'—See s. 27, *supra*.

2. 'Counterfeiting.'—See s. 28, *supra*.

PRACTICE.

Evidence.—Prove (1) that the thing in question was a machinery, instrument *or material necessary for or used in forging* or counterfeiting a currency-note or bank-note

"In some cases a mere inspection of the articles would satisfy the Court that they are capable of being used in the making of counterfeit notes. But where that is not the case, it is the duty of the Crown to adduce evidence of a *competent* and qualified witness who would be able to explain to the Court the process by which

the instruments or materials in question could be used in making a counterfeit note...Instruments and materials which may be useful in making correct drawings of the outlines of the designs and figures of a currency-note may be of no use whatever in manufacturing counterfeit notes."[1]

(2) That the accused made, or performed, some part of the process of making the machinery, instrument, or material, in question; or that he bought, sold, or disposed of it; or that he had it in his possession.

(3) That the object of the accused was that such machinery, instrument, or material might be used for the purpose of forging or counterfeiting currency-notes or bank-notes; or that he knew, or had reason to believe, that the same was intended to be used for such purpose.

Before the Court could come to the conclusion that the accused had the objects in question for the purpose of counterfeiting, the prosecution should establish that he had formed in his mind the purpose or intention of counterfeiting currency-notes. The onus of doing so is on the Crown according to the language of the section—unlike the English law where in the case of a similar offence with respect to the counterfeiting of Bank of England notes, the onus is laid on the accused of proving a lawful excuse "for knowingly having in his custody or possession any plate, stone or other material or any instrument or device for engraving a bank-note." But "if the purpose and intention of the accused be proved, it is not necessary that all the articles required for counterfeiting should be found on him to hold him guilty of an offence under the section. A man may not be able to command all the articles required for the purpose but he may be actually proved to be in possession of only some. This would not deter the Court from convicting him of an offence under the statute."[2]

Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, made (*or* performed any part of the process of making, *or* bought *or* sold *or* disposed of, *or* had in your possession) an instrument (*or* material, to wit——, for the purpose of being used (*or* knowing *or* having reason to believe that it was intended to be used) for forging (*or* counterfeiting) a currency-note (*or* a bank-note), to wit——, and that you thereby committed an offence punishable under s. 489-D of the Indian Penal Code, and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

[1] Per Abdur Rahim, J., in *Abdul Rahiman*, (1911) 21 M. L. J. 766, 768, 769, 10 M. L. T. 108, 109, 110

[2] Per Sundara Aiyar, J., in *ibid*, pp. 773, 776 and 114.

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

Object.—*The authors of the Code say*: "We agree with the great body of jurists in thinking that in general a mere breach of contract ought not to be an offence, *but only to be the subject of a civil action.*

"To this general rule there are, however, some exceptions. *Some breaches* of contract are very likely to cause evil such as no damages or only very high damages can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damages can be obtained. Such breaches of contract are, we conceive, proper subjects for penal legislation."[1]

Breach of contract of service during voyage or journey.

490. Whoever, being bound by a lawful contract[1] to render his personal service[2] in conveying or conducting any person or any property from one place to another place, or to act as servant to any person during a voyage or journey, or to guard any person or property during a voyage or journey, voluntarily omits so to do,[3] except in the case of illness or ill-treatment, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

ILLUSTRATIONS.

(*a*) A, a palanquin bearer, being bound by legal contract to carry Z from one place to another, runs away in the middle of the stage. *A has committed the* offence defined in this section.

(*b*) A, *a coolie, being bound by lawful contract to carry* Z's baggage from one place to another, throws the baggage away. A has committed the offence defined in this section.

(*c*) A, a proprietor of bullocks, being bound by legal contract to convey goods on his bullocks from one place to another, illegally omits to do so. *A has committed* the offence defined in this section.

(*d*) A, by unlawful means, compels B, a coolie, to carry his baggage. B in the course of the journey puts down the baggage and runs away. Here, as B was *not lawfully bound to carry the baggage, he has not committed any offence.*

Explanation.—It is not necessary to this offence that the contract should be made with the person for whom the service is to be performed. It is sufficient if the contract is legally made with any person, either expressly or impliedly, by the person who is to perform the service.

ILLUSTRATION.

A contracts with a dak company to drive his carriage for a month. B employs the dak company to convey [illegible] with the company supplies B with a carriage [illegible] *of the journey* voluntarily leaves the carri[illegible]t with B. A is guilty of an offence under this section.

[1] Note P, p. 170.

COMMENT.

This section has been repealed by the Workman's Breach of Contract (Repealing) Act, 1925 (III of 1925) with effect from April 1, 1926.[1]

The Commentary is therefore omitted.

Breach of contract to attend on and supply wants of helpless person.

491. Whoever, being bound by a lawful contract[1] to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness,[2] is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

COMMENT.

Object.—The authors of the Code say: "We also think that persons who contract to take care of infants of the sick and of the helpless lay themselves under an obligation of a very peculiar kind, and may with propriety be punished if they omit to discharge their duty. The misery and distress which their neglect may cause is such as the largest pecuniary payment would not repair; they generally come from the lower ranks of life, and would be unable to pay anything. We therefore propose to add to this class of contracts the sanction of the penal law."[3]

Ingredients.—This section requires three essentials:—

1 Binding of a person by a lawful contract.

2. Such contract must be to attend on or to supply the wants of a person who is helpless or incapable of providing for his own safety or of supplying his own wants by reason of (i) youth, or (ii) unsoundness of mind, or (iii) disease, or (iv) bodily weakness.

3. Voluntary omission to perform the contract by the person bound by.

1. 'Whoever being bound by a lawful contract.'—Under this section it is not the breach of contract towards the other party to the contract that is to be regarded, but the breach of the legal obligation towards the incapable person, which has been accepted and transferred by the contract. See Comment on 490, *supra*.

2. 'To attend on or to supply the wants of any person who, by reason of youth, etc.'—The Law Commissioners observe: "We are not prepared to punish as a criminal every menial servant, who quits his employer without a certain notice upon the expiration of the term for which he is hired, under ordinary circumstances. But we conceive that Clause 465 may be improved in one respect. It seems, as it stands, not to be applicable to any but those servants who have contracted specially to attend upon the sick, insane, &c., but we think it should be made to apply to servants who are or ought to be in attendance upon a sick or insane master, though they may have only contracted with him in the ordinary way, while he was of sound body and mind, and to servants, whether engaged specifically for the purpose or not, who by the lawful command of their employers have been ordered to take care of young children and have not objected to do so"[3] The accused, a cook, on a morning whilst the complainant's wife was ill and unable to supply her own wants, left his service without warning or permission. It was alleged that the illness of the complainant's wife was aggravated thereby. It was held that the accused was engaged only as an ordinary cook to a family, and was not bound to attend on, or

[1] *Gazette of India*, Part IV, dated 14th February 1925, p. 3.

[2] Note P, p. 171.

[3] 2nd Rep., s. 329.

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

Object.—The authors of the Code say: "We agree with the great body of jurists in thinking that in general a mere breach of contract ought not to be an offence, but only to be the subject of a civil action.

"To this general rule there are, however, some exceptions. Some breaches of contract are very likely to cause evil such as no damages or only very high damages can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damages can be obtained. Such breaches of contract are, we conceive, proper subjects for penal legislation."[1]

Breach of contract of service during voyage or journey.

490. Whoever, being bound by a lawful contract[1] to render his personal service[2] in conveying or conducting any person or any property from one place to another place, or to act as servant to any person during a voyage or journey, or to guard any person or property during a voyage or journey, voluntarily omits so to do,[3] except in the case of illness or ill-treatment, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

ILLUSTRATIONS.

(*a*) A, a palanquin bearer, being bound by legal contract to carry Z from one place to another, runs away in the middle of the stage. A has committed the offence defined in this section.

(*b*) A, a coolie, being bound by lawful contract to carry Z's baggage from one place to another, throws the baggage away. A has committed the offence defined in this section.

(*c*) A, a proprietor of bullocks, being bound by legal contract to convey goods on his bullocks from one place to another, illegally omits to do so. A has committed the offence defined in this section.

(*d*) A, by unlawful means, compels B, a coolie, to carry his baggage. B in the course of the journey puts down the baggage and runs away. Here, as B was not lawfully bound to carry the baggage, he has not committed any offence.

Explanation.—It is not necessary to this offence that the contract should be made with the person for whom the service is to be performed. It is sufficient if the contract is legally made with any person, either expressly or impliedly, by the person who is to perform the service.

ILLUSTRATION.

A contracts with a dak company to drive his carriage for a month. B employs the dak company to convey him on a journey, and during the month the company supplies B with a carriage which is driven by A. A in the course of the journey voluntarily leaves the carriage. Here, although A did not contract with B, A is guilty of an offence under this section.

[1] Note P, p. 170.

COMMENT.

This section has been repealed by the Workman's Breach of Contract (Repealing) Act, 1925 (III of 1925) with effect from April 1, 1926.[1]

The Commentary is therefore omitted.

Breach of contract to attend on and supply wants of helpless person.

491. Whoever, being bound by a lawful contract[1] to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness,[2] is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

COMMENT.

Object.—The authors of the Code say: "We also think that persons who contract to take care of infants of the sick and of the helpless lay themselves under an obligation of a very peculiar kind, and may with propriety be punished if they omit to discharge their duty. The misery and distress which their neglect may cause is such as the largest pecuniary payment would not repair; they generally come from the lower ranks of life, and would be unable to pay anything We therefore propose to add to this class of contracts the sanction of the penal law."[2]

Ingredients.—This section requires three essentials:—

1. Binding of a person by a lawful contract.
2. Such contract must be to attend on or to supply the wants of a person who is helpless or incapable of providing for his own safety or of supplying his own wants by reason of (i) youth, or (ii) unsoundness of mind, or (iii) disease, or (iv) bodily weakness.
3. Voluntary omission to perform the contract by the person bound by.

1. **'Whoever being bound by a lawful contract.'**—Under this section it is not the breach of contract towards the other party to the contract that is to be regarded, but the breach of the legal obligation towards the incapable person, which has been accepted and transferred by the contract. See Comment on 490, *supra*.

2. **'To attend on or to supply the wants of any person who, by reason of youth, etc.'**—The Law Commissioners observe: "We are not prepared to punish as a criminal every menial servant, who quits his employer without a certain notice upon the expiration of the term for which he is hired, under ordinary circumstances. But we conceive that Clause 465 may be improved in one respect. It seems, as it stands, not to be applicable to any but those servants who have contracted specially to attend upon the sick, insane, &c., but we think it should be made to apply to servants who are or ought to be in attendance upon a sick or insane master, though they may have only contracted with him in the ordinary way, while he was of sound body and mind, and to servants, whether engaged specifically for the purpose or not, who by the lawful command of their employers have been ordered to take care of young children and have not objected to do so"[3] The accused, a cook, on a morning whilst the complainant's wife was ill and unable to supply her own wants, left his service without warning or permission. It was alleged that the illness of the complainant's wife was aggravated thereby. It was held that the accused was engaged only as an ordinary cook to a family, and was not bound to attend on, or

[1] *Gazette of India*, Part IV, dated 14th February 1925, p. 3.

[2] Note P, p. 171.

[3] 2nd Rep., s. 329.

to supply the wants of, any helpless person, and that, *therefore, this section did* not apply to such a case.[1]

3. 'Voluntarily omits.'—The omission to perform the contract must be without any reasonable cause. A person who is disabled by *illness cannot be* said to voluntarily omit. As to the meaning of the word 'voluntarily,' see s. 39, *supra*.

PRACTICE.

Evidence.—Prove (1) that the accused entered into a contract to attend on, or supply the wants of, the person in question.

(2) That such contract was a lawful one.

(3) That such person was helpless or incapable of providing for his own safety or of supplying his own wants.

(4) That such helplessness or incapableness was due to youth, or unsoundness of mind, disease or bodily weakness.

(5) That the accused omitted to attend on such person, or to supply his wants.

(6) That he did so voluntarily.

Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class—Triable summarily.

Breach of contract to serve at distant place to which servant is conveyed at master's expense.

492. Whoever, being bound by lawful contract in writing[1] to work for another person as an artificer, workman or labourer, for a period not more than three years, at any place within British India to which by virtue of the contract he has been or is to be conveyed at the expense of such other,[2] voluntarily deserts the service of that other during the continuance of his contract, or without reasonable cause refuses to perform the service which he has contracted to perform,[3] such service being reasonable and proper service,[4] shall be punished with imprisonment of either description for a term not exceeding one month, or with fine not exceeding double the amount of such expense, or with both, unless the employer has ill-treated him or neglected to perform the contract on his part.

COMMENT.

This section has been repealed by the Workman's Breach of Contract (Repealing) Act, 1925, (III of 1925) with effect from April 1, 1926.[2]

The Commentary is, therefore, omitted.

[1] *Solomon*, (1887) Cr. R. No. 43 of 1887, Unrep. Cr. C. 354.

[2] See *Gazette of India*, Part IV, dated 14th February 1925, p. 3.

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE.

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.

493. Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Object.—This section punishes the offence committed when a man, either married or unmarried, induces a woman to become, as she thinks, his wife, but in reality his concubine. The form of the marriage ceremony depends on the race or [illegible] ces are [illegible] e may [illegible] same race or creed as herself and thus inducing her to contract a marriage, in reality unlawful, but which, according to the law under which she lives is valid. Suppose a person half English half Asiatic by blood, calls himself a Mahomedan or a Hindu and by this deception causes a Mahomedan or a Hindu woman to go through the ceremony of marriage, in a form which she deems valid and to cohabit with him, he has committed this offence A man who deceives a woman into the belief that a certain ceremony which he causes to be performed by some accomplice, constitutes a valid marriage and thus induces the woman to cohabit with him, may be punished under this section [1]

The act falling within the purview of this section will also come under cl. 4 of s. 375.

Ingredients.—The section has two ingredients :—

1 The deceit that causes a false belief in the existence of a lawful marriage.

2. Cohabitation or sexual intercourse with the person causing such belief.

PRACTICE.

Evidence.—Prove (1) that the accused caused the woman in question to believe that she was lawfully married to him.

(2) That he induced that woman to cohabit with him under the belief.

(3) That he caused such belief by deceit.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

Complaint by the person aggrieved is necessary.—No Court shall take cognizance of this offence except upon a complaint made by some person aggrieved by it.[2]

Charge.—I (*name and office of Magistrate, etc.,*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, by deceit caused a certain woman, to wit AB, who was not lawfully married to you, to believe that she was lawfully married to you, and, in that belief cohabited or had sexual intercourse

[1] M. & M. 432.

[2] Criminal Procedure Code, s. 196

with her; and that you thereby committed an offence punishable under s. 493 of the Indian Penal Code and within the cognizance of the Court of Session (or the High Court).

And I hereby direct that you be tried by the said Court on the said charge.

Marrying again during lifetime of husband or wife.

494. Whoever, having a husband or wife living,[1] marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife,[2] shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction;

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

COMMENT.

This section punishes the offence known to English law as bigamy.

Scope.—This section does not apply to Hindu or Mahomedan males, who are allowed to marry more than one wife, but it applies to Hindu and Mahomedan females, and to Christians[1] and Parsis[2] of either sex.

Ingredients.—This section requires:—

1. Existence of the first wife or husband when the second marriage is celebrated.

2. The second marriage being void by reason of the subsistence of the first according to the law applicable to the person violating the provisions of the section.

1. **'Having a husband or wife living.'**— [illegible] marriage in the case of Hindus, Mahomedans, Jews, Buddhists, [illegible] accordance with their religious usages. In [illegible] mined by Act XV of 1872, of Parsis, by Act XV of 1865. The validity of a marriage celebrated under the Special Marriage Act[3] will be determined by its provisions

If the first marriage is not a valid marriage no offence will be committed by contracting a second marriage. For instance, if A marries B, a person within prohibited degrees of affinity, and during B's life-time marries C, A has not committed bigamy.[4]

"A marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely,

[1] Act XV of 1872.
[2] Act XV of 1865.
[3] Act III of 1872, as amended by Act XXX of 1923.
[4] *Chadwick*, (1847) 11 Q. B. 205. See *Kay*, (1887) 16 Cox 202.

be considered otherwise than as intending a marriage contract."[1] But a union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union for life of one man and one woman to the exclusion of all others.[2]

'Living.'—It must be shown that the husband or wife is alive at the date of the second marriage.

Mahomedan law allows a minor to repudiate marriage on attaining puberty.—"Under the Mohamedan law, when a child is given in marriage by any person other than the father or grandfather, he or she has the option of either ratifying it or repudiating it on attaining puberty...The only difference between the Sunni and the Shiah law on the question of option on puberty is that whereas according to the latter school a marriage contracted for a minor by a person other than the father or grandfather is wholly ineffective until it is ratified by the minor on attaining puberty, according to the (Hanafi) Sunni school it continues effective until it is cancelled by the minor. Both schools give to the minor an absolute power either to ratify or to cancel the unauthorised marriage. The (Hanafi) Sunni law presumes ratification when the girl after attaining the age of puberty has remained silent and has allowed the husband to consummate the marriage."[3] B, a Mahomedan girl, whose father was dead, was alleged to have been given in marriage by her mother to J., some years before she attained puberty. Prior to her attaining puberty, J was sentenced to a term of imprisonment for theft. While he was in [illegible] marri- [illegible] eeded [illegible] with [illegible] cause, assuming that B was properly married to J by B's mother when B was a child, B had the option of either ratifying or repudiating such marriage on attaining puberty.[4]

A *nikah* marriage[5], or *sagai*[6], or *pat*[7] marriage falls within the purview of this section, but not *jhingara*.[8]

Marriage during Iddat.—In a Bombay Sessions case it was held that a Mahomedan woman marrying again during the lifetime of a husband who has divorced her but within the period of *iddat* is not guilty of bigamy.[9] The Calcutta High Court holds the same view. It has laid down that under Mahomedan law the marriage of a man, who subsequently embraces Christianity, becomes *ipso facto* void, notwithstanding his reconversion to Islam during the period of *iddat*; [illegible] marriage during such period, does not commit [illegible] husband but by reason of a [illegible] Penal Code has nothing to do.[10] The former Chief Court of the Punjab decided that a second marriage contracted with a woman whose husband was dead and who was

[1] *Warrender* v. *Warrender*, (1835) 2 Cl. & F. 488, 530; *Brinkley* v. *Attorney-General*, (1890) 15 P. D 76.

[2] *In re Bethell: Bethell* v. *Hildyard*, (1888) 38 Ch. D. 220.

[3] Per Amir Ali, J., in *Badal Aurat*, (1891) 19 Cal. 79, 82

[4] *Ibid.*

[5] *Judoo Mussulmanee*, (1866) 6 W. R. (Cr.) 60.

[6] *Mussamut Chamia*, (1880) 7 C. L. R. 354, *Bissuram Koiree*, (1878) 3 C. L. R. 410.

[7] *Bai Rupa*, (1864) 2 B. H. C (Cr. C.) 117; *Ramjee Teli* v. *Ragho Teli*, (1899) 12 C.P.L.R. (Cr.) 19.

[8] *Gigal* v. *Phio*, (1888) P. R. No. 25 of 1888.

[9] *Sabiha*, (1907) 9 Bom. L. R. J. 207.

[10] *Abdul Ghani* v. *Azizul Haq*, (1911) 39 Cal. 409, 412.

in the state of observing her *iddat* being unlawful under the Mahomedan law, no conviction under this section was sustainable.[1]

[illegible] valid marriage, and the parties obtaining such [illegible] though it is customary [illegible] ngst the Mahomedans, the Parsis,[2] and the [illegible]

2. **'Marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife.'**—Where a person, already bound by an existing marriage, goes through with another person a form of marriage known to, and recognised by, the law as capabl[illegible] such person is guilty of bigamy, notwithstanding [illegible] depend-ently of the bigamous character of the marriage, may consti[illegible] isability in the parties, or make the form of marriage resorted to inapplicable to their case.[4] It is immaterial even if the second marriage is void on another ground besides that of its being bigamous.[5]

It is immaterial whether the ceremony of the second marriage takes place within or beyond the King's dominions.[6]

Good faith and mistake of law are no defences to a charge of bigamy.[7] It is no defence in law to an indictment for bigamy that the accused, at the time of the alleged bigamous marriage, believed, in good faith and on reasonable grounds, that he had been divorced from the bond of his first marriage, if in fact he had not been divorced.[8]

Publication of banns of marriage.—The act of causing the publication of banns of marriage is an act done in the preparation to marry but does not amount to an attempt to marry. Where, therefore, a man having a wife living, caused the banns of marriage between him and a woman to be published, it was held that he could not be punished for an attempt to marry again during the life-time of his wife.[9]

Whether custom a good defence to prosecution.—The Bombay High Court has ruled that Courts will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to re-marry. Bona fide belief that the [illegible] a defence [illegible] A custom [illegible] e husband of the Taipada Koli caste, [illegible] to whom she has been first married, and to contract a second marriage (*natra*) with another man during the life-time of her first husband, and without his consent, was held to be invalid, as being entirely opposed to the spirit of the Hindu law; and that such marriage was "void by reason of its taking place during the life-time of such husband," and therefore punishable, as regards the woman, under this section.[11] Accused No. 1 was married to the complainant but the marriage was

[1] *Muest. Bibi*, (1882) P. R. No. 43 of 1882.

[2] The Parsi Marriage and Divorce Act, XV of 1865.

[3] The Native Converts' Marriage Dissolution Act, XXI of 1866.

[4] *Henry Allen*, (1872) L. R. 1 C. C. R. 367; *Jane Brown*, (1843) 1 C. & K. 144. This view is not adopted in the Irish case of *Fanning*, (1866) *10 Cox* 411, where it is said that English cases are distinguishable as the bigamous marriages in them were void for consanguinity and not for fornication.

[5] *Gurbal Singh* v. *Shama Singh*, (1876) P. R. No. 19 of 1876.

[6] *Russell*, [1901] A. C. 446.

[7] *Narandikath Avullah* v. *Parakkal Mammu*, (1922) 45 Mad. 986.

[8] *Thomas Wheat*, [1921] 2 K. B. 119.

[9] *Peterson*, (1876) 1 All. 316

[10] *Sambhu Raghu*, (1876) 1 Bom. 347. See *Sankaralingam Chetti* v. *Subban Chetti*, (1894) 17 Mad. 479, where it is decided that [illegible] a caste custom by [illegible] ssible [illegible] ing to [illegible] ignal marriage.

[11] *Bai Rupa*, (1864) 2 B. H. C. (Cr. C.) 117; *Keshav Hargovan* v. *Bai Gandi*, (1916) 17 Bom. L. R. 594.

not consummated. Sometime after the marriage, the complainant went to South Africa, and during his absence there he did not write to his wife, nor did he furnish her with maintenance. The accused obtained, according to custom of her caste, a release dissolving the marriage (*fargati*) from her caste people and married accused No. 2. It was held that the release was inoperative and that both the accused were guilty of bigamy.[1]

The Calcutta High Court has, however, upheld a caste custom which allowed a wife to undergo a *nikah* or *sagai* marriage after she was relinquished by her husband.[2] According to the Mad[illegible] y such custom should be allowed by Courts.[3] In [illegible] Court did give countenance to the custom of a c[illegible] for a sufficient reason to divorce his wife. In this case a member of the Ajanya Rajput Guzars caste executed a deed of divorce to his wife. The Court held on the evidence that the deed was proved; that in that caste a husband was, for a sufficient reason, such as incontinence, allowed to divorce his wife; that the deed had not been executed for a sufficient reason; and that, consequently, the parties entering into a second marriage were guilty of an offence under this section.

Conversion from Hinduism.—According to Hindu law an apostate is not absolved from all civil obligations, the matrimonial bond remaining indissoluble. A non-Christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity.[5] Hindu law does not recognize polygamy on the part of a woman. A Hindu woman who having a Hindu husband living marries a Mahomedan[6] or a Christian[7] even after becoming a Mahomedan or Christian, as the case may be, commits bigamy. A Hindu husband under similar circumstances commits no offence as Hindu law recognizes the right of a husband to contract a valid second marriage notwithstanding the continuance of a former marriage.

Conversion from Christianity.—The Madras High Court once held that a Hindu Christian convert relapsing into Hinduism and marrying a Hindu woman cannot be convicted of bigamy on the ground that he has another wife living whom he married while a professed Christian.[8] It was so held on the ground that the Hindu law allowed polygamy on the part of a husband. The same High Court [illegible] which a Native Chris- [illegible] n according to Hindu [illegible] e was guilty of bigamy [illegible] erence even if he had renounced the Christian religion before contracting the second marriage.[9] But in a later case the former ruling has been followed and the latter has been dissented from. In this case a Hindu convert had married a Christian woman according to the rites of the Roman Catholic religion. Subsequently, and during the life-time of his Christian wife, he reverted to Hinduism and married a Hindu woman in accordance with the rites of the class to which the parties belonged. It was held that he was not guilty of bigamy.[10]

[1] *Bas Ganga*, (1916) 19 Bom. L. R. 56, 4 Bom. Cr. C. 3

[2] *Julia*, (1892) 19 Cal. 627.

[3] *Tholasingam*, (1896) 1 Weir 568.

[4] (1882) 6 Bom. 126.

[5] *Ram Kumari*, (1891) 18 Cal. 264; *Mussumat Gholam Fatima*, (1870) P. R. No. 32 of 1870

[6] *Ganga*, (1880) 4 Bom. 330; *Budansa Routher* v. *Fatema Bi*, [1914] M. W. N. 278, (1913) 26 M. L. J. 260 *Nandi*, (1919) [illegible] the provisions of the Indian Divorce Act (IV of 1869).

[7] *Millard*, (1887) 10 Mad. 218.

[8] (1866) 3 M. H. C. App. 7; *Michael*, (1886) 1 Weir 563.

[9] *Lazar*, (1907) 30 Mad. 550.

[10] *Antony*, (1910) 33 Mad. 371.

in the state of observing her *iddat* being unlawful under the Mahomedan law, no conviction under this section was sustainable.[1]

Divorce.—Divorce dissolves a valid marriage, and the parties obtaining such dissolution can re-marry. Divorce is unknown to Hindu law, though it is customary amongst lower classes of the Hindus. Divorce is allowed amongst the Mahomedans, the Parsis,[2] and the Native Christians.[3]

2. **'Marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife.'**—Where a person, already bound by an existing marriage, goes through with another person a form of marriage known to, and recognised by, the law as capable of producing a valid marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their case.[4] It is immaterial even if the second marriage is void on another ground besides that of its being bigamous.[5]

It is immaterial whether the ceremony of the second marriage takes place within or beyond the King's dominions.[6]

Good faith and mistake of law are no defences to a charge of bigamy.[7] It is no defence in law to an indictment for bigamy that the accused, at the time of the alleged bigamous marriage, believed, in good faith and on reasonable grounds, that he had been divorced from the bond of his first marriage, if in fact he had not been divorced.[8]

Publication of banns of marriage.—The act of causing the publication of banns of marriage is an act done in the preparation to marry but does not amount to an attempt to marry. Where, therefore, a man having a wife living, caused the banns of marriage between him and a woman to be published, it was held that he could not be punished for an attempt to marry again during the life-time of his wife.[9]

Whether custom a good defence to prosecution.—The Bombay High Court has ruled that Courts will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to re-marry. Bona fide belief that the consent of the caste made the second marriage valid does not constitute a defence [illegible] [10] A custom [illegible] the husband to whom she has been first married, and to contract a second marriage (*natra*) with another man during the life-time of her first husband, and without his consent, was held to be invalid, as being entirely opposed to the spirit of the Hindu law; and that such marriage was "void by reason of its taking place during the life-time of such husband," and therefore punishable, as regards the woman, under this section.[11] Accused No. 1 was married to the complainant but the marriage was

[1] *Musst. Bibi, (1882) P. R. No. 43 of 1882*

[2] The Parsi Marriage and Divorce Act. XV of 1865.

[3] The Native Converts' Marriage Dissolution Act, XXI of 1866.

[4] *Henry Allen, (1872) L. R. 1 C. C. R.* 367; *Jane Brown,* (1843) 1 C. & K. 144. This view is not adopted in the Irish case of *Fanning,* (1866) 10 Cox 411, where it is said that English cases are distinguishable as the bigamous marriages in them were void for consanguinity and not for fornication.

[5] *Gurbaksh Singh v Shama Singh,* (1876) P. R. No. 19 of 1876.

[6] *Russell,* [1901] A. C. 446.

[7] *Narantakath Ayullah v. Perakkal Mammu,* (1922) 45 Mad. 986.

[8] *Thomas Wheat,* [1921] 2 K. B. 119.

[9] *Peterson,* (1876) 1 All. 316.

[10] *Sambhu Raghu,* (1876) 1 Bom. 347. See *Sankaralingam Chetti v. Subban Chetti,* (1894) 17 Mad. 479, where it is decided that there is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expense of the latter's original marriage.

[11] *Bai Rupa,* (1864) 2 B. H. C. (Cr. C.) 117; *Keshar Hargovan v. Bai Gandi,* (1913) 17 Bom. L. R. 891.

not consummated. Sometime after the marriage, the complainant went to South Africa, and during his absence there he did not write to his wife, nor did he furnish [illegible]

[illegible]

guilty of bigamy.[1]

[illegible] lowed a wife to [illegible] by her husba[illegible] custom should [illegible] lid give counte[illegible] ufficient reason to divorce his wife. In this case a member of the Ajanya Rajput Guzars caste executed a deed of divorce to his wife. The Court held on the evidence that the deed was proved; that in that caste a husband was, for a sufficient reason, such as incontinence, allowed to divorce his wife; that the deed had not been executed for a sufficient reason; and that, consequently, the parties entering into a second marriage were guilty of an offence under this section.

Conversion from Hinduism.—According to Hindu law an apostate is not absolved from all civil obligations, the matrimonial bond remaining indissoluble. A non-Christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity.[5] Hindu law does not recognize polygamy on the part of a woman. A Hindu woman who having a Hindu husband living marries a Mahomedan[6] or a Christian[7] even after becoming a Mahomedan or Christian, as the case may be, commits bigamy. A Hindu husband under similar circumstances commits no offence as Hindu law recognizes the right of a husband *to contract a valid second marriage notwithstanding the continuance of a former* marriage.

Conversion from Christianity.—The Madras High Court once held that a Hindu Christian convert relapsing into Hinduism and marrying a Hindu woman cannot be convicted of bigamy on the ground that he has another wife living whom he married while a professed Christian.[8] It was so held on the ground that the Hindu law allowed polygamy on the part of a husband. The same High Court [illegible] tive Christ- [illegible] to Hindu [illegible] of bigamy [illegible] if he had [illegible]

the rites of the Roman Catholic religion. Subsequently, and during the life-time of his Christian wife, he reverted to Hinduism and married a Hindu woman in accordance with the rites of the class to which the parties belonged. It was held that he was not guilty of bigamy.[10]

[1] *Bas Ganga*, (1916) 19 Bom. L. R. 56, 4 Bom. Cr. C. 3.

[2] *Jukni*, (1892) 19 Cal. 627.

[3] *Thalaisingam*, (1896) 1 Weir 568.

[4] (1882) 6 Bom. 126.

[5] *Ram Kumari*, (1891) 18 Cal. 264; *Mussumat Gholam Fatima*, (1870) P. R. No 32 of 1870.

[6] *Gangi*, (1880) 4 Bom. 330; *Budamsa Routher* v. *Fatema Bi*, [1914] M. W. N. 278, (1913) 26 M. L. J. 260 *Nandi*, (1919) [illegible] of 1869].

[7] *Millard*, (1887) 10 Mad. 218.

[8] (1866) 3 M. H. C. App. 7; *Michael*, (1886) 1 Weir 563.

[9] *Lazar*, (1907) 30 Mad. 550.

[10] *Antony*, (1910) 33 Mad. 371.

in the state of observing her *iddat* being unlawful under the Mahomedan law, no conviction under this section was sustainable.[1]

Divorce.—Divorce dissolves a valid marriage, and the parties obtaining such dissolution can re-marry. Divorce is unknown to Hindu law, though it is customary amongst lower classes of the Hindus. Divorce is allowed amongst the Mahomedans, the Parsis,[2] and the Native Christians.[3]

2. **'Marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife.'**—Where a person, already bound by an existing marriage, goes through with another person a form of marriage known to, and recognised by, the law as capable of producing a valid marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independent [illegible] constitute a legal disability in [illegible] inapplicable to their case.[4] It [illegible] on another ground besides that of its being bigamous.[5]

It is immaterial whether the ceremony of the second marriage takes place within or beyond the King's dominions.[6]

Good faith and mistake of law are no defences to a charge of bigamy.[7] It is no defenc[illegible] accused, at the time of the alleged [illegible] reasonable grounds, that he had [illegible] in fact he had not been divorced.[8]

Publication of banns of marriage.—The act of causing the publication of banns of marriage is an act done in the preparation to marry but does not amount to an attempt to marry. Where, therefore, a man having a wife living, caused the banns of marriage between him and a woman to be published, it was held that he could not be punished for an attempt to marry again during the life-time of his wife.[9]

Whether custom a good defence to prosecution.—The Bombay High Court has ruled that Courts will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to re-marry. *Bona fide* belief that the [illegible] constitute a defence [illegible] custom [illegible] husband [illegible] *(natra)* with another man during the life-time of her first husband, and without [illegible] consent, was held to be invalid, as be[illegible] and that such marriage was "[illegible] of such husband," and there [illegible] section.[11] Accused No. 1 was married to the complainant but the marriage [illegible]

[1] *Musst. Bibi*, (1882) P. R. No. 43 of 1882.

[2] The Parsi Marriage and Divorce Act, XV of 1865

[3] The Native Converts' Marriage Dissolution Act, XXI of 1866.

[4] *Henry Allen*, (1872) L. R. 1 C. C. R. 367; *Jane Brawn*, (1843) 1 C. & K. 144. This view is not adopted in the *Irish* case of *Fanning*, (1866) 10 Cox 411, where it is said that English cases are distinguishable as the bigamous marriages in them were void for [illegible] (1876) [illegible]

[5] *Russell*, [illegible]

[7] *Narantakath Avullah* v. *Parakkal Mammu*, (1922) 45 Mad. 986.

[8] *Thomas Wheat*, [1921] 2 K. B. 119.

[9] *Peterson*, (1876) 1 All. 316.

[10] *Sambhu Raghu*, (1876) 1 Bom. 347. See *Sankaralingam Chetti* v. *Subban Chetti*, (1894) 17 Mad. 479, where it is decided that [illegible] custom by [illegible] marriage.

[11] *Bai Rupa*, (1864) 2 B. H. C. (Cr. C.) 117; *Keshav Hargovan* v. *Bai Gandi*, (1915) 17 Bom. L. R. 584.

reason of a mistake of fact K thought that the previous marriage had been declared void by a Court of competent jurisdiction, he had not committed any offence.[1]

Absence for seven years.—Where the accused's first wife had left him for sixteen years and it was proved by the second wife that she had known him for nine years, living as a single man, and that she had never heard of the first wife, who, it appeared, had been living seventeen miles from where the accused resided, it was held that the accused ought to be acquitted.[2] The accused's first husband had been continually absent from her for seven years next preceding the second marriage, on which occasion she represented herself as a single woman, and was married by her maiden name. The jury found that they had no evidence that, at the time of her second marriage, she knew that he was alive, but that she had means of acquiring knowledge of that fact, had she chosen to make use of them. It was held that on that finding the conviction could not be supported.[3] Where it was proved that the accused had married W in 1865, and lived with her after the marriage, but for [illegible], he had gone through the [illegible] evidence as to the accused [illegible] they last saw each other, [illegible] ord Coleridge, C. J., said: "There is proof of the existence of a state of things and no evidence of the cessation of that state of things, consequently, the presumption is that the existing state continued."

In 1864 W married A. In 1868 he was charged with bigamy in marrying B, his wife A being then alive, and was convicted. In 1879 he married C and in 1880, C being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D, C being then alive, W was convicted, it being held by the presiding [illegible] was alive when W married C, or that the [illegible] A being then alive. It was held that the question should have been left to the jury whether upon the above facts A was alive or not when W married C.[5]

Persons present at a bigamous marriage.—Mere consent of persons to be present at an illegal marriage, or their presence in pursuance of such consent, or the grant of accommodation in a house for the marriage, does not necessarily constitute abetment of such marriage.[6]

Abetment.—A man may be guilty of abetment although the girl herself may be, from want of intelligence or knowledge, incapable of committing this offence.[7] The wife of the first accused having left his house with her minor daughter, performed the marriage of the daughter with a boy. The first accused hearing of this applied to a Magistrate for a warrant under s. 100, Criminal Procedure Code, and thereupon the girl was handed over to him, and a few months later she was married by him to the second accused. Both the accused were then prosecuted for abetting the offence of bigamy. It was held that although a Hindu father was the proper person to give his daughter in marriage, the rule was firmly established that a marriage, which was duly solemnised and was otherwise valid, was not rendered void because it was brought about without the consent of the guardian in marriage or even in contravention of an express order of the Court; that even if the marriage was brought about by fraud and might on that account be declared invalid, it was not a nullity and was binding until it was set aside by a competent Court, and that unless it was declared to be invalid it could sustain an indictment for bigamy.[8]

[1] *Karim Baksh*, (1918) P. W. R. (Cr.) No. 31 of 1918.
[2] *Thomas Jones*, (1842) Car. & Mar. 614.
[3] *Mary Briggs*, (1856) 26 L. J. (M. C.) 7.
[4] *Jones*, (1883) 11 Q. B. D. 118.
[5] *Willshire*, (1880) 6 Q. B. D. 366.
[6] *Umi*, (1882) 6 Bom. 126.
[7] *Nand Lal Singh*, (1902) 6 C. W. N. 343; *Hub Ali*, (1923) 21 A. L. J. R. 187.
[8] *Gajja Nand*, (1921) 2 All. 288.

A Christian cannot by embracing Mahomedanism marry a second time during the life-time of his first wife.[1] The accused, a Christian woman, who had married a Christian according to Christian rites and during the life-time of her husband had become a Mahomedan and married a Mahomedan according to Mahomedan rites was guilty of an offence under this section, notwithstanding the provisions of the Mahomedan law.[2] Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance and of nicety not decided as yet.[3]

Conversion from Mahomedanism.—A Mahomedan who becomes an Ahmediyan (a sect of Mahomedans) does not become an apostate and his wife is guilty of bigamy if she marries another during his life-time.[4]

Exception.—The exception speaks of (1) the first marriage having been declared void by a Court; and (2) seven years' absence on the part of a spouse in a manner not heard of by the other party. Under the English law there is a third element, viz., *bona fide* belief in the spouse's death,[5] which is not adopted in this exception. The proviso to this exception confines its application to cases in which the accused before the second marriage discloses the real state of the case, and such knowledge as he or she may have concerning the circumstances, to the person about to be married.

If the accused *bona fide* believed that the earlier marriage was set aside by the Court he would not be guilty.[6]

If it is proved that the accused and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to shew that during that time he was aware of her existence; and, in the absence of such proof, the accused is entitled to be acquitted.[7] Even where the absence is the result of wilful desertion, it lies on the prosecution to shew, not merely that the person charged had the means of knowledge, but the person knew that the first consort was living.[8] But it has been held in two Indian cases that a woman, who, having the means of acquiring knowledge of the death of her first husband, does not choose to make use of them, and marries, commits bigamy.[9]

The doctrine of a certain school of Mahomedan divines in regard to the competency of a woman to marry again after the absence of her husband for four years does not entitle a woman so re-marrying to the benefit of the exception.[10]

Under this exception it is incumbent on the person contracting the second marriage, if it is contracted within seven years, to inform the other party about the first marriage.[11]

Bona fide belief as to earlier marriage having been set aside by Court.—A certain girl was married by her grandfather to one B. On attaining puberty she brought a suit to have the marriage declared void, as she wished to repudiate it, and obtained an *ex parte* decree which was, however, set aside and later on the suit was [illegible] K, who [illegible] It was [illegible] ree had [illegible] h as by

[1] *Skinner v. Orde*, (1871) 14 M. I. A. 309, 324.

[2] *Mussammat Rari*, (1918) P. R. No. 5 of 1919.

[3] Robert Skinner v. Charlotte Skinner, (1897) 25 Cal 537, 546.

[4] *Narandatath Avullah v. Parakkal Mammu*, (1922) 45 Mad. 986.

[5] *Tolson*, (1889) 23 Q. B. D. 168.

[6] *Karim Bakhsh*, (1918) P. W. R. (Cr.) No. 31 of 1918, *infra*.

[7] *John Curgerwen*, (1865) L. R. 1 C. C. R. 1; *Heaton*, (1863) 3 F. & F. 819.

[8] *Faulkes*, (1902) 19 T. L. R. 250.

[9] *Enai Beebee*, (1865) 4 W. R. (Cr.) 25; *Mussammat Muhammad Nissa*, (1899) P. R. No. 1 of 1900.

[10] *Alam Shah v. Jewan*, (1878) P. R. No. 27 of 1878.

[11] *Enai Beebee*, sup.

[illegible] ascertained. The general [illegible] country is, that between [illegible] of the place where it is celebrated. If valid there, it is valid everywhere. If invalid there, it is equally invalid everywhere. But there are exceptions to this rule. On the one hand a Christian country would not recognise, as lawful, polygamy or some incestuous marriages contracted by Christians while residing in Mahomedan or other countries. On the other hand, where there is a local necessity from the absence of laws or the presence of prohibitions or obstructions not binding upon other countries, or from [illegible] Courts, its validity is to be determined by the law prevailing in British India.[2]

Proof of marriage among the English.—To constitute a valid marriage by the common law [illegible] clergyman in holy [illegible] lid.[3] [illegible] h or [illegible] be [illegible] o be [illegible] ding to the law of the country in which it was celebrated. If the marriage is proved by a person present at it, it is not necessary to prove the registration, or licence, or banns.[4]

Proof of marriage among the Hindus.—There is no statutory marriage law for the Hindus, and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong.[5]

Proof of marriage among the Mahomedans.—At a marriage between Mahomedans, a Mullah, with the necessary witnesses and vakils, is always present to read the *sigha*. He should, therefore, be called as a witness. The *sigha* recited at the marriage of minors is different from that recited at the marriage of adults. There should be evidence to show that *akd* was performed.[6] Where, however, the [illegible] ecial [illegible] on of the certificate given under s. 6 of the Parsi Marriage and Divorce Act, 1865, or a certified extract from the register of marriages under s 7 of the Act.

Proof of marriage among the Native Christians.—This can be proved by a certified copy of any entry of a marriage in the Marriage Register under s 80 of the Indian Christian Marriage Act.[8]

Proof of marriage among the Jews.—In order to prove a Jewish marriage it is not sufficient to produce a witness who was present at the religious ceremony in the synagogue, a written contract (*ketuba*) between the parties being essential to the validity of the marriage, production and proof of the execution of such document is necessary.[9] Jews domiciled in England cannot validly contract a marriage within the degrees prohibited by English law.[10]

[2] M. & M. 433.

[3] *Budamea Kouther* v. *Fatema Bi*, [1914] M. W. N. 278, 26 M. L. J. 260.

[4] *Beamish* v. *Beamish*, (1858) 9 H. L. C. 274.

[5] *William Allison*, (1806) R. & R. 109.

[6] *Subbarayan*, (1885) 9 Mad. 9.

[7] *Badal Aurat*, (1891) 19 Cal 79.

[8] *Sheikh Alimuddin*, (1906) 10 C.W.N. 952.

[9] Act XV of 1872.

[10] *Alikhausen*, (1893) 17 Cox 630. See *Nathan* v. *Wolf*, (1890) 16 T. L. R. 250.

[10] *In re De Wilton, De Wilton* v. *Montefiore*, [1900] 2 Ch. 481; *Benjamin* v. *Benjamin* (1925) 28 Bom. L. R.

Where a Mahomedan guardian of a married female infant, while her husband was living, caused a marriage ceremony to be gone through in her name with another man, but without her taking any part in the transaction, it was held that he did not commit the offence of abetment under s. 109 and this section.[1]

Priest officiating at a bigamous marriage.—The priest who officiates at a bigamous marriage is an abettor under this section and s. 109.[2]

Statutes relating to marriage and divorce.—Act XV of 1865 (Parsis); Act XXI of 1866 (Act to legalize the dissolution of marriages of Native Converts to Christianity); Act IV of 1869 (Act to amend the law relating to Divorce and Matrimonial causes); Act III of 1872 (Special form of Marriages) as amended by Act XXX of 1923; Act XV of 1872 (Christians); Act VII of 1909 (Sikhs).

PRACTICE.

Evidence.—Prove the following facts:—

(1) That the accused had already been married to some person.[3] The provision of s. 50 of the Indian Evidence Act shows that where marriage is an ingredient of an offence, the fact of the marriage must be strictly proved.[4] Proof of actual marriage is always necessary; proof of marriage by cohabitation, reputation and other circumstances from which a marriage may be inferred is not sufficient.[5] A mere statement on the part of the accused that he had committed bigamy is not sufficient.[6] The Court should require some better evidence of the marriage than the mere statement of the complainant and the woman.[7] The Madras High Court has expressed its opinion that a husband or wife is not precluded from proving his or her marriage. Where, therefore, the complainant, the woman, and her mother swore to the fact of the marriage, it was held that the marriage was sufficiently proved.[8] A marriage may be established by preponderating repute and by conduct, even though the repute may be divided.[9] Where there is *prima facie* evidence of cohabitation as man and wife, and a long course of treatment of the woman as wife and the children as legitimate, the presumption of marriage can be repelled only by evidence of the clearest character. Much weight must be attached to reputation among the relations on both sides, among all the friends and among all the acquaintances in the locality where the parties resided. The evidence of resemblance of a child to the putative father is admissible.[10]

Evidence of the identity of the accused on the occasions both of the first and of the second marriage is necessary. On an indictment for bigamy, a photographic likeness of the first husband was allowed to be shown to the witnesses present at the first marriage, in order to prove his identity with the person mentioned in the marriage certificate.[11] But, except under very special circumstances, the Court will not act upon identification by a photograph only.[12]

It is also incumbent upon the prosecution to prove the validity of the first marriage.[13] Where the first marriage took place not within any part of the British dominions but in a foreign country, and there is a question concerning the validity

[1] *Abdool Kureem*, (1878) 4 Cal. 10. This case does not seem to lay down sound law.

[2] *Umi*, (1882) 6 Bom. 126; *Millard*, (1887) 10 Mad. 216.

[3] *Birbal* v. *Sawan*, (1874) P. R. No. 4 of 1874; *Alam Shah* v. *Jewan*, (1878) P. R. No. 27 of 1878; *Makandi* v. *Mohri*, (1893) P. R. No. 17 of 1893.

[4] *Pitambur Singh*, (1879) 5 Cal. 566, F. B., overruling *Watira*, (1872) 8 Beng. L. R. App. 63, 17 W. R. (Cr) 5; *Shivana*, (1883) Unrep. Cr. C. 190; *Kallu*, (1892) 5 All 223.

[5] *Morris* v. *Miller*, (1767) 4 Burr. 2057, 2059.

[6] *Daniel Flaherty*, (1847) 2 C. & K. 782; *Lindsay*, (1902) 66 J. P. 505, 18 T. L. R. 761. Contra, *John Newton*, (1843) 2 M. & Rob. 503.

[7] *Dal Singh*, (1897) 20 All. 166.

[8] *Subbarayan*, (1885) 9 Mad. 9, 11.

[9] *Lyle* v. *Ellwood*, (1874) L. R. 19 Eq 93; *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, (1881) 6 App. Cas. 364.

[10] *Bibi Imambandi* v. *Haji Motamuddi*, (1911) 15 C. L. J. 621.

[11] *Tolson*, (1864) 4 F. & F. 103.

[12] *Frith* v. *Frith*, [1896] P. 74.

[13] *Kay*, (1887) 16 Cox 292.

of such marriage, the law of the foreign country must be ascertained. The general principle with regard to marriages contracted in a foreign country is, that between persons of full age, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. If invalid there, it is equally invalid everywhere. But there are exceptions to this rule. On the one hand a Christian country would not recognise, as lawful, polygamy or some incestuous marriages contracted by Christians while residing in Mahomedan or other countries. On the other hand, where there is a local necessity from the absence of laws or the presence of prohibitions or obstructions not binding upon other countries, or from peculiarities of religious opinions, or conscientious scruples, or from circumstances of exemption from local jurisdiction, marriages will be allowed to be valid according to the law of th [illegible] places and in d [illegible] are allowed to [illegible]

If a marri [illegible] Courts, its validity is to be determined by the law prevailing in British India.[2]

Proof of marriage among the English.—To constitute a valid marriage by the [illegible] to the law of the country in which it was celebrated. If the marriage is proved by a person present at it, it is not necessary to prove the registration, or licence, or banns.[4]

Proof of marriage among the Hindus.—There is no statutory marriage law for the Hindus, and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong.[5]

Proof of marriage among the Mahomedans.—At a marriage between Mahomedans, a Mullah, with the necessary witnesses and vakils, is always present to read the *sigha*. He should, therefore, be called as a witness. The *sigha* recited at the marriage of minors is different from that recited at the marriage of adults. There should be evidence to show that *akd* was performed.[6] Where, however, the father of a minor girl is present at her marriage and is a consenting party, no special recitations are necessary to make a valid marriage under the *Hanafi* law.[7]

Proof of marriage among the Parsis.—This can be proved by the production of [illegible] copy of any entry of a marriage in the Marriage Register under s. 80 of the Indian Christian Marriage Act.[8]

Proof of marriage among the Jews.—In order to prove a Jewish marriage it is not sufficient to produce a witness who was present at the religious ceremony in the synagogue, a written contract (*katuba*) between the parties being essential to the validity of the marriage, production and proof of the execution of such document is necessary.[9] Jews domiciled in England cannot validly contract a marriage within the degrees prohibited by English law.[10]

[1] M. & M. 433.
[2] *Budamsa Routher* v. *Fatema Bi*, [1914] M. W. N. 278, 26 M. L. J. 260.
[3] *Beamish* v. *Beamish*, (1859) 9 H. L. C. 274.
[4] *William Allison*, (1806) R. & R 109
[5] *Subbarayan*, (1885) 9 Mad. 9
[6] *Badal Aurat*, (1891) 19 Cal 79.
[7] *Sheikh Alimuddin*, (1906) 10 C.W.N. 982.
[8] Act XV of 1872.
[9] *Alkhausen*, (1893) 17 Cox 630. See *Nathan* v. *Wolf*, (1890) 16 T. L. R. 250
[10] *In re De Wilton, De Wilton* v. *Montefiore*, [1900] 2 Ch. 481; *Benjamin* v. *Benjamin* (1925) 28 Bom. L. R.

(2) That the person with whom he had married was still living. The prosecution must prove to the satisfaction of the Court that the husband or wife, as the case may be, was alive at the date of the second marriage. This is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the Court would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, the Court would probably decline to draw that inference. The law makes no presumption either way. The legislature sanctions a presumption that a person who has not been heard of for seven years is dead[1]; but this affords no ground for the converse proposition, *viz.*, that when a party has been seen or heard of within seven years, a presumption arises that he is still living.[2]

Whether evidence is necessary, on the part of the prosecution, to show that the accused married, knowing his second wife to be alive, depends upon the particular facts of each case.[3] Positive proof that at the time of his second marriage the accused knew that his first wife was alive is not absolutely necessary.[4]

(3) That the accused married another person.

The celebration of the second marriage is proved in the same manner as that of the first.

(4) That the second marriage was void by reason of its taking place during the life of the first spouse.[5]

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

Complaint by the person aggrieved is necessary.—Under s. 198 of the Code of Criminal Procedure no Court shall take cognizance of an offence falling under this section except upon a complaint made by some person aggrieved by such offence. This section is intended to prevent Magistrates from inquiring into cases coming under ss. 493 to 496, unless the husband or some person aggrieved lodges a complaint. It is not necessary, however, that a complainant should state precisely the section of the Code under which the accused shall be charged. It is sufficient if the complainant lays before the Magistrate matters which, if proved, would be sufficient to warrant a commitment under this section.[6]

The brother of a lunatic husband is not a 'person aggrieved' by the wife's bigamy, and he is not competent to complain.[7] Similarly, the brother of the second (bigamous) husband[8] or the father of the first husband[9] of the accused is not a 'person aggrieved.' The person aggrieved is either the first husband or the second.[10]

Venue.—The proper Court to try a charge under this section is the Court which has territorial jurisdiction at the place where the offence was committed. Persons accused of abetting the commission of the offence are triable by the Court within whose territorial jurisdiction the abetment takes place.[11]

Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, having a wife [*or* husband] to wit——, living, married again AB, and such marriage being void by reason of

[1] See the Indian Evidence Act, s 108.
[2] *Lumley*, (1866) L. R. 1. C. C. R. 196, 198.
[3] *Ellis*, (1858) 1 F. & F. 399.
[4] *David Jones*, (1869) 11 Cox 358.
[5] *Musst. Bibi*, (1882) P. R. No. 43 of 1882; (1870) 1 Weir 565, F. B.
[6] *Alli*, (1902) 25 All. 209; *Ujjala Bewa*, (1878) 1 C. L. R. 523.
[7] *Bai Rukshmoni*, (1886) 10 Bom. 340.
[8] *Imtiazan*, (1902) 25 All. 132.
[9] *Lala*, (1900) 32 All. 78.
[10] *Sarna Kahmi*, (1899) 26 Cal. 336 C; *Lala*, sup.
[11] *Mussamat Bhagwatia*, (1924) 3 Pat. 417.

its taking place during the life-time of the said wife [*or* husband], and that you thereby committed an offence punishable under s. 494 of the Indian Penal Code and within the cognizance of the Court of Session (*or* the High Court).

And I hereby direct that you be tried by the said Court on the said charge.[1]

Punishment.—As to the Frontier District, see the Frontier Crimes Regulation, 1901, ss. 11 (3) (*d*); and 12 (2).

Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.

495. Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENT.

Object.—This section provides a higher penalty when the fact of the former marriage is concealed from the person with whom the subsequent marriage is contracted.

The authors of the Code say: "The act which in the English law is designated as bigamy is always an immoral act. But it may be one of the most serious crimes that can be committed. It may be attended with circumstances which may excuse though they cannot justify it.

"The married man who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife, but in reality his concubine, and the mother of an illegitimate issue, is guilty of one of the most cruel frauds that can be conceived. Such a man we would punish with exemplary severity.

"But suppose that a person arrives from England, and pays attentions to one of his countrywomen at Calcutta. She refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married, she shall be an outcast from society, that nobody in India knows that he has a wife, that he may very likely never fall in with his wife again, and that she is ready to take the risk. The lover accordingly agrees to go through the forms of marriage.

"It cannot be disputed that there is an immense difference between these two cases. Indeed, in the second case the man can hardly be said to have injured any individual in such a manner as calls for legal punishment. For what individual has he injured? His second wife? He has acted by her consent, and at her solicitation. His first wife? He has certainly been unfaithful to his first wife. But we have no punishment for mere conjugal infidelity. He will often have injured his first wife no more than he would have done by keeping a mistress calling that mistress by his own name, introducing her into every society as his wife, and procuring for her the consideration of a wife from all his acquaintance. The legal rights of the first wife and of her children remain unaltered. She is the wife; the second is the concubine. But suppose that the first wife has herself left her husband, and is living in adultery with another man. No individual can then be said to be injured by this second invalid marriage. The only part injured is society, which has undoubtedly a deep interest in the sacredness of the matrimonial contract, and which may therefore be justified in punishing those who go through the forms of that contract for the purpose of imposing on the public.

[1] (1867) 3 W. R. (Cr. L.) 9.

"The law of England on the subject of bigamy appears to us to be in some cases too severe, and in others too lenient. It seems to bear a close analogy to the law of perjury. The English law on these two subjects has been framed less for the purpose of preventing people from injuring each other, than for the purpose of preventing the profanation of a religious ceremony. It therefore makes no distinction between perjury which is intended to destroy the life of the innocent, and perjury which is intended to save the innocent; between bigamy which produces the most frightful suffering to individuals and bigamy which produces no suffering to individuals at all. We have proceeded on a different principle. While we admit that the profanation of a ceremony so important to society as that of marriage is a great evil, we cannot but think that evil immensely aggravated when the profanation is made the means of tricking an innocent woman into the most miserable of all situations. We have therefore proposed that a man who deceives a woman into believing herself his lawful wife when he knows that she is *not so, and induces her, under that persuasion, to cohabit with him*, should be punished with great severity.

"There are reasons similar, but not exactly the same, for punishing a woman who deceives a man into contracting with her a marriage which she knows to be invalid. For this offence we propose a punishment which, for reasons too obvious to require explanation, is much less severe than that which we have provided for a similar deception practised by a man on a woman"[1]

The authors of the Code intended to punish with greater severity only the man who deceived a woman. But the section as it stands applies to either party.

CASES.

Concealment of the fact of the first marriage at the time of contracting the second.—A woman, who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise, and contracts a second marriage within sixteen months after cohabitation with her first husband, without disclosing the fact of the former marriage to her second husband, is liable to enhanced punishment under this section.[2]

Infant marriage.—Where a child of ten years was married again during the life-time of her husband, the marriage being negotiated and caused to be performed by the mother of the accused, it was held that the child had not attained sufficient maturity of understanding to judge of the nature and consequences of her conduct on the occasion of the second marriage.[3]

PRACTICE.

Evidence.—Prove the same points (1) to (4) as for s. 464; and further:—

(5) That the accused, when marrying the second person, concealed from such person the fact of the former marriage.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint by the person aggrieved is necessary.—See s. 493, *supra*.[4]

Marriage ceremony fraudulently gone through without lawful marriage.

496. Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married,[1] knowing that he is not thereby lawfully married,[2] shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[1] Note Q, pp. 171, 172.
[2] *Enas Beebee*, (1865) 4 W. R. (Cr.) 25.
[3] *Godi*, (1896) Unrep. Cr. C. 876.
[4] Criminal Procedure Code, s. 193.

COMMENT.

Ingredients.—The section requires two essentials :—

1. Dishonestly or with a fraudulent intention going through the ceremony of marriage.

2. Knowledge on the part of the person going through the ceremony that he is not thereby lawfully married.

1. **'Dishonestly or with a fraudulent intention, goes through the ceremony** [illegible] intention.'

2. **'Knowing that he is not thereby lawfully married.'**—The accused must have the knowledge that there is no marriage. A case of bigamy is not contemplated by this section. Where it is intended that there should be a valid marriage and that there should be only a show of marriage for some ulterior and fraudulent purpose, the case does not come under this section [1] The section punishes mock marriages. It applies to cases in which a ceremony is gone through which would [illegible] ties is deceived by the [illegible] which effect is sought [illegible] purpose. Where the ceremony gone through does, but for the previous marriage, constitute a valid marriage, and both parties are aware of the circumstances of the previous marriage, s. 494 applies.[2]

An abuse of the marriage ceremony where no deceit is practised on the woman, and no dishonest or fraudulent intent is proved, is not an offence under this section.

Sections 493 and 496.—The two sections are somewhat alike ; the difference appears to be that under s 493 deception is requisite on the part of the man, and cohabitation or sexual intercourse consequent on such deception. The offence under s. 496 requires no deception, cohabitation, or sexual intercourse as a *sine qua non*, but a dishonest or fraudulent abuse of the marriage ceremony. In the latter case the offence can be committed by a man or a woman, in the former only by a man.

Abetment.—The mere act of allowing the marriage to take place at one's house does not amount to an abetment of illegal marriage [3]

PRACTICE.

Evidence.—Prove (1) that the accused went through the ceremony of marriage.

(2) That when he went through such ceremony he knew that he was not thereby lawfully married to the complainant.

(3) That he did as in (1) dishonestly or with a fraudulent intention.[4]

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

Complaint by the person aggrieved is necessary.—See s. 493, *supra*.[5]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, dishonestly (*or* fraudulently) went through the ceremony of being married to AB, knowing that you were not thereby lawfully married, and that you thereby committed an offence punishable

[1] *Sheikh Alimuddin*, (1906) 10 C. W.N. 982.
[2] *Rama Sona*, (1873) Cr. R. July 1873, Unrep. Cr. C. 77.
[3] *Kudum*, (1864) W. R. (Gap. No.) Cr. 13.
[4] *Ibid.*
[5] Criminal Procedure Code, s. 198.

he was found in a place in which adultery might have been committed and that he was minded to commit it.[1] Where a married woman went to visit a man, but before adultery was committed, she was taken away by her husband, it was held that the man could not be convicted of an attempt to commit adultery.[2]

PRACTICE.

Evidence.—Prove (1) that the accused had sexual intercourse with the woman in question.

The sexual intercourse required for adultery being the same identical thing as the sexual intercourse required for rape, the evidence of sexual intercourse on a charge of adultery must not be stronger than that in a suit for a divorce. The best proof available must always be produced, but in both cases evidence of opportunities sought for and obtained and of familiarities which point strongly to an inference of guilt, are sufficient to establish the fact of sexual intercourse.[3]

Evidence of having lived with the wife of an absent person for several weeks and moreover of having slept in the same bed for a number of days and of considerable attachment between the accused and the woman where there is no allegation that the accused is impotent, is, although circumstantial, sufficient evidence to prove sexual intercourse between them.[4]

(2) That she was then the wife of another man.

Strict proof is necessary of the marriage of the woman.[5] The actual fact of the marriage between the complainant and the woman must be proved in some way or another.[6]

(3) That the accused knew, or had reason to believe, that she was the wife of another man.

The question the Court has to determine is, whether or not the accused honestly believed that the woman was the wife of another man.[7]

(4) That such man did not consent to, or connive at, such intercourse.

A person may call the woman with whom he is accused of having had sexual intercourse as a witness on his behalf.[8]

The admission of a man and a woman coupled with the evidence of the witnesses to the effect that the two lived together as man and wife leads to the inevitable presumption that acts of adultery must have been committed.[9]

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Death of husband does not put an end to prosecution.—The death of the husband does not necessarily put an end to a prosecution under this section.[10]

Complaint by the person aggrieved is necessary.—No Court shall take cognizance of the offence except upon a complaint made by the husband of the woman or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed.[11] It is submitted that a husband who has

[1] *Basava Chary*, (1889) 1 Weir 569.

[2] *Ghulam Mahomed*, (1879) P. R. No. 13 of 1879; *Paira Ram*, (1902) P. R. No. 25 of 1902.

[3] *Madhub Chunder Giri Mohunt*, (1873) 21 W. R. 13; *Hunter*, (1920) 2 U. P. L. R. 419.

[4] *Hunter*, sup.

[5] [illegible]

[6] *Bhaghu Dhondi*, (1914) 17 Bom. L. R. 75, 3 Bom. Cr. C. 8.

[7] *Manohar Raiji*, (1868) 5 B. H. C. (Cr. C.) 17.

[8] *Sheikh Bechoo*, (1866) 6 W. R. (Cr.) 92.

[9] [illegible] 159.

[illegible] See [illegible] r.) [illegible] 9; [illegible] Jil [illegible] an [illegible] lu, [illegible] 2) [illegible] U. B. R. 155.

obtained a divorce cannot be a complainant because divorce puts an end to the relationship of husband and wife.[1]

Although a man cannot be charged with adultery except by the husband of the woman with whom he commits it, yet he may be charged with and convicted of house-trespass with intent to commit adultery, without the husband himself making the charge, if there is no consent or connivance on the part of the latter.[2] In a case the accused was found in the complainant's house by night, and he stated that he was there for the purpose of carrying on an intrigue with the complainant's wife. The complainant refused to lay a complaint of house-trespass with intent to commit adultery. It was held that the Magistrate was right in refusing to convict him of a charge which the husband refused to make.[3] Where an accused person was committed [illegible] by a husband under s. [illegible] adultery under this sec[illegible] him under this section it was held that the Sessions Judge had acted without jurisdiction.[4] The Court of Session may add charges under this section and s. 498, in the manner indicated in s. 226 and the following sections of the Code of Criminal Procedure, when the complaint of the husband is not merely of offences involving the use of force but was also a specific complaint of the offence punishable under the aforesaid sections.[5] Where in a prosecution under s. 366 the husband of the woman appeared as a witness and asked the Magistrate to drop the proceedings under s. 366 as he intended to prosecute the accused under s. 498, it was held that the statement made by the husband, as a witness, fell within the definition of complaint as defined in s. 4, cl. (*h*) of the Code of Criminal Procedure, and therefore a conviction under s. 498, treating the statement made by the husband as a complaint, was legal.[6]

Withdrawal of charge.—Where the husband of a woman, with whom the accused was alleged to have committed adultery, professed himself unwilling to proceed with the prosecution, and the judge thereupon ordered the accused to be discharged, the High Court, in the exercise of its discretion, declined to interfere.[7] But in an Allahabad case it has been ruled that a charge of adultery cannot be withdrawn by a complainant with the Magistrate's consent.[8]

Orders for re-trial and examination of wife.—In an enquiry into a case of alleged adultery and enticing away a married woman for illicit purposes, the complainant refused to examine his wife as to the marriage. The Deputy Magistrate declined to frame a charge and discharge the accused. The Sessions Judge directed a re-trial to be held by another Deputy Magistrate and ordered that the evidence of the wife should be taken as to the marriage. It was held that the Sessions Judge in ordering a re-trial had not exercised a proper discretion, he having admitted that the prosecution had failed to prove the marriage, and it not being alleged that any evidence was tendered by the prosecution and not taken by the Deputy Magistrate.[9]

Offender liable to a conviction for every fresh act.—Where a man who has been convicted of adultery with another man's wife, continues his adulterous intercourse, he will be liable to a second conviction and punishment for the fresh act, notwithstanding that the woman has not returned to the protection of her husband after the conviction of her paramour.[10]

1 [illegible] (1921) 34 C. L. J. 51.

6 *Bhawani Dat*, (1916) 38 All. 276.

7 *Ramlo Jerio*, (1868) 5 B. H. C. (Cr. C.) 27.

8 *Gumbheer*, (1870) 2 N. W. P. 234.

9 *Chunder Nath Ghose* v. *Nundololl Chatterji*, (1884) 11 Cal. 81.

10 *Emaji*, (1880) Cr. R. 28th Oct. 1880, Unrep. Cr. C. 150.

Mayne is of opinion that a man cannot be convicted of adultery a second time in respect of the same woman, if she is not taken back by her husband. But there is nothing in the section to support this view.

Charge.—A charge of adultery, alleging commission of offences between two dates, is legal where it is impossible, in the circumstances of the case, to assign particular dates on which sexual intercourse took place.[1]

It should run thus—

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, committed adultery with AB, knowing or having reason to believe her to be the wife of CD, and without the consent or connivance of the said CD; and that you thereby committed an offence punishable under s. 497 of the Indian Penal Code, and within my cognizance (*or* cognizance of the Court of Session).

And I hereby direct that you be tried [by the said Court (*if the case is tried by Magistrate omit these words*)] on the said charge.

Punishment. As to the Frontier District, see the Frontier Crimes Regulation, 1901, ss. 11 (3) (*d*); and 12 (2).

Enticing or taking away or detaining with criminal intent a married woman.

498. Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Sections 361 and 366 may be compared with this section which comes into operation when the two former sections fail to apply.

Ingredients.—The section requires two things :—

1. Taking or enticing away or concealing or detaining the wife of another man from (*a*) that man, or (*b*) any person having the care of her on behalf of that man.

2. Such taking, enticing, concealing or detaining must be with intent that she may have illicit intercourse with any person.

This and the preceding sections are evidently intended for the protection of husbands, who alone can institute prosecutions for offences under them.

1. 'Takes or entices away any woman who is...the wife of any other man.'—'Enticing' implies some blandishment or coaxing. It is the taking or enticing of the wife from the husband or the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. It is none the less taking, although the [illegible] ceeded from the woman and the accused had for so[illegible] request[2] If in point of fact the husband had, prev[illegible] act of taking or enticing awa[illegible] under such cir[illegible] of the section,

[1] *Bhola Nath Mitter*, (1924) 51 Cal. 488.

[2] *Kumarasami*, (1865) 2 M. H. C. 331.

living under the protection of her husband or of some one acting on his behalf.[1] The fact that the woman accompanied the accused of her own free-will does not diminish the criminality of the act.[2]

It is the enticement or taking away from the husband and not the enticement to any person which constitutes the offence. If, therefore, it is clearly proved that a man has enticed the woman away from her husband's control with intent that she may have illicit intercourse with any person and she has actually left her husband's control without any definite intention to return or with the intention to remain away from her husband's protection indefinitely, the offence is complete as regards the person who has so enticed the woman, who may, as a matter of fact, not be her paramour at all, but some third person, even though the woman and her paramour should never meet at all.[3] For the purposes of a conviction under this section there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him, or an intention that she should remain away indefinitely.[4]

'Whom he knows or has reason to believe to be the wife of another man.'—The woman must be the wife of another man. If the marriage is voidable then this section does not apply.[5]

If a particular union between two persons is recognized as marriage, then the taking or enticing away the woman with a party to such union will amount to an offence under this section. Thus, where the accused enticed away a woman, who was the illegitimate daughter of a Brahmin father and Bania mother and who had married a Bania, it was held that the accused was guilty as such a marriage was recognized by the caste to which the husband belonged and was not invalid according to Hindu law.[6] Where by custom a marriage with a widow is valid and the accused abducted a woman so married with knowledge of the marriage, it was held that he was guilty of an offence under this section.[7]

Mahomedan law.—*Iddat.*—According to Mahomedan law if a woman marries before the expiry of *iddat* the marriage is null and void. Where a woman had married her husband's brother during her *iddat* and subsequently married the accused, it was held that the accused had committed no offence under this section.[8]

The complainant, a Mahomedan, alleged that he had been married six times; that all the wives were living, but that he kept two of the first four partially divorced (*i.e.*, by pronouncing the words of divorce only once or twice and not thrice) in order to legalize his marriage with the fifth and the sixth, and so kept within the law which permitted him to have four wives The accused was charged with abducting or committing adultery with the sixth wife. It was held that the woman in question was not the wife of the complainant [9]

Where a wife, who was deserted by her husband, went of her own free-will, to live with another man, a conviction under this section was set aside, as there was no enticing or taking away.[10]

'Woman.'—See s. 10, *supra*.

'Reason to believe.'—See s. 26, *supra*.

'Conceals or detains such woman.'—The words 'conceals or detains' are intended to be applied to the enticing or inducing a wife to withhold or conceal herself from her husband, and assisting her to do so, as well as to physical restraint or prevention of her will or action Depriving the husband of his proper control

[1] *Mihan Singh*, (1883) P. R. No. 15 of 1883, p. 26.
[2] *Jan Mahomed*, (1902) 4 Bom. L. R. 435.
[3] *Gaman*, (1899) P. R. No. 9 of 1899.
[4] *Ahmad*, (1917) P.L.R. No. 145 of 1817.
[5] *Bulanda*, (1910) P. W. R. (Cr.) No. 33 of 1910.
[6] *Madan Gopal*, (1912) 34 All. 589.
[7] *Gobindu*, (1918) P. R. No. 10 of 1919.
[8] *Isa* v. *Ranon*, (1911) P. W. R. No. 1 of 1912, P. L. R. No. 83 of 1912.
[9] *Rab Nawaz Khan*, (1874) P. R. No. 1 of 1875.
[10] *Pochun Chung*, (1865) 2 W. R. (Cr.) 35; *Pahlwan*, (1914) P. L. R. No. 129 of 1915, P. W. R. (Cr.) No. 5 of 1915.

over his wife, for the purpose of illicit intercourse is the *gist of the offence, and a* detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments.[1] Detention does not necessarily imply *that it is against the* consent of the person detained. Where a married woman left her husband's house and went to another man's and lived with him as his *wife, it was held that the man with whom she lived had committed an offence under* this section.[2] If a man keeps the wife of another under his protection in a house *he detains her within the meaning of this section.*[3] *But there can be no detention* where the man is living with a man of her own free-will and refuses to go back with her husband.[4]

The words 'such woman' do not mean such woman as has been so enticed away as mentioned in the section, *but mean such woman whom the accused knows* or has reason to believe to be the wife of any other man; the detention of such a woman with the particular intent defined in the section is one *of the offences* made punishable under the section.[5] In an earlier case the same High Court had expressed the opinion, though the point had not been specifically discussed, that a person could not be convicted of detaining an enticed woman until the enticing had been proved.[6] This interpretation gives the go-bye to the latter part of the section which makes concealment *or detention of such woman punishable and is not followed* by Straight, J., in *Niadar's case* above referred to.

"A wife living in her husband's house, or in a house hired by him for her occupation, and at his expense, is, during his temporary absence, living under his protection so as to bring the case within the meaning of s. 498—provided, of course, that...he knew, or had reason to know, that she was the wife of the man *from whose protection he took her, or on whose behalf the person from whom he* took her had charge of her, and also provided that he took her with the intent *specified in the Act.* To hold otherwise would be to declare the worst cases of seduction not punishable under the Penal Code."[7]

2. 'With intent that she may have illicit intercourse with any person.'—Intention is the gist of this offence. The intention must be that the woman should have unlawful sexual intercourse with a person.

A person who entices away a married woman from her husband's house with intent that he may dispose of her in marriage to some one *else commits* an offence under this section, because sexual intercourse between the woman and any other person to whom she has thus been given in marriage, during the life-time of her husband, would be illicit intercourse within the meaning of this section.[8]

Where a procuress induced a married woman of twenty to leave her husband, [illegible] e had made her deliberate choice and was deter- [illegible] e her husband and become a prostitute in Calcutta, the High Court held that the procuress could not be convicted of kidnapping under s. 366, but was guilty of enticing away a married woman under this section, "for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the prisoner interposed."[9] The complainant alleged that his father-in-law had detained his wife, and that with his help the accused married his wife and since then had kept her in his (accused's) house. *The accused was convicted under this section.* It was held that the conviction was bad inasmuch as there was no evidence whatever to show that the accused

[1] *Sundara Dass Teran,* (1868) 4 M. H. C. 20.

[2] (1872) 7 Mad. Jur. 133.

[3] *Bansi Lal v. Ali Muhammad,* (1913) P. L. R. No. 319 of 1913, P. W. R. No. 36 of 1913.

[4] *Lachman Chamar,* (1920) 18 A. L. J. R. 311.

[5] *Niadar,* (1888) 10 All. 580; *Ala Bakhsh,* (1891) P. R. No. 16 of 1891.

[6] *Tika Singh,* (1880) 3 All. 251.

[7] Per Jackson and Glover, JJ., in *Mutty Khan v. Mungloo Khansama,* (1866) 5 W. R. (Cr.) 50.

[8] *Naurang,* (1915) 13 A. L. J. R. 251.

[9] *Srimotee Poddee,* (1864) 1 W. R. (Cr.) 45.

enticed away the complainant's wife from her husband's or her father's house with intent to have illicit intercourse with her.[1]

Sections 366 and 498.—Section 366 applies to cases where, at the time of the abduction, the woman has no intention of marriage or illicit intercourse at the time when the abduction takes place, but it is the intention of the person abducting to compel her afterwards to marr[illegible] her afterwards to illicit intercour[illegible] of the taking or enticing is that [illegible] other person, even though, as it generally happens, she is quite aware of the purpose [illegible] party to it. [illegible] ffence as compared with [illegible]

Wife cannot be punished as abettor.—In the case of adultery it is distinctly enacted that the wife is not punishable as an abettor; it is, therefore, inconsistent to punish her as an abettor of the minor offence mentioned in this section.[3] It has been left an open question whether a woman can be convicted of abetting the 'taking away' of herself within this section.[4] Enticement denotes a state of passivity on the part of the woman, and hence does not come within the three clauses of s. 107 which imply a certain degree of activity in the abettor. If a woman requested a man to take her away her act would probably be covered by s. 107, cl. (1).

Alyasanatan law.—The cohabitation of man and woman under the Alyasanatan system is not considered to be a marriage so as to render punishable a person who entices away the woman with the intent specified in the section.[5]

PRACTICE.

Evidence.—Prove (1) that the woman in question is the wife of another man.

The provisions of s. 50 of the Evidence Act show that where marriage is an ingredient in an offence the fact of the marriage must be strictly proved.[6] It is not sufficient for the prosecution to prove that the complainant and the woman in respect of whom the charge is made lived together as man and wife.[7] Strict proof of marriage is necessary,[8] it cannot be presumed.[9] The Court should require some better evidence of the marriage than the mere statement of the complainant and the woman.[10] The Madras High Court has, however, held that the evidence of the husband and wife is sufficient to prove the marriage.[11] The fact and the legality of the marriage are material elements in a case of enticing or taking away or detaining with criminal intent a married woman and must be proved as strictly as any other material facts, but it is not necessary that they should be proved in any particular way.[12] The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years and at the time of the commencement of cohabitation a marriage between them was possible This presumption of law can be repelled only by strong, distinct and conclusive evidence, and the mere fact that the direct evidence of the marriage which took place many years ago is unsatisfactory cannot displace this

[1] *Jasimaddin Sheikh* v. *Ichohal Mistri*, (1897) 1 C. W. N. 498.

[2] *Jatra Shekh* v. *Reazat Shekh*, (1892) 20 Cal. 483.

[3] [illegible]

[4] *Balambal*, (1902) 26 Mad. 463.

[5] *Koraga*, (1883) 6 Mad. 374.

[6] *Pitambur Singh*, (1879) 5 Cal. 566, F. B.

[7] *Arshed Ali*, (1883) 13 C. L. R. 125.

[8] *Sobrati* v. *Jungli*, (1898) 2 C. W. N. 245.

[9] *Mokandi* v. *Mohri*, (1893) P. R. No. 17 of 1893.

[10] *Dal Singh*, (1897) 20 All. 166; *Kallu*, (1882) 5 All. 233; *Santok Singh*, (1898) 18 A. W. N. 186; *Padam Singh*, (1906) 3 A. L. J. R. 224n; *Budhu*, (1920) 42 All. 401; *Pirthi*, (1900) 3 O. C. 342; *Phikku*, (1925) 2 O. W. N. 586.

[11] *Subbarayan*, (1885) 9 Mad. 9.

[12] *Nazir Khan*, (1913) 36 All. 1.

presumption. Marriage is evidenced, not constituted, by habit and repute and in a case where no valid marriage is possible no amount of evidence as to habit and repute can establish it.[1]

Although in some cases there may be danger in relying solely upon the interested evidence of a spouse, nevertheless a conviction based upon the evidence of a spouse is not illegal.[2]

(2) That she was under the care of her husband, or of some one on his behalf.

(3) That the accused took or enticed her away from her husband or that other person, or concealed, or detained her.

(4) That the accused knew, or had reason to believe, that she was the wife of another man.

(5) That the accused did as above with intent that she might have illicit intercourse with some person.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Presidency Magistrate, or Magistrate of the first or second class.

Complaint by the aggrieved person is necessary.—No Court shall take cognizance of this offence unless upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman.[3] Complaint by a man who has purchased a married woman is not competent.[4]

The intention of the law is to prevent Magistrates inquiring, of their own motion, into cases connected with marriage unless the husband or other person authorized *moves them to do so.* But where the husband is a complainant and brings his complaint under s. 366, a conviction under this section may properly be had if the evidence be such as to justify a conviction for the minor offence, and yet insufficient for a conviction for the graver one.[5] But this view has not been adopted in some cases.[6] In a Bombay case, the accused was tried on charges under ss. 363 and 366. At the conclusion of the case, the Court added a charge under this section and convicted the accused on all the three charges. It was held that the procedure in the case was not regular; *and the additional charge framed at the stage it was framed was prejudicial to the accused.* The Court set aside the conviction under this section and ordered an inquiry into the remaining charges.[7]

Where, in a case in which the complaint was of the offences of kidnapping a minor girl and theft of her jewels, there was no allegation even in the sworn statement of the complainant that the accused's purpose was to have illicit intercourse with her daughter, and there was not even a statement as to puberty; it was held that there was no complaint of an offence under this section, so as to give the Magistrate jurisdiction to try and convict the accused of such an offence.[8] Though a person having the care of a woman on behalf of her husband can lodge a complaint, such person cannot compound an offence under that section and an acquittal based on a compounding of offence by such person is erroneous.[9] The death of the husband does not put an end to the prosecution launched under this section.[10] Detention of a married woman is a continuing offence and a person committing such an offence is always liable to prosecution except for any period in respect of which he has been found innocent. Acquittals in respect of previous detentions are no bar to a fresh charge for a subsequent detention.[11]

[1] *Indar Singh* v. *Thakar Singh*, (1921) 3 L. L. J. 317.

[2] *Syed Munir*, (1917) 14 N. L. R. 28.

[3] *Criminal Procedure Code*, s. 199; *Nihalo*, (1909) P. W. R. (Cr.) No. 22 of 1909.

[4] *Mughlu*, (1925) 26 P. L. R. 382.

[5] *Jatra Shekh* v. *Rezzat Shekh*, (1892) 20 Cal. 483.

[6] *Chemon Garo*, (1902) 29 Cal. 415; *Isap Mahomed*, (1906) 31 Bom. 218; *Kallu*, (1882) 5 All. 233; *Bangaru*, (1903) 27 Mad. 61; *Bhana*, (1910) P. R. No. 32 of 1910; *Roda Singh*, (1917) P. R. No. 2 of 1918; *Khushal Singh*, (1904) 17 C.P.L.R. 105. See *Bhawani Dat*, (1916) 38 All. 276.

[7] *Isap Mahomed*, sup.; *Bhana*, sup.

[8] *Arunachalam Chetty*, (1923) 45 M. L. J. 543, [1923] M. W. N. 876.

[9] *Fateh Muhammad*, (1919) 4 L. L. J. 488; *Mir Alam*, (1922) 5 L. L. J. 183.

[10] *Masj Din*, (1922) 4 Lah. 7.

[11] *Nadar*, (1920) 4 L. L. J. 535.

Sections 497 and 498.—A person convicted of adultery under s. 497 of the Code need not be convicted also under this section [1]

Finding.—A finding exactly in the words of this section—that the prisoner took or enticed away a married woman from her husband; or some person having the care of her on his behalf, with intent that she may have illicit intercourse with any person, or concealed or detained such woman with a like intent—though not actually illegal, when it is doubtful which of the several offences has been committed, is a finding which ought not to be resorted to if it can be avoided, and it can be determined under which part of the section the accused is guilty [2]

Place of trial.—A complaint under this section for detaining a woman for the purpose of illicit intercourse can be enquired into only in the district where such detention occurs.[3]

The Punjab Rule.—In cases under s. 498 of the Indian Penal Code where the fact of an existing marriage between the complainant and the woman enticed away is in issue, it is not an uncommon practice for the Court trying the case to stay proceedings on the criminal side, and to refer the prosecutor for redress to the civil Court. This procedure is irregular. It is optional to the injured person to seek redress either in the criminal or civil Court. If he elects the former, the Court has no authority to refuse a hearing and to pass an order which entails upon him the delay and expense of a civil suit. But the marriage must be fully proved before a conviction can be arrived at. In many such cases the question really in dispute is only the amount of the dowry or by and to whom it is to be paid.[4]

Charge.—I (*name and office of Magistrate, etc*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, took away (*or* enticed away, *or* concealed, *or* detained) a certain woman, to wit AB, whom you knew or had *reason to believe to be the wife of CD, from the said CD, [or from EF who had* the care of the said AB on behalf of CD], with intent that the said AB might have illicit intercourse with some person; and that you thereby committed an offence punishable under s 498 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment.—Where the accused was convicted of an offence under this section and it appeared that the woman being not on good terms with her husband went to the accused of her own accord, a sentence of one year's rigorous imprisonment was considered to be too severe.[5] A light sentence is sufficient to meet the ends of justice when the abducted woman is an active abettor,[6] or where the husband did not care much about his wife and did not take any action against the accused for a number of months after her abduction.[7]

[1] *Pochun Chung*, (1865) 2 W R. (Cr.) 35

[2] *Mothoora Nath Roy*, (1874) 22 W R. (Cr) 72.

[3] *Jaswant Singh*, (1916) P. L. R No 51 of 1918, P W. R. No. 8 of 1918.

[4] P. C C. R. & O., Vol. II, No. 30, p. 199

[5] *Rasul Khan*, (1910) P. L. R No. 33 of 1910 P W R (Cr) No. 60 of 1910

[6] [illegible] 20 of 1914 [illegible]

[7] [illegible]

CHAPTER XXI.

OF DEFAMATION.

Defamation.

499. Whoever by words either spoken or intended to be read, or by signs or by visible representations,[1] makes or publishes any imputation concerning any person[2] intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person,[3] is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

ILLUSTRATIONS.

(a) A says—"Z is an honest man; he never stole B's watch": intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

Imputation of truth which public good requires to be made or published.

First Exception.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Public conduct of public servants.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character so far as his character appears in that conduct, and no further.

Conduct of any person touching any public question.

ILLUSTRATION.

It is not defamation in A to express in good faith any opinion whatever respect-

of the duties of which the public is interested.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Publication of reports of proceedings of Courts.

Explanation.—A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice is a Court within the meaning of the above section.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Merits of case decided in Court or conduct of witnesses and others concerned.

ILLUSTRATIONS.

(*a*) A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(*b*) But if A says—"I do not believe what Z asserted at that trial, because I know him to be a man without veracity." A is not within this exception, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Merits of public performance.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

ILLUSTRATIONS.

(*a*) A person who publishes a book, submits that book to the judgment of the public.

(*b*) A person who makes a speech in public, submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(*d*) A says of a book published by Z—"Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind." A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(*e*) But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine," A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Censure passed in good faith by person having lawful authority over another.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

ILLUSTRATION.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Accusation preferred in good faith to authorized person.

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

ILLUSTRATION.

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception.

Imputation made in good faith by person for protection of his or other's interests.

Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

ILLUSTRATIONS.

(*a*) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(*b*) A, a Magistrate, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Caution intended for good of person to whom conveyed or for public good.

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Punishment for defamation.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine or with both.

COMMENT.

In the words of the authors of the Code, "the essence of the offence [illegible] tion consists in its tendency to cause that description of pain which [illegible] person who knows himself to be the object of the unfavourable sentiments [illegible] fellow-creatures, and those inconveniences to which a person who [illegible] such unfavourable sentiments is exposed."[1]

The criminal law of this country with regard to defamation [illegible] construction of s. 499, not on what may be the English law on [illegible] According to the theory of the criminal law of England the [illegible] private libel consists in its tendency to provoke a breach [illegible] Penal Code, defamation has been made an offence [illegible] tendency to cause acts of illegal violence. The authors [illegible] appears to us evident that between the offences of [illegible] voking to a breach of the peace, there is a distinction [illegible] theft and murder. Defamatory imputations of [illegible] ency to cause acts of violence. Words which [illegible] whatever may have that tendency in the [illegible] defamation has a tendency to cause acts of [illegible] tion, considered as defamation, is in [illegible] cause such acts: nay, circumstances [illegible] considered as defamation, may be [illegible] ular as a provocation to a breach of the [illegible] woman, published by a person [illegible] 1] 1 Q. B. tion in one of its most odious [illegible] Edmondson v. satirist could be said to prove [illegible] B. 371. imputation on the counts [illegible] [1891] 1 Q. B. seen only by that officer [illegible] Singh, sup. defamation, is a very [illegible] (1883) P. obvious tendency to [illegible] Int. (

[1] Note B, p. [illegible]
[illegible] v. Thomas [illegible] of [illegible]
27 [illegible] Prasad [illegible] [illegible] 20 L.
22 All. 231; [illegible]

telegram,[1] or printed on papers distributed broad-cast,[2] constitute publication. So is filing in Court a petition containing defamatory matter concerning a person with the intention that it should be read by other persons.[3] When a person presents a defamatory petition to a superior public officer, who, in the ordinary course of official routine, sends it to some subordinate officer for inquiry, there is a publication of the letter at the place where he may receive it, and a publication for which the original writer may *prima facie* be held responsible, whether or not he expressly asks for an enquiry.[4] Communication to a husband or wife of a charge against the wife or husband is a publication[5] but uttering of a libel by a husband to his wife is not.[6]

Where there is a duty which forms the ground of privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons where that is reasonable and in the ordinary course of business. A solicitor, acting on behalf of his client, wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was dictated to a clerk in the office and was copied into the letter-book by another clerk. In an action against the solicitor for libel it was held that the publication to his clerks was necessary and usual in the discharge of his duty to his client.[7] But where there is no such duty the act of dictating a letter even to a short-hand writer will amount to publication.[8]

The accused in reply to a notice from the complainant's pleader calling upon him to pay money lent to him by the complainant wrote a letter to the pleader containing defamatory statements about the complainant. The complainant thereupon charged the accused with defamation. The lower Courts held that the letter having been sent to the complainant's pleader must be considered to have been addressed to the complainant himself and therefore there was no publication to a third person. On revision, the former Chief Court of the Punjab held that as the defamatory statements contained in the accused's letter to the complainant's pleader were wholly irrelevant to, and unconnected with, the question of the alleged loan mentioned in the pleader's letter, the pleader must be held to be a third person as far as those statements were concerned, and that therefore there had been publication within the purview of this section.[9]

Where a libel is printed, the sale of each copy is a distinct publication, and a fresh offence; and a conviction or acquittal on an indictment for publishing one copy will be no bar to an indictment for publishing another copy.[10]

The person who publishes the imputation need not necessarily be the author of the imputation. The person who publishes, and the person who makes, an imputation are alike guilty.[11] It is not necessary that the accused himself must actually utter the words; it is enough if some body else utters the words and the accused by his conduct and by words adopts as his own the words reported by the other.[12] "In considering whether there has been publication of it by him (the person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken a subordinate part in disseminating it), the particular

[1] *Whitfield* v. *S. E. R. Y.*, (1858) El. Bl. & El. 115.

[2] *Thiagaraya* v. *Krishnaswami*, (1892) 15 Mad. 214.

[3] *Greene* v. *Delanney*, (1870) 14 W. R. (Cr.) 27; *Abdul Hakim* v. *Tej Chandar Mukarji*, (1881) 3 All. 815.

[4] *Raja Shah*, (1889) P. R. No. 14 of 1889.

[5] *Wenman* v. *Ash*, (1853) 13 C. B. 836; *Shoobhagee Koeri* v. *Bokhori Ram*, (1906) 4 C. L. J. 390.

[6] *Wennhak* v. *Morgan*, (1888) 20 Q. B. D. 635; *Jaikishen Das* v. *Sher Singh*, (1910) P. R. No. 10 of 1910.

[7] *Boxsius* v. *Goblet Freres*, [1894] 1 Q. B. 842. See to the same effect *Edmondson* v. *Birch & Co., Ltd.*, [1907] 1 K. B. 371.

[8] *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524.

[9] *Jaikishen Das* v. *Sher Singh*, sup..

[10] *Pundit Mokand Ram*, (1883) P. R. No. 12 of 1883.

[11] [illegible] 1894) 19 [illegible] (1895) [illegible] 395.

[illegible] *Appanna* v. *Peta Akkanna*, (1924) 20 L. W. 921, 47 M. L. J. 746.

telegram has passed on papers distributed. Headland[1] constitute publication. So in filing in Court a petition containing defamatory matter concerning a person with the intention that it should be read by other persons.[2] When a person presents a defamatory petition to a superior public officer, who in the ordinary course of official routine, or be it to some other superior officer for enquiry, there is a publication of the letter at the place where he may receive it, and a publication, for which the original writer may *primâ facie* be held responsible, whether or not he expressly asks for an enquiry.[3] Communication to a husband or wife of a charge against the wife or husband is a publication,[4] but uttering of a libel by a husband to his wife not.[5]

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[1] *Blatfield v. S. E. R.* 1 . (1858) El. Bl. & El. 115.

[2] *Thangayya v. Krishnaswami*, (1892) 15 Mad 214.

[3] *Greene v. Delanney*, (1870) 14 W. R. (Cr.) 27; *Abdul Halim v. Tej Chandar Mularji*, (1881) 3 All. 815

[4] *Raja Shah*, (1889) P. R. No 14 of 1889.

[5] *Wennan v. Ash*, (1853) 13 C. B. 836; *Shoshagee Kooer v. Bakhori Ram*, (1906) 4 C. L. J. 390

[6] *Henekal v. Morgan*, (1888) 20 Q. B. D 635; *Jaikishen Das v. Sher Singh*, (1910) P. R. No. 10 of 1910.

[7] *Barnes v. Gedet Freres*, (1894) 1 Q B. 842. See to the same effect *Edmondson v. Birch & Co., Ltd.*, [1907] 1 K. B. 371.

[8] *Pullman v. Hill & Co.*, [1891] 1 Q. B. 524.

[9] *Jaikishen Das v. Sher Singh*, sup.

[10] *Pandit Mohand Ram*, (1883) P. R. No. 12 of 1883

[11] *Janardhan Damodhar Dikshit*, (1894) 10 Bom. 703; *Leandro Mascarenhas*, (1895) Unrep. Cr. C. 769, Cr. R. No. 34 of 1895

[12] *Basina Appanna v. Peta Akkanna*, (1924) 20 L. W. 921, 47 M. L. J. 740.

circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was prima facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it."[1] "An accidental publication is no publication at all."[2]

Repetition.—The Code makes no exception in favour of a second or third publication as compared with the first. If a complaint is properly laid in respect of a publication which is prima facie defamatory, the Magistrate is bound to take cognizance of the complaint, and deal with it according to law.[3] Repetition of rumours, however prevalent, is not an excuse.[4]

The doctrine of merger has no place in criminal law, and the circumstance that a person has in the first instance made a defamatory statement out of Court and has afterwards, by repeating such defamatory statement, when examined as a witness in Court, committed the offence of perjury, can be no bar to a prosecution for defamation in respect of the defamatory statement made out of Court.[5] The accused made certain defamatory statements about an officer in a memorial to the Lieutenant-Governor of the United Provinces who ordered an enquiry. The accused was called by two officers, one after another, who were appointed to enquire into the truth of the allegations and repeated the statements. It was held that the conviction of the accused on three separate charges for making and publishing the statement was good.[6]

Publication of defamatory matter in a newspaper.—The publisher of a newspaper is responsible for defamatory matter published in such paper whether he knows the contents of such paper or not.[7] It would be a sufficient answer to a charge of defamation against the editor of a newspaper if he proved that the libel was published in his absence and without his knowledge, and that he had in good faith entrusted the temporary management of the newspaper during his absence to a competent person.[8] Under the common law of England the proprietor of a newspaper was criminally responsible for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge. Statute 6 & 7 Vic., c. 96, was, therefore, passed to mitigate the rigour of the common law, and to give the proprietor the benefit of the presumption that when one person employs another to do a lawful act, he is to be taken to authorize him to do it in a lawful and not in an unlawful manner, and that the statute declared for the purpose that it was competent to the proprietor to prove that the libel was published without his authority, consent or knowledge, and that the publication did not arise from want of due care or caution on his part.[9]

The sending of a newspaper containing defamatory matter by post from Calcutta, where it is published, addressed to a subscriber at Allahabad, is publication of such defamatory matter at Allahabad.[10]

[1] Per Romer, L. J., in *Vizetelly* v. *Mudie's Select Library Ltd.*, [1900] 2 Q. B. 170, 180.

[2] Per Wills, J., in *Munslow*, [1895] 1 Q. B. 758, 765; *Emmens* v. *Pottle*, (1885) 16 Q. B. D. 354.

[3] *Howard*, (1887) 12 Bom. 167.

[4] *Wathman* v. *Weaver*, (1822) 11 Price 257n.

[5] *Periyaswami Kolasawmi Tever*, (1886) 1 Weir 580.

[6] *Jai Debi*, (1915) 13 A. L. J. R. 631.

[7] *McLeod*, (1880) 3 All. 342.

[8] *Ramasami* v. *Lokanada*, (1886) 9 Mad. 387; *Pandit Moland Ram*, (1883) P. R. No. 12 of 1883.

[9] *Holbrook*, (1878) 4 Q. B. D. 42.

[10] *McLeod*, sup.; *Girjashankar Kashiram*, (1890) 15 Bom. 286; *Bal Gangadhar Tilak*, (1897) 22 Bom. 112, 129; *Kally Doss Mitter*, (1866) 5 W. R. (Cr.) 44.

No privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist; but, apart from statute law, his privilege is no other and no higher.[1]

'Imputation concerning any person.'—The words complained of must contain an imputation concerning some particular person or persons whose identity can be established. If the words complained of contain no reflection upon a particular individual or individuals, but may equally apply to others although belonging to the same class an action will not lie. Where the accused published in his paper an account of an outrage on a woman alleged to have been perpetrated by two constables within the jurisdiction of the Begunia *thana*, in which four constables were stationed, it was held that, in the absence of proof that it was intended to charge any particular and identifiable constables with the alleged offence, the accused was not guilty of defamation.[2]

It is immaterial whether the imputation is conveyed obliquely, or indirectly, or by way of question, conjecture, or exclamation, or by irony,[3] or by feigned names.[4] An imputation, even if it be true, is not by itself good ground for making it.[5]

The words "a coward, dishonest man, and something worse than either,"[6] and the words to the effect that the complainant and others were preparing to bring false charges against the accused,[7] are held to be defamatory. It is not open to one member of a caste to call another an outcaste. Words which impute unworthiness to remain a member of the caste are defamatory.[8]

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may amount to defamation (Expln 3)

'Imputation against a dead person.'—It has been held with regard to libels on the memory of persons deceased, that a writing reflecting on the memory of a dead person, not alleged to be published with a design to bring a scandal or contempt on the family of the deceased, is not punishable as a libel (See Explanation 1). "Now to say, in general, that the conduct of a dead person can at no time be canvassed: to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased and with a view to injure his posterity,... then it becomes illegal."[9]

Where the defamation consists of imputing matters concerning a deceased person, the essence of the offence consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures and in those inconveniences to which a person who is the object of such unfavourable sentiments is exposed.[10]

[1] *Channing Arnold*, (1914) 16 Bom L. R 544, P. C.

[2] *Government Advocate, Bihar* v. *Gopa Bandhu Das*, (1922) 1 Pat. 414, 3 P. L. T. 209, *Protap Chandra Guha Roy*, (1925) 29 C. W. N. 904, 42 C. L. J. 178.

[3] See for authorities Archbold, 23rd Edn., p. 1129.

[4] *William Tayler*, (1869) 26 C. L. J 345.

[5] *Gopalrao* v. *Mt. Pyari Bi*, (1882) 5 C. P. L. R. (Cr) 55.

[6] *McCarthy*, (1887) 9 All. 420.

[7] *Shibo Prosad Pandah*, (1878) 4 Cal. 124.

[8] *Cooppoosami Chetty* v. *Duraisami Chetty*, (1909) 33 Mad. 67. See *Vengala Venkayya* v. *Thallam Venkataramiah*, (1914) 17 M. L. T. 369.

[9] Per Lord Kenyon in *Topham*, (1791) 4 T. R. 126, 129. See *Labouchere*, (1884) 12 Q. B D 320.

[10] *Parwari*, (1919) 41 All. 311.

A prosecution may be maintained for defamation of a deceased person, but no suit for damage will lie in such a case. *Where, therefore, a suit was brought* by the heir and nearest relation of a deceased person for defamatory words spoken of such deceased person, and alleged to have caused damage to the plaintiff as a *member of the same family, it was held that* the suit was not maintainable.[1]

Imputation against a combination of persons.—"Explanation 2 includes a com*pany or an association or collection of* persons as such within the word 'person'" as used in the definition, so that the latter should not be limited to individuals.[2] Explanation 2 which finds a parallel in the English law gives a legal remedy to a combination of persons, when, by defamation of that combination, many individual persons might be injured.[3]

It has been held in a series of cases that an action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business.[4] The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position.[5]

In a case in which the explanation is properly called into use the identity of the Company or Association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such cannot by virtue of this explanation justify a charge of defaming an individual and a charge cannot combine the explanation with the definition for such a purpose.[6] It is

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words can only be interpreted in such a way as to reflect on all the members of that class. "If a person wrote that all lawyers were thieves no particular lawyer could sue him unless there is something to point to the particular individual."[8] Where a writing inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, it is no libel, but it must descend to particulars and individuals to make it a libel[9]; *e.g.*, the religious society called the S. Nunnery[10] "*or certain persons* lately arrived from Portugal and living near Broad Street."[11] The imputation must be capable of being brought home to a particular individual or collection of individuals as such.[12] Where a defamatory matter appears only to apply to a class of individuals, if the description in such matters is capable of being, by innuendo, shown to be directly applicable to any one individual of that class, an action may be maintained.[13]

Ironical expressions.—Explanation III which finds a corresponding parallel in the English law makes ironical expressions, if defamatory, punishable. Where it has been sarcastically said of a lawyer, with intent to convey an entirely opposite idea as that "he is an *honest* lawyer," this explanation will apply.

[1] *Lackumeey Rowji v. Hurbun Nursey*, (1881) 5 Bom. 580.
[2] Per Buckland, J., in *Protap Chandra Guha Roy*, (1925) 29 C. W. N. 904, 42 C. L. J. 178.
[3] See *Williams*, (1822) 5 B. & Ald. 595.
[4] *South Hetton Coal Co., Ltd. v. N. E. News Association*, (1894) 1 Q. B. 133.
[5] Per Lord Esher, M. R., in *ibid*, p. 141.
[6] *Protap Chandra Guha Roy*, sup.
[7] *Ibid.*
[8] Per Willes, J., in *Eastwood v. Holmes*, (1858) 1 F. & F. 347, 349; *Osborn*, (1732) 2 Barnard (K. B.) 138, 166
[9] *Alme & Nott*, (1699) 3 Salk. 224.
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[11] *Osborn*, (1732) 2 Barnard, sup., Kel, (J.) Pl. 183, 226.
[12] *Government Advocate, Bihar v. Gopa Bandhu Das*, (1922) 3 P. L. T. 209, 1 Pat. 414.
[13] *Protap Chandra Guha Roy*, sup.

Imputation concerning a caste.—The accused, who were members of the Reddi caste, convened a meeting of their caste in the village and stated at such meeting to the members of the caste that the members of another caste in the village, viz., the Balijas, were inferior to their caste, that they (the Reddies) should have no intercourse with the Balijas, and that the village servants should not serve the latter. The village servants consequently refused to serve the Balijas, and the Reddies abstained from associating with them. It was held that the acts of the accused did not amount to such an imputation on the complainant, who was a member of the Balija caste, as would warrant a conviction for defamation.[1] The Court said: "No conduct affecting the complainant's status as a member of the Balija caste or involving in it a transgression of the rules of his caste and tending to lower his reputation as a Balija among his castemen or the general public, appears to have been imputed."

2. 'Words either spoken or intended to be read, or by signs or by visible representations.'—An essential difference between the Indian and the English law is that the former recognizes 'words spoken' as a mode of defamation, and the latter does not. By the English law, defamation is a crime only when it is committed by writing, printing, engraving or some similar process. Spoken words reflecting on the private character, however atrocious may be the imputation which these words convey, however numerous may be the assembly before which such words are uttered, furnish ground only for a civil action. Under the English law no indictment will lie for words spoken and not reduced into writing unless they be seditious, blasphemous, grossly immoral or obscene, or uttered to a Magistrate in the execution of his office, or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge.[2] The Penal Code makes no distinction between written and spoken defamation.[3] In it the term 'defamation' is used to embrace both libel and slander. The authors of the Code say: "Herein the English law is scarcely consistent with itself. For if defamation be punished on account of its tendency to cause breach of the peace, spoken defamation ought to be punished even more severely than written defamation, as having that tendency in a higher degree. A person who reads in a pamphlet a calumnious reflection on himself, or on some one for whom he is interested, is less likely to take a violent revenge than a person who hears the same calumnious reflection uttered. Public men who have, by long habit, become callous to slander and abuse in a printed form, often show acute sensibility to imputations thrown on them to their faces. Indeed, defamatory words, spoken in the presence of the person who is the object of them, necessarily have more of the character of a personal affront, and are, therefore, more likely to cause breach of the peace than any printed libel.

"The distinction which the English criminal law makes between written and spoken defamation is generally defended on the ground that written defamation is likely to be more widely spread and to be more permanent than spoken defamation. These considerations do not appear to us to be entitled to much weight. In the first place, it is by no means necessarily the fact that written defamation is more extensively circulated than spoken defamation. Written defamation may be contained in a letter intended for a single eye. Spoken defamation may be heard by an assembly of many thousands. It seems to us most unreasonable that it should be penal to say, in a private letter, that a man is dissipated, and not penal to stand up at the town-hall, and there, before the whole society of Calcutta, falsely to accuse him of poisoning his father.

"In the second place, it is not necessarily the fact that the harm caused by defamation is proportioned to the extent to which the defamation is circulated. Some slanders,—and those slanders of a most malignant kind,—can produce harm

[1] *Venkata Reddi*, (1885) 1 Weir 575.

[2] See Archbold, 23rd edn., p. 1127.

[3] *Parvathi* v. *Mannar*, (1884) 8 Mad. 175; *Mohuni Pursoram Doss*, (1865) 2 W. R. (Cr.) 36.

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It has been held in a series of cases that an action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business.[4] The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position.[5]

In a case in which the explanation is properly called into use the identity of the Company or Association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such cannot by virtue of this explanation justify a charge of defaming an individual and a charge cannot combine the explanation with the definition for such a purpose.[6] It is doubtful if the police force at a particular place is such an association or collection of persons as is contemplated in explanation 2.[7]

Where a collection of persons is defamed, the defamatory words must apply to all the class. The libel need not name the class as such; it is sufficient if the words can only be interpreted in such a way as to reflect on all the members of that class. "If a person wrote that all lawyers were thieves no particular lawyer could sue him unless there is something to point to the particular individual."[8] Where a writing inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, it is no libel, but it must descend to particulars and individuals to make it a libel[9]; *e.g.*, the religious society called the S. Nunnery[10] "or certain persons lately arrived from Portugal and living near Broad Street."[11] The imputation must be capable of being brought home to a particular individual or collection of individuals as such.[12] Where a defamatory matter appears only to apply to a class of individuals, if the description in such matters is capable of being, by innuendo, shown to be directly applicable to any one individual of that class, an action may be maintained.[13]

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[11] *Osborn*, (1732) 2 Barnard, sup., Kel, (J.) Pl. 183, 230.

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"The distinction which the English criminal law makes between written and spoken defamation is generally defended on the ground that written defamation is likely to be more widely spread and to be more permanent than spoken defamation. These considerations do not appear to us to be entitled to much weight. In the first place, it is by no means necessarily the fact that written defamation is more extensively circulated than spoken defamation. Written defamation may be contained in a letter intended for a single eye. Spoken defamation may be heard by an assembly of many thousands. It seems to us most unreasonable that it should be penal to say, in a private letter, that a man is dissipated, and not penal to stand up at the town-hall, and there, before the whole society of Calcutta, falsely to accuse him of poisoning his father.

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only while confined to a very small circle, and would be at once refuted if they *were published. A malignant whisper addressed to a single hearer, and meant to go* no further, may indicate greater depravity, may cause more intense misery, and may deserve more severe punishment than a satire which has run through twenty editions. A person, for example, who, in private conversation, should infuse into the mind of a husband suspicions of the fidelity of a virtuous wife, might be a defamer of a far worse description than one who should insert the lady's name in a printed lampoon.

"It must be allowed that, in general, a printed story is likely to live longer than a story which is only circulated in conversation. But, on the other hand, it is far easier for a calumniated person to clear his character, either by argument or by legal proceedings, from a charge fixed in a printed form, than from a shifting rumour, which nobody repeats exactly as he heard it. In general, we believe, a man would rather see in a newspaper a story discreditable to him which he had the means of refuting, than know that such a story, though not published, was current in society."[1]

'**Intended to be read.**'—"Where the words containing the imputation are in writing, it is necessary, . .that the maker of the imputation shall intend that the words shall be read, that is, read by some other person than the person defamed, or, in other words, that they shall be made public, for the essence of the offence . . . is the intention to harm reputation, and that necessarily requires publicity to be given to the imputation."[2]

'**By signs or by visible representations.**'—This is a class of defamation likely to do as much mischief as an[illegible] and it has always been considered by the English law to be a [illegible] of a man which renders him ridiculous or co[illegible]ious charges are, and very often has a wider effect. The words 'visible representations' will include every possible form of defamation which ingenuity can devise. "For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel."[3]

3. '***Intending to harm or knowing or having reason to believe that such* imputation will harm the reputation of such person.**'—It is not necessary to prove *that the complainant* actually suffered directly or indirectly from the scandalous imputation alleged; it is suffici[illegible] intended to harm, or knew, or had reason to believe, [illegible] the reputation of the complainant.[4] [illegible] ten-tion to harm [illegible] it there was reason to believe that the *imputation m*[illegible][5]

An impu[illegible] although made in the absence of actual [illegible] Con-scious [illegible] be no malice in fact. [illegible] ed in a street quarrel and were mere vulgar abuse, it was held that in the circumstances there was no deliberate intention to harm the reputation of the person defamed.[7]

'**Harm the reputation.**'—"The meaning which should be attached to 'harm' is [illegible] by 'harm' is meant imputa-[illegible] in [illegible] "

[1] Note R, pp. 176, 177.

[2] Per Oldfield, J., in *Taki Husain*, (1884) 7 All. 205, 222, F. B.

[3] Per Lopes, L. J., in *Monson* v. *Tussauds Limited*, [1894] 1 Q. B. 671, 692.

[4] *Thakur Dass*, (1874) 6 N. W. P. 86, *Gobinda Pershad Pandey* v. *Garth*, (1900) 28 Cal. 63; (1883) 1 Weir 575; *Alex Pimendo*, (1920) 22 Bom. L. R. 1224, 5 Bom. Cr. C. 257.

[5] *Kewala Nandgir*, (1913) P. W. R. (Cr.) No. 34 of 1913.

[6] *Palani Asari*, (1882) 1 Weir 613.

[7] *Anthony Rodgers*, (1887) 1 Weir 607.

certainly does not constitute defamation.[1] A person who commits defamation is not to be excused from the penalties attached to the offence merely because he has comported himself in respect of the mode of giving expression to the defamatory matter in such a way that little real injury results from the offence.[2]

The word 'harm' is used in the definition of 'injury' (s. 44).

A man's reputation is his property, and if possible of more value than other property. But a man's opinion of himself cannot be called his 'reputation.'[3] A man has no 'reputation' to himself and therefore communication of defamatory matter to the person defamed is no publication.

The use of common abuses cannot be regarded as conveying any such imputation as can in any way harm the reputation of the person towards whom it is used and it therefore does not constitute this offence.[4] But if obscene and insulting words are used regarding any person after an altercation with him is over, the person using such words would be guilty of defamation.[5]

Explanation 4 specifies the various ways in which the reputation of a person may be harmed. It says that the imputation must directly or indirectly lower the moral or intellectual character of the person defamed. "The words '*directly* or *indirectly*' ...mean that the person defamed must either be abused in express terms, or the wording of the communication must convey such imputations as any person reading it must understand to impute misconduct or bad character. The words cannot...be understood to mean that the person libelled should himself be the direct means of publishing the libel to others."[6] This explanation does not apply where the words used, and forming the basis of a charge, are *per se* defamatory, though when the meaning of words spoken or written is doubtful, and evidence is necessary to determine the effect of such words and whether they are calculated to harm a particular person's reputation, it is possible that the principle enunciated in the explanation might and would with propriety be applied.[7] The complainant, one Scott, was a Chairman of a Municipal Board. At a meeting of the Board, which was presided over by the complainant, a resolution was passed calling on the accused to pay certain taxes due by her to the Municipality and was signed by the complainant. A copy of the resolution, signed by the Secretary, was sent to the accused, who returned it after writing upon it the words, "Mrs. McCarthy will take no notice of anything written by H. G. Scott, he already having shown himself a coward, dishonest man, and something worse than either." It was held that the accused was guilty of defamation. The Court said: "In this case there is no question as to the significance or meaning of the words written. They are distinctly defamatory within the meaning of s. 499, and, as such whether they were written in haste or in anger, the respondent is clearly responsible."[8] The wording of this explanation is very loose. Anything calculated to lower the reputation of a person may come under this provision. Thus an accusation of anonymous letter writing may amount to defamation.[9] An imputation that a Mahomedan had killed a cow in his compound is not one which can be said to harm his reputation.[10] In reply to a book written by the complainant attacking Vaishnavism and its founders, the accused retorted by a similar publication and both books dealt with highly controversial religious matters. Very violent language was used in the latter about the complainant. It was held that it did not amount to defamation as the personal character or respectability of the complainant was not in any way assailed.[11]

[1] Per Mahmood, J., in *Tota Ram* v. *Emperor* (1884) 7 All. 206, 220.

[2] *Nathu Chaudhuri* (1880) 1 Weir 204.

[3] Per Mahmood, J., in *Tota Ram*, *supra*.

[4] *Jadu* (1888) 3 A. W. N. 3; *Amir Ram* (1887) 8 A. W. N. 187.

[5] *Lord Lam Sen* (1918) 41 A. L. J. 600.

[6] Per Mahmood, J., in *Tota Ram*, *supra*.

[7] *Emperor* v. *Tota Ram* (1884) 6 All. 221.

[8] *Kuppuswamy* (1887) 9 A. 450.

[9] *Ibid.*, p. 452.

[10] (1872) 2 Mad. Jur. 232.

[11] *Sadhakar* v. *James* (1887) 9 C. P. L. R. (r. 12.

[12] *Ramaprasad Sarma* v. *Krishnasarma Mandalar*, (1924) 47 M. L. J. 664, (1924) M. W. N. 504.

It is not defamation for a number of persons to meet and resolve for good reasons not to associate with a particular person. But they should not publish the resolution.[1]

Exceptions.—There are occasions when a man is allowed to speak out or write matters about others which would ordinarily be defamatory. These occasions are reduced to the following ten exceptions :—

1. Imputation of truth which public good requires to be made or published.
2. Public conduct of public servants.
3. Conduct of [illegible] ublic question.
4. Publication [illegible] Courts.
5. Merits of a [illegible] nduct of witnesses and others concerned.
6. Merits of a public performance.
7. Censure passed in good faith by a person having lawful authority over another.
8. Accusation preferred in good faith to an authorised person.
9. Imputation made in good faith by a person for the protection of his or other's interests.
10. Caution intended for the good of the person to whom it is conveyed or for public good.

Exception 1.—*This and exception 4 require that the imputation should* be true. The remaining exceptions do not require it to be so. They only require *that the imputation should be made in good faith. "For," say the authors* of the Code, "to require in these cases that the imputation should be true, would be to render these exceptions mere nullities. Whether a public functionary is or is not fit for his situation; whether a person who has bestirred himself to get [illegible] been tried for an offence was or was not guilty; which of two witnesses who contradicted each other on a trial ought to be believed; whether a portrait is (life) like; whether a song has been well sung; whether a book is well written; —these are questions about which honest and discerning men may hold opinions diametrically opposite; and to require a man to prove to the satisfaction of a Court of law that the opinion which he has expressed on such a question is a right opinion is to prohibit all discussion on such questions. The same may be said of those private communications which we propose to allow. It is plainly desirable that a merchant should disclose to his partners his unfavourable opinion of the honesty of a person with whom the firm has dealings. It is desirable that a father should caution his son against marrying a woman of bad character. But if the merchant is permitted to say to his partners, if the father is permitted to say to his son, only what can be legally proved before a Court, it is evident that the permission is worth nothing."[2]

'Public good.'—The truth of the imputation complained of shall amount to a defence if it was for the public benefit that the imputation should be published but not otherwise. The authors of the Code observe: "A person who has been guilty of gross acts of swindling at the Cape comes to Calcutta, and proposes to set up a house of agency. A person who has been forced to fly from England on account of his infamous vices repairs to India, opens a school, and exerts himself to obtain pupils. A captain of a ship induces natives to emigrate, by promising to convey them to a country where they will have large wages and little work. He takes them to a foreign colony, where they are treated like slaves, and returns to India to hold out similar temptations to others. A man introduces a common prostitute as his wife into the society of all the most respectable ladies of the presidency. A person in a high station is in the habit of encouraging ruinous play

[1] *Nga On Thin*, (1921) 1 B. L. J. 39. [2] Note B, pp. 183, 184.

among young servants of the Company. In all these cases, and in many others which might be named, we conceive that a writer who publishes the truth renders a great service to the public, and cannot, without a violation of every sound principle, be treated as a criminal.

"There are undoubtedly many cases in which the spreading of true reports, prejudicial to the character of an individual, would hurt the feelings of that individual, without producing compensating advantage in any other quarter. The proclaiming to the world that man keeps a mistress, that he is too much addicted to wine, that he is penurious in his house-keeping, that he is slovenly in his person; [illegible] discretions who has [illegible] ter, can seldom or never produce any good to the public sufficient to compensate for the pain given to the person attacked, and to those who are connected with him."[1]

The onus of proving the statement or at least of showing that he had reasonable ground for believing it to be true, and was actuated in making such statement not by malicious motives, but by an intelligent zeal for the public interest, lies on the person making the statement.[2]

The person making the imputation cannot escape liability, if in addition to statements which would be protected, he goes further and makes false and uncalled for statements, for he cannot then be regarded as acting in good faith.[3]

A Court may find that an imputation is true, and made for the public good, but on considering the manner of the publication (*e.g.*, in a newspaper) it may hold that the particular publication is not for the public good, and is, therefore, not privileged.[4] A privilege does not justify publication in excess of the purpose or object which gives rise to it.[5] An editor of a newspaper does not act in good faith and for the "public good, when he publishes every foul rumour, however ill-founded and however much pain it may give to those concerned, which comes to his ears, and he states that he does not vouch for the truth of the rumour. The discharge of journalistic duties does not justify the publication of all cases of rumours, injustice, and oppression, which may have the effect of seriously injuring the reputation of others, without the least inquiry into its truth.[6]

Cases.—Imputation of truth which public good requires to be made.—C was put out of caste by a *panchayat* of his caste-fellows on the ground that there was an improper intimacy between him and a woman of his caste. Certain persons, members of such *panchayat*, circulated a letter to the members of their caste generally, in which stating that C and such woman had been put out of caste and the reason for the same, and requesting the members of the caste not to receive them into their houses or to eat with them, they made certain statements applying equally to C or such woman. Such statements were defamatory. It was held that if such persons were careless enough to use language which was applicable to C, they did so at their peril and they could not escape the responsibility of having defamed C by saying that they intended such language to apply to such woman, that had such persons contented themselves with announcing the determination of the *panchayat*, and the grounds upon which such determination was based, they would have been protected, but it seemed as they did not have contented themselves, but were further and made false and uncalled for statements regarding C, they had acted in good faith.[7]

[1] [illegible]

[2] [illegible]

[3] [illegible]

[4] [illegible]

[5] [illegible]

[6] [illegible]

[7] [illegible]

In discussing the claims of a councillor for a Municipal office, a person is entitled to make remarks in the interests of the public, so long as he abstains from aspersing the private character of the former.[1]

Exception 2.—"Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander. A writer in a public paper has the same right as any other person, and it is his privilege, if indeed it is not his duty, to comment on the acts of public men which concern not himself only but which concern the public, and the discussion of which is for the public good. And where a person makes the public conduct of a public man the subject of comment and it is for the public good, he is not liable to an action if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no wilful misrepresentation of fact or any misstatement which he must have known to be a misstatement if he had exercised ordinary care."[2]

If a person undertake to criticise the acts of a public man, he must take care not to assert that which is not true as the basis of his criticism and he is bound not to conceal wilfully anything which would show that the criticism is not well-founded.[3] The opinion expressed must be expressed in good faith and must not contain only the half truth. The accused, an editor of a newspaper, published an article in which the following passage, admittedly referring to the complainant, occurred:—"Has his (the complainant's) character been inquired into? Does no one remember that this very man was sent by the Subordinate Judge of Sholapur to be prosecuted? Are not the proceedings instituted by the Subordinate Judge to be found on the record?" The Magistrate found that it was literally true that the complainant had been sent to be prosecuted, but that it was also true that the prosecution had, to the accused's knowledge, been ordered to be withdrawn by the District Judge. It was held that although the statement contained only the truth, it was incomplete and misleading; and that, as the accused was well aware that the prosecution referred to had been withdrawn, and did not injuriously affect the complainant's character, he could not plead that the imputation made by him on the complainant's character was made in good faith, or for the public good.[4]

In dealing with the question of good faith, the proper point to be decided is, not whether the allegations put forward by the accused in support of the defama- [illegible] after [illegible][5]

The expression 'opinions in good faith' means that in order to express an opinion in good faith the person who holds it must have taken care and attention in forming it.[6]

The mere absence of ill-will does not of itself prove that the imputation was made in good faith.[7]

As to 'public servant,' see s. 21, *supra*.

Exception 3.—The authors of the Code say: "There are public men who are not public functionaries; persons who hold no office may yet...take a very active part in urging or opposing the adoption of measures in which the community is deeply interested. It appears clear to us that every person ought to be allowed to comment, in good faith, on the proceedings of these volunteer servants of the public, with the same freedom with which we allow him to comment on the proceedings

[1] *Subroya Iyer* v. *Moulvi Kadar Rowthu Abdul*, [1914] M. W. N. 351.

[2] Per Couch, J., in *Howard* v. *Mull*, (1866) 1 B. H. C. App. 85, 91; see also *Abdul Hakim* v. *Tej Chandar Mukarji*, (1881) 3 All. 815.

[3] *William Tayler*, (1896) 26 C. L. J. 345.

[4] *Kakde*, (1880) 4 Bom. 208.

[5] *Shiko Prosad Pandah*, (1878) 4 Cal. 124. See s. 52.

[6] *Banks*, (1869) 26 C. L. J. 401.

[7] *Palani Asari*, (1882) 1 Weir 513.

of the official servants of the public."[1] The comment must be such that a fair mind would use under the circumstances, and it must not misstate facts, because a comment cannot be fair which is built upon facts, which are not truly stated, and further, it must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputation.[2]

In *Campbell* v. *Spottiswoode*[3] Cockburn, C.J., said: "It seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced; and that you have no right to impute to a man in his conduct as a citizen,—even although it be open to ridicule or disapprobation,—base, sordid, dishonest, and wicked motives, unless there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly entertained some mistaken belief upon the subject, but that your belief is well founded and not without cause... It has been said in argument that it is for the interest of society that a man's public conduct shall be criticised without any limit, except that which it is admitted on all hands must be imposed—namely, that the writer must only write according to what he thinks just and true. But, it seems to me that the public at large have an equal interest in the maintenance of public character, without which public affairs could never be conducted with a view to the welfare and the best interests of our country; and I think that we ought not to sanction attacks upon public men, which if allowed would be destructive of their character and honour, unless such attacks are well founded. Where the public conduct of a public man is made the subject of observation, and the writer who is commenting upon it makes imputa- [illegible] also well founded, there I should be prepared to say that the imputation so made would not be the subject of an action. But I do not think we should be laying down the law according to what has always been understood to be essential to the best interests of the community, if we were to say because a writer may fancy that the conduct of a public man is open to the suspicion of dishonesty, that therefore he is entitled to denounce that man as dishonest"

As to the meaning of 'public,' see s. 12, *supra*.

Case.—Conduct of a person touching a public question.—Where M, a medical man and the editor of a medical journal, said in such journal of an advertisement published by H, another medical man, in which H solicited the public to subscribe to a hospital of which he was the surgeon in charge, stating the number of successful operations which had been performed.—"The advertiser is certainly entitled to be congratulated on his marvellous success; but it is hardly consistent with the feelings and usages of the medical profession to herald them forth in this fashion. We are not surprised to find that H has [illegible] with the approval of his [illegible] ve no hesitation in pronou[illegible] t was held that inasmuch as such advertisement had the effect of making such hospital a "public qesiton" and of submitting it to the "judgment of the public," and M had expressed himself in good faith, M was within the third, sixth and ninth exceptions.[4]

Exception 4.—"Where there are judicial proceedings before a properly constituted [illegible] in open Court, then the publication, [illegible] what takes place before that tribunal [illegible] as will result in a final decision being

[1] Note R, pp. 182, 183.

[2] *Joynt* v. *Cycle Trade Publishing Co*, [1904] 2 K. B. 292, 294.

[3] (1863) 32 L. J. Q. B. 185, 199, 200.

[4] *McLeod*, (1880) 3 All. 342. See *Subroya Iyer* v. *Moulvi Kadar Routhu Abdul*, [1914] M. W. N. 351.

[1] Per Lord Esher, M. R., in *Kimber* v. *The Press Association*, [1893] 1 Q. B. 65, 68.

It is not to be expected that in discharging this duty of a public journalist he will always be infallible. His judgment may be biassed, one way or the other, without the slightest reflection upon his good faith; and, therefore, if his comments are fair, no one has a right to complain...It is well that the conduct of the judge or jury should, if necessary, be brought to the bar of public opinion, like all other matters of public concern...That the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance. But...it behoves those who pass judgment, and call upon the public to pass judgment, on those who are suitors or witnesses in courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others; but to remember, that they are bound to exercise a fair, an honest, and an impartial judgment upon those whom they hold up to public obloquy."[1] Writers in public papers are of great utility, and do great benefit to the public interests by watching the proceedings of the Courts of Justice, and fairly commenting on them if there is anything that calls for observation; but they should be careful, in discharging that function, that they do not wantonly assail the character of others, or impute criminality to them, and if they do so, and do not bring to the performance of the duty they discharge that due regard for the interests of others which the assumption of so important a censorship necessarily requires, they must take the consequences.[2]

Exception 6.—The object of this exception is that the public should be aided by comment in its judgment of the public performance submitted to its judgment. All kinds of performances in public may be truly criticised, provided the comments are made in good faith. "Liberty of criticism," says Lord Ellenborough,[3] "must be allowed, or we should neither have purity of taste nor of morals Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

"What is the meaning of a 'fair comment'? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit, if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case...Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said"?[4]

A fair comment upon a literary work, or other such production, submitted to the judgment of the public, that is to say, a comment which is the expression of honest opinion and does not go beyond the limits of what may fairly be called 'criticism,' is no libel.[5] A fair comment is a comment which is true, or which, if false, expresses the real opinion of its author, such opinion having been formed with a reasonable degree of care and on reasonable grounds. The right of fair comment involves two essentials: first, that the imputation should be a comment on the

[1] Per Cockburn, C. J., in *Woodgate* v. *Ridout*, (1865) 4 F. & F. 202, 216, 223.

[2] Per Cockburn, C. J., in *Tanfield*, (1878) 42 J. P. 423, 424.

[3] *Tabart* v. *Tipper*, (1808) 1 Camp. 350, 351.

[4] Per Lord Esher, M. R., in *Merivale* v *Carson*, (1887) 20 Q. B. D. 275, 280, 281.

[5] McQuire v. *Western Morning News Co.*, [1903] 2 K. B. 100.

levy of assessment by the complainant (a Mamlatdar) by sale of moveable property, alleged that the complainant acted towards him unjustly and spitefully, that in passing the order appealed against he was actuated by personal ill-will and malice towards the accused, and had exercised his authority with a view to cause harassment and loss to the accused. It was held that the accused was protected by exceptions 8 and 9 in making the statements as they were made in good faith.[1] Certain paddy traders sent to the Traffic Manager of the Burma Railways a telegram, containing an allegation that a station master was giving preferential treatment to charcoal dealers and setting forth particulars in support of their allegation. The railway authorities after an inquiry into the allegation held that it was not substantiated, and the station master prosecuted the paddy traders for defamation. They showed that when they sent their telegram they had good reasons for supposing their allegation to be true. It was held that they were entitled to the protection of this exception.[2]

Where the accused told his friend E and subsequently at the instance of E wrote to the superior officer of the complainant to the effect that the complainant and the wife of E had been seen behaving on a certain night in such a manner and under such circumstances as to render unavoidable the conclusion that acts of impropriety took place between them and it was found that the accused honestly believed in the truth of the statements, it was held that the accused was not guilty of defamation.[3]

Accusation made to unauthorised persons.—Where the right to a plot of land was in dispute between the complainant and the accused, and the latter in a petition presented by him to the Municipal Council of his town about the land, made a statement that the complainant was convicted and sentenced to rigorous imprisonment, it was held that the statement to the Municipal Council, though true, was not privileged.[4]

Exception 9.—The exception relates to private communications which a person makes, in good faith, for the protection of his own interests or of any other person, or for the public good. This exception is nothing more than a reproduction of the canon or guiding principle which was stated by Lord Campbell in *Harrison v. Bush*,[5] namely: "A communication made bona fide upon any subject matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contains criminatory matter, which, without this privilege, would be slanderous and actionable."

Any one in the transaction of business with another has a right to use language bona fide which is relevant to that business, and which a due regard to his own interests makes necessary, even if it should directly, or by its consequences, be injurious or painful to another.[6] The rule of public policy on which this principle is based is that honest transactions of business and of social intercourse would otherwise be deprived of the protection which they should enjoy.[7]

According to the Calcutta High Court this exception does not formulate any rule of absolute privilege. Good faith on the part of the person who makes or publishes the imputation must be established.[8]

In considering whether there was 'good faith,' *i.e.*, due care and attention, the position of the person making the imputation must be taken into considera-

[1] *Anandrao Balkrishna Rangnekar*, (1914) [illegible]

[2] *Slater*, (1890) 15 Bom. 351, *Sher Singh*, (1910) P. W. R. (Cr.) No. 6 of 1910.

[3] *Venkata Narasimha v. Kotayya*, (1889) 12 Mad. 374, 377.

[4] *Satis Chandra Chakrabarti v. Ramdayal Dey*, (1920) 32 C. L. J. 91, 24 C. W. N. 982.

tion.[1] If good faith was not established it was not strictly necessary to consider if the public good was involved.[2]

This exception includes the first exception. It refers to any imputation made in good faith, whereas the first exception applies only to true imputation made for the public good. It is not essential that, before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true. If, having regard to certain facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interests, he may fairly be held to have made out his good faith.[3] Where a matter is of public interest, the Court ought not to weigh any comment on it in a fine scale; some allowance must be made for even intemperate language, provided, however, the writer keeps himself within the bounds of substantial truth, and does not misrepresent or suppress any facts.[4]

A person making defamatory expressions for the protection of his son's interests is not privileged, unless the imputation is made in good faith.[5]

Communications by a member of a caste.—There is a dividing line between the passing of a resolution at a caste meeting and its communication by the authorities of the caste to its members in their discharge of their social duty. If any member of a caste publish to all its members a caste resolution in such discharge of duties the law will hold the occasion of the publication to be privileged. The member who publishes it is bound to publish it and the members of the caste have an interest in hearing it. But there must be good faith on the part of the member who publishes, that is, it must be proved that the publication was made with due care and attention.[6] If a person really was outcasted, a statement to the members of the brotherhood that he was outcasted is the kind of statement contemplated by the expression "public good" The Court observed: "So long as caste prevails and it must be remembered that it is sanctified by religious and [illegible] 'public good.' If it is not from the Indian point of view for the 'public good,' caste ought to be abolished. It seems to me that there is no way out of that dilemma, and, therefore, to justify this conviction it was necessary to hold, not merely that the statement was untrue, but that if, as the Sessions Judge thought, it was true, that it was a statement not honestly made for the benefit of the brotherhood."[7] Where, according to the practice of a caste Sabha, a member who absented himself, when summoned to answer a charge, was excommunicated and the fact reported to all other Sabhas of the caste, and the accused so excommunicated the complainant and reported that fact to all other caste Sabhas, it was held that there was nothing to show that the accused were not acting in good faith.[8] The accused having suspected that the complainants were given to drinking liquor, made an application to the caste calling for an enquiry into their conduct. For this they were convicted of defamation. It was held that the accused were not guilty, for, as members of the caste, they had every right to do what they had done, so long as they acted in good faith

[1] *Nagarji Trikamji*, (1891) 19 Bom. 340; *Scaly v. Ramnarain Bose*, (1865) 4 W. R. (Cr.) 22.

[2] *Purna Chandra Ghose*, (1924) 28 C. W. N. 579.

[3] *Abdul Halim v. Tej Chandar Mukerji*, 1881) 3 All. 815, 817.

[4] *Fernandez*, (1911) 13 Bom. L. R. 1187, 1188, 1 Bom. Cr. C. 68.

[5] *Parsoram Doss*, (1865) 3 W. R. (Cr.) 45.

[6] *Virji Bhagwan*, (1909) 11 Bom. L. R. 639.

[7] *Umed Singh*, (1923) 46 All. 64, 67.

[8] *Ayyasvami Iyer v. Annan Thiruvala Iyer*, (1921) 19 L. W. 639, 47 M. L. J. 8.

and for the protection of the interests of the caste: and that the communication was privileged inasmuch as it was not communicated to anybody beyond the caste, and all that the accused did was to complain to the caste which had jurisdiction to enquire into the complaint.[1] Where a libellous communication is made regarding a member of a caste, the mere fact that the person making such communication is a member of the caste, will not of itself suffice to make the communication privileged.[2]

Privileges of Judges, etc.—The privileges of judges, parties, counsel, attorneys, pleaders, and witnesses, come under this exception. So also, statements made in pleadings and in reports to superior officers are protected by it. (As to civil action, see the authors' "The English and Indian Law of Torts," 9th Edn., p. 171.)

In India the law regarding defamatory statements made, in the course of judicial proceedings, by judges, counsel or pleaders, witnesses, and parties is in an unsettled condition. The Madras High Court has adopted the English rule of absolute immunity in all cases. The Bombay High Court has not followed the English rule in cases of criminal prosecutions on the ground that English law could not be resorted to where it went beyond the terms of s. 499, but in civil actions it has followed the dictum of the Privy Council in *Baboo Gunnesh Dutt* v. *Mugneeram* [illegible] High Court has gone a step further and held that [illegible] must be decided in accordance [illegible] Indian Evidence Act. The Calcutta High Court has [illegible] of a person prosecuted for defamation must be determined by the application of the provisions of the Penal Code and not otherwise.[4]

[illegible] Section 77, no doubt protects Judges for acts done when acting [illegible] 7 of this section protects a Judge cen- [illegible] There is no reported Indian criminal case touching the absolute immunity of judges.

It has been the English law that a Judge "can't be put to answer civilly or criminally for words spoken in office."[5] [illegible] be maintained against a Judge for words used by [illegible] even [illegible] use.[6] [illegible] which this rule rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice".[7] This provision of the law is not intended for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges do exercise their functions with independence and without fear of consequences.[8] In Madras it has been held that the English authorities on the subject apply to Judges and Courts in India.[3]

[illegible] to common law no action will lie against an [illegible] spoken with reference to, and in the course of, an enquiry before a judicial [illegible] nal, although they are uttered by the advocate maliciously and not with the object of supporting the case of his client, and are

[1] *Padam Babul Mhatre*, (1912) 14 Bom. L. R. 585, 1 Bom. Cr. C. 152.

[2] *Coopoosami Chetty* v. *Duraisami Chetty*, (1909) 33 Mad 67. See *Vengala Venkayya* v. *Thallam Venkataramiah*, (1914) 17 M. L. T. 369; *Bishambhar Das* v. *Gobind Das*, (1914) 12 A. L. J. R. 552.

[3] (1872) 11 Beng. L. R. (P. C.) 321.

[4] *Satis Chandra Chakrabarti* v. *Ramdayal De*, (1920) 48 Cal. 388.

[5] Per Lord Mansfield in *Skinner*, (1773) Lofft. 55, 56.

[6] *Raman* v. *Subramanya*, (1893) 17 Mad. 87; *Moulavie Ally Kurreem* v. *Teignmouth Sandys*, (1858-59) Boul. 1; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668.

[7] Per Lord Esher, in *Anderson* v. *Gorrie*, [illegible] p. 670.

[8] [illegible] (1893) 17 Mad. [illegible] 3 Ex. 220; [illegible] S. 576.

[9] [illegible] 0 Mad. 28, F. B. See also the judgment [illegible] *Vagarji Trikamji*, (1894) 19 Bom. 340.

uttered without any justification or even excuse and from personal ill-will or anger towards the person defamed arising out of a previously existing cause, and are irrelevant to every issue of fact which is contested before the tribunal.[1] The rule is made so wide not to protect counsel who deliberately and maliciously slander others, but in order that innocent counsel who act *bona fide* may not be "unrighteously harassed with suits."

The advocate "is trusted with interests and privileges and powers, almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty, and he may have to speak upon subjects concerning the deepest interests of social life and the innermost feelings of the human soul...his words and acts ought to be guided by a [illegible] client—binding him to exert every faculty [illegible] may maintain that client's right, together [illegible] iding him to guard against the abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right"[2]

In *Sullivan* v *Norton*,[3] the Madras High Court has applied the common law principle to advocates in this country. Collins, C. J., in this case said: "I think that the advocates in this country have and should have the same privileges in respect of liberty of speech (bearing always in mind the remarks of Earle, C. J., in *Kennedy* v. *Broun*) they have so long enjoyed in England; and that in this country it would be beyond measure embarrassing to the advocate and disastrous to the interests of the client, if the advocate was exposed to the liability of a criminal or civil charge for defamation for words uttered in Court...

"I disagree with the learned Acting Advocate-General that an advocate is bound to consider the position in life of the person whose conduct he is condemning. His words and acts ought only to be guided by a sense of duty—duty to his client—and by a constant recourse to his own sense of right to guard against the abuse of the powers and privileges entrusted to him."

The Bombay High Court has, however, observed that *Sullivan* v. *Norton* is not an interpretation of s. 499, which should be construed without reference to the English law. It has held that where express malice is absent (and it ought not to be presumed) a Court, having due regard to public policy, would be extremely cautious before it deprived the advocate of the protection of this exception.[4] But, in a subsequent Full Bench case it has expressly laid down that in this country an advocate enjoys the same measure of license as he enjoys in England; that he cannot be punished for acting on the instructions given him when he did not and could not know that they were false; and that he has the fullest liberty of speech so long as his language is justified by his instructions, or by the evidence, or by the proceedings on the record. The mere fact that his words are defamatory, or that they are calculated to hurt the feelings of another, or that they ultimately turn out to be absolutely devoid of all solid foundation will not make him responsible nor render him liable ir [illegible] n a later case the same High Court, after [illegible] or a pleader has the unqualified privilege [illegible] t when a pleader is charged with defamation in respect of words spoken or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose.[6]

[1] *Munster* v. *Lamb*, (1883) 11 Q. B. D 588.

[2] Per Earle, C. J., in *Kennedy* v. *Broun*, (1863) 32 L. J. (C. P.) 137, 146.

[3] (1886) 10 Mad. 28, 35, F. B.

[4] *Nagarji Trikamji*, (1894) 9 Bom. 340, followed in *Upendra Nath Bagchi*, (1909) 36 Cal. 375.

[5] *Bhaishanker* v. *Wadia*, (1899) 2 Bom. L. R. 3, F. B.

[6] *Purshottamdas Ranchhoddas*, (1907) 9 Bom. L. R. 1287.

The Calcutta High Court has held that it is not defamation for a pleader to put a question in cross-examination to a witness, for the purpose of impeaching his credit, even if it appears that the question assumed a state of facts to be true, which was not really so, if it is based on facts known to the pleader, which knowledge was used in apparent good faith, entirely in the interest of his client and not for his own ends. The Court said: "It seems to us, especially in the mofussil of this country, where instructions, to the personal knowledge of one of us, are very commonly inaccurate and misleading, that a pleader would certainly be at least as much justified in acting on his own recollection as on specific instructions, and we do not think that, because he has drawn merely a wrong inference from a fact, that of itself, in the absence of any malice, should take him out of the ninth Exception to s. 499."[1] Following this case it has further held that a question put to a witness in cross-examination by a pleader making an imputation affords no ground for a criminal prosecution. A pleader is entitled to the presumption that the questions he asks in cross-examination are asked in good faith for the protection of the interest of his client. To rebut this presumption there must be convincing evidence that the pleader was actuated by an improper motive personal to himself and not by a desire to protect or further the interests of his client in the cause. It is the duty of the pleader to present his client's case, but it is not his duty to enquire whether it is true or false, so far, at any rate, as the purposes of a prosecution for defamation are concerned. The Court said: "It is for the public good that a person charged with the responsibility of an advocate should, so far as may be, feel unfettered by any control other than that of the presiding Judge, in the use of every weapon placed at his disposal by the law for the defence of the liberty of his client. The provisions of the ninth Exception to s. 499 of the Indian Penal Code must be interpreted accordingly."[2]

The Rangoon High Court has held that the English law of absolute privilege does not apply to statements of advocates in judicial proceedings. Legal practitioners are subject to the criminal law of defamation in this section.[3] An advocate cannot shelter himself behind his clients when he allows himself to be made the medium of reckless imputations on a Court of Justice.[4]

Witness.—According to English law a witness in a Court of Justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness. A statement as to another matter, made to justify the witness in consequence of a question going to the witness' credit, has reference to the enquiry within the above rule.[5] But a remark made by a witness in the box, wholly irrelevant to the matter of enquiry, uncalled for by any question of counsel and introduced by the witness maliciously for his own purposes, would not be privileged. [illegible] about the Court, before or after he [illegible] want statements made by a witness on oath or solemn affirmation in a judicial proceeding are not absolutely privileged on a prosecution for defamation, but are governed by the provisions of s. 499.[7]

According to the Calcutta High Court a witness who, being actuated by malicious motives, makes a voluntary and irrelevant statement, not elicited by any question put to him while under examination, to injure the reputation of another,

[1] *Upendra Nath Bagchi*, (1909) 36 Cal. 375, 383.

[2] *Nikunja Behari Sen* v. *Harendra Chandra Ghosh*, (1910) 41 Cal. 514, 517.

[3] [illegible]

[4] [illegible]

[5] [illegible] P. D. 540, on appeal, 2 C. P. D. 53; *Goffin* v. *Donnelly*, (1881) 6 Q. B. D. 307.

[6] *Trotman* v. *Dunn*, (1816) 4 Camp. 211; *Lynam* v. *Gowing*, (1880) 6 L. R. Ir. 259.

[7] *Bai Shanta* v. *Umrao Amir Malik*, (1925) 28 Bom. L. R. 1, 8 Bom. Cr. C. 193, *p. p.* overruling *Babaji*, (1892) 17 Bom. 127 and *Balkrishna*, (1893) 17 Bom. 573. See *Karigowda*, (1894) 19 Bom. 51.

commits an offence under this section.[1] If the statements are relevant to the issue in the case under enquiry no prosecution for defamation would lie.[2] Where the accused, shortly after the disposal of a criminal case against him brought by one B, stated openly in answer to a query of his pleader in that case that the origin of the criminal case was due to the fact that some one of the accused's party had said at a social gathering that B's daughter-in-law had eloped, and he was subsequently prosecuted for defamation for making a statement defamatory of B. It was held that the statement of the accused did not constitute this offence as it was not made with the intention of harming the reputation of anybody, but was made in answer to a natural question put to him by his legal adviser at a time when the relationship of legal adviser and client continued.[3] This principle has been extended to a person for what he states in answer to questions put to him by a police-officer conducting an investigation under the Code of Criminal Procedure.[4] Subsequently, however, the Judges felt disposed to refer the question to a Full Bench.[5]

The Madras High Court following the English law has laid down that statements of witnesses made in the witness-box are absolutely privileged. If they are false the remedy is by indictment for perjury and not for defamation. In this case the petitioner, Manjayya, was charged under this section, and convicted. The [illegible] family." The Head Assistant Magistrate who convicted the prisoner was of opinion that the petitioner's answer as above caused harm to the reputation of Shesha Chetti, and that even if the petitioner did not know the answers to be false, yet he did not know them to be true, and the circumstances under which the statements were made indicated a total absence of legal and actual good faith. When the case went up to the High Court in revision, Collins, C. J., in the course of his judgment, said: "I apply the observations of Cockburn, C. J., in the case of *Seaman* v. *Netherclift*,[6] and of Field, J., in *Goffin* v. *Donnelly*[7] as to the rules of public policy which subordinated the interest of the individual to that of a higher interest, viz., public justice and of this Court, in the case of *Hinde* v. *Baudry*.[8] The Judges there said that the principle of public policy guards the statements of a witness against an action whether the statements were malicious or not. I think the same observations will apply if the crimina[illegible] the Indian Penal Co[illegible] for that offence. I [illegible] defamation." Shepherd, J., agreeing with the learned Chief Justice, observed "I would only refer to the opinion strongly expressed by the Judicial Committee in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*[9] that witnesses are free from any other consequences with respect to statements made by them as such, except that of indictment for perjury. This opinion was expressed with reference to a civil action for damages, but that, as it appears to me, makes no difference. If the ground of the principle is that 'it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages,' public policy must no less require that they should not be exposed to the fear of

[1] *Haidar Ali* v. *Abru Mia*, (1905) 32 Cal. 756; *Moher Sheikh*, (1893) 21 Cal. 392; *Mo*[illegible]

[2] *Methuram Dass* v. *Jaggannath Dass*, (1901) 28 Cal. 794. See *Govinda Pillai* (1892) 16 [illegible]

[3] *Debendra Nath Shahav*. *Bhaginath Shaha*, (1909) 13 C. W. N. 1087.

[illegible] (1887) 11 Beng. L. R. (P.C.) 321.

prosecution except, as I have observed, the prosecution for perjury."[1] This case has been followed in a later case,[2] in which the complainant brought a suit for money against the defendant in the Munsif's Court. The defendant pleaded that the suit was brought out of spite, and, in reply to questions put to him by the Court, he gave answers which were defamatory of the plaintiff. The accused on these facts was convicted of defamation. He put in a revision petition to the High Court against the above conviction. Mr. Justice Benson, in reversing the judgment, said: "It is not clear whether he was examined on solemn affirmation; but in any case he was under sections 5 and 13 of the Indian Oaths Act under an obligation to state the truth, [illegible] if he spoke falsely. That be [illegible] for using the language he di [illegible] *Manjayya* v. *Shesha Shetti*."

The Allahabad High Court has held that if a witness whilst giving evidence makes a statement concerning any person which amounts to defamation, he may be prosecuted under this section in respect of such statement, and it lies upon him to show that the statement which he has made falls within one or other of the exceptions or that he is protected from prosecution by the proviso to s. 132 of the Indian Evidence Act. In this case one Ganga Prasad was a witness for the defence on the trial of one Birbal for theft. When put into the witness-box he was asked what he knew about Birbal's case. He replied that he knew nothing; but he added of his own accord that he knew that Birbal had stolen his watch eight years previously and that he had to give Rs. 10 to one Banke Lal, whom he pointed out as one of the persons present in the Court, before he got the watch back. He said, further, that if his house was searched, "thousands of rupees worth of stolen property would be found." It was found that Banke Lal was a respectable Zemindar, and that he was a drug contractor for the Moradabad district and paid Rs. 400 as income-tax. Banke Lal prosecuted Ganga Prasad for defamation. The Joint Magistrate convicted him and this conviction was upheld by the Sessions Court. Ganga Prasad all along put forward the plea of absolute privilege and applied to the High Court in revision to set aside the conviction on the same ground. The case was at first heard by Knox, C. J., and Richards, J., but had to be posted again before a third Judge as there was a difference of opinion between the two Judges who first heard the case, Richards, J., holding in favour of the privilege and Knox, C. J., holding otherwise. Mr. Justice Aikman, the third Judge, concurred with Knox, C. J.[3] This exception is intended primarily to apply to statements which the accused cannot prove to have been true in fact, or which are mere expressions of opinion, or [illegible] are or are not true in fac[illegible] to statements made [illegible] led those statements are true; and if the statements are true in fact, and relevant to the matter under investigation, it is obviously for the public good that they should be made.[4]

Thus the opinion of the Bombay, Calcutta and the Allahabad High Courts is opposed to the adoption of the English rule of absolute privilege.

The former Chief Court of the Punjab adopted the reasoning of the Calcutta and Allahabad High Courts. It ruled that this exception modified the principle of English law. There was nothing in this section which protected witnesses as a class in respect of statements made by them in that character. The true test of immunity in the case of witnesses, as of other persons, was whether the exception was established in its entirety.[5]

[1] *Manjayya* v. *Shesha Shetti*, (1888) 11 Mad. 477, 479.

[2] [illegible]

[3] [illegible]

[4] [illegible]

[5] *Maya Das*, (1893) P. R. No. 14 of 1893. *Phundi Ram*, (1910) P. W. R. (Cr.) No. 7 of 1911; *Miran Shah*, (1912) P. W. R. (Cr.) No. 31 of 1912, P. L. R. No. 244 of 1912.

The former Judicial Commissioner's Court of Upper Burma followed the Calcutta and Allahabad rulings.[1]

Parties.—According to English law no action can be brought for any statement made by parties during the conduct of a case.

The Bombay High Court has held that a complainant who, when asked by the Magistrate to state his grievance, deliberately makes a defamatory statement without any justification is not protected by this exception.[2] Whilst an application and a counter-application to prevent a breach of the peace were being investigated into by the police, the accused called the complainant a 'rogue'. It appeared that some four months previously the complainant was convicted and fined at the instance of the accused. The accused having been convicted of defamation, it was held that the accused was protected by exception 9, inasmuch as the statement was made apparently for the protection of his own interest and when his application was under investigation by the police, and that the statement was made by him in good faith.[3]

The Madras High Court has recognised the great importance of allowing the utmost freedom to counsel, parties and witnesses during the progress of a case, and if the accused himself asks any question, while defending himself, the question could not be made the subject of a civil action, nor would any criminal proceeding lie for defamation.[4] Where, therefore, a person who was being defended by a counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character, it was held that he was guilty of defamation.[5] But where, in the course of a criminal trial, the pleader who defended the accused put a question to the complainant who was examined therein as a witness, conveying an insinuation of being implicated in a crime, it was held that the accused was not guilty of defamation.[6] Statements of a defamatory character made by an accused in the course of the statement which he is invited to make under s. 342, Criminal Procedure Code, is privileged.[7] In a Full Bench case it has been laid down that the statement of a person charged with an offence in ans[illegible] lutely [illegible] under [illegible] not su[illegible] further said that the law of defamation as laid down in the Penal Code did not exclude the application of the doctrine of absolute privilege from the law of defamation in India; and [illegible] the course of a judicial [illegible] nsel, witness or party w[illegible] tory statement made by a person regarding another in a complaint presented by the former against the latter is absolutely privileged.[9] But where a defamatory statement is made before an officer, who is neither a judicial officer nor a Court, *e.g.*, a registration officer, it has been held in a subsequent Full Bench case that it is not absolutely privileged.[10]

In a Full Bench case the Calcutta High Court has laid down that a defamatory statement, on oath or otherwise, by a party to a judicial proceeding falls within s. 499, and is not absolutely privileged. Under cl. 30 of the Letters Patent, 1865,

[1] *Meer Burks* v. *Maung Hla Pe*, (1918) 3 U. B. R. 101

[2] *Dinshaji Edalji* v. *Jehangir Cowasji*, (1922) 24 Bom. L. R. 400, 6 Bom. Cr. C. 200.

[3] *Esufalli Abdul Hussein*, (1918) 20 Bom. L. R. 601, 4 Bom. Cr. C. 255.

[4] *Hayes* v. *Christian*, (1892) 15 Mad. 414, 416.

[5] *Ibid.*

[6] [illegible] ba- [illegible] du- [illegible] 15. [illegible] T. 256.

[8] *Venkata Reddy*, (1912) 36 Mad. 216, F. B.

[9] *Muthuswami Naidu*, (1912) 11 M. L. T. 431.

[10] *Krishnamal* v. *Krishnaiyangar*, (1912) 23 M. L. J. 50, [1912] M. W. N. 473, F. B.

the provisions of such Code must be followed, and the Court cannot engraft thereon exceptions derived from the common law of England or based on public policy. The civil liability for defamation does not stand on the same basis as the criminal. A suit for damages for a defamatory statement, made on oath or otherwise, by a party to a judicial proceeding, in the absence of statutory rules on the subject, is governed by the principles of justice, equity and good conscience, which, according to a large preponderance of judicial opinion, are identical with the corresponding relevant rules of English common law.[1]

Where, in a prosecution for defamation in respect of statements made by the accused as complainant in a criminal case, the accused pleaded *inter alia* his privilege as a suitor, the Allahabad High Court held that the plea was bad, inasmuch as the doctrine of absolute privilege of statements made by suitors did not apply in India to criminal proceedings for defamation under the Penal Code.[2]

The former Chief Court of the Punjab adopted the view of the Allahabad High Court.[3]

The former Chief Court of Lower Burma laid down that the statement of a person accused of a criminal offence was not privileged. The statement, however, was not a statement made by an accused person on his trial for committing an offence, but in a written statement filed in proceedings which, though before a Magistrate, partook largely of a civil nature, by a person who was not only a competent witness, but who clearly ought to have gone into the witness-box.[4] The Rangoon High Court has held that a party who gives evidence on his own behalf in a judicial proceeding may be prosecuted for any defamatory statement made in the course of his evidence. He may, however, plead this exception in defence.[5]

Pleadings.—Auth [illegible] tion for defamatory [illegible]

The Allahabad [illegible] statements made by a party in a petition presented to a criminal Court are absolutely privileged in a civil action for damages based on libel.[6] In an application for the transfer of a criminal case the applicants alleged, with some apparent reason, that the case had been falsely got up against them by the complainant at the instigation of one U, in order to prejudice them in their defence in a civil suit which U had caused to be brought against them. It was held that this statement did not amount to defamation as it fell within the ninth exception.[7]

The Calcutta High Court is of opinion that defamatory matter appearing in a plaint is not privileged. It convicted the accused in a case for describing the complainant in his plaint by a wantonly offensive designation.[8] A person will be guilty of defamation for making a defamatory statement in an affidavit if the statement is wholly irrelevant to the enquiry to which the affidavit relates.[9] The act of filing in Cou[illegible] concerning a person calculated to harm his [illegible] publishing the imputation.[10] The procedure of [illegible] th impunity be used as the means of indulging in feelings of personal spite. Where a person, without any reasonable ground, filed a petition before a Magistrate to the effect that certain

[1] *Satis Chandra Chakravarti v. Ram Dayal De*, (1920) 48 Cal. 388, F. B.

[2] *Gajadhar*, (1890) 10 A. W. N. 170. But [illegible] not come within this principle: [illegible] *Parsad* (1924) 22 A. L. J. R. 597. [illegible] *gh*, sup. *Chandra la Ram v.* [illegible] *to Ghosh*, [illegible] V.R. (Cr.) 2 W. R.

[3] *Sayed Ali*, (1920) 4 B. L. J. 101.

[4] *Chunni Lal v. Narsingh Das*, (1917) 16 [illegible] (Cr.) 36.

persons were preparing to bring false charges against him, he was convicted of defamation.[1] The Calcutta High Court has held in a case that statements made by a complainant before a Magistrate by way of a complaint are absolutely privileged.[2] In a subsequent case, after distinguishing this decision on the ground that the privilege claimed there was not in a criminal prosecution but in a suit for damages, it was held that there was no absolute privilege for a defamatory statement made in [illegible] accused for the [illegible] by the terms o[illegible] come within the exceptions, it was not privileged; and that the English common law doctrine of absolute privilege did not obtain in the mofussil in India.[3] But on similar facts another Division Bench of the same High Court had previously held that a complainant making untrue statements in such an application could not be convicted of defamation.[4]

There is no case decided by the Bombay High Court under the Penal Code but in a civil action it has held that statements in pleadings are not actionable.[5]

The Madras High Court remarked in *Hinde* v. *Baudry*[6]: "If they (defendants) were rightfully making an application in the suit, the principle of public policy which guards the statement of a party or witness against an action would protect them whether the statement was malicious or not." It is of opinion that there is no difference between evidence given in the box and the evidence on affidavits, in that they are both absolutely privileged and no suit for damages will lie in respect of evidence given therein.[7] A defamatory statement in a complaint to a Magistrate is absolutely privileged.[8]

The former Chief Court of the Punjab laid down that a person who made defamatory statements in [illegible] former Chief Court of Lower Bur[illegible] High Court has held that in cri[illegible] ement was made on an occasion of privilege or not is to be decided with reference to the provisions of s. 105 of the Indian Evidence Act and this section.[11]

According to English law no action lies for any statement made in the pleadings.[12]

Reports.—The report of an officer, in the execution of his duty, under his superior's orders, which contains defamatory imputations against others, but which does not appear to have been made recklessly or unjustifiably is covered by this exception. An Inspector of Police sent to enquire whether it was true that a certain person was the leader of dacoits, reported that it was false, but the Banias of the village were trying to get the man punished from an ill-feeling, and added: "I learn from private enquiries that there is scarcely a woman in the house of the Banias who has not passed a night or two with the defendant." It was held that he was not protected by this exception.[13]

Cases.—**Statement made to protect the interest of another.**—Where a man who was watching a case on behalf of his partner informed the judge, while the hearing was

[1] *Shibo Proshad Pandah*, (1878) 3 C. L. R. 122.

[2] *Golap Jan* v. *Bholanath Khettry*, (1911) 38 Cal 880. So far as civil Courts are concerned it has, however, decided that defamatory statements in pleadings are not absolutely privileged: *Augada Ram* v. *Nemai Shaha*, (1896) 23 Cal. 867; *Sandyal* v. *Bhoba Sundari Deb*, (1910) 15 C. W. N. 995. [illegible]

[3] [illegible]

[4] [illegible]

[5] [illegible] *ama-chan* [illegible] 5, 8 M. L. T. 55.

[6] *Muthusami Naidu*, (1912) 37 Mad. 110.

[7] *Kirpa Ram*, (1887) P. R. No. 21 of 1887.

[8] *Maung Mya Thi* v. *Henry Po Saw*, (1906) 13 Burma L. R. 96

[11] *Ma Mya Shwe* v. *Maung Maung*, (1924) 2 Rang. 333.

[12] *Revis* v. *Smith*, (1856) 18 C. B. 126.

[13] *Rajnarain Sein*, (1870) 6 Beng. L. R. App. 42, 14 W. R. (Cr.) 22. See *Sher Singh*, (1880) P. R. No. 23 of 1880.

[illegible] 40 Cal. 441, *jokinore*,

interests of those to whom he made the imputation. If the accused speaks about the complainant violently and publicly he would not be protected.[1]

Cases.—Want of good faith.—The complainant, a Brahman, who had been put out of caste, was re-admitted by the executive committee of the caste after performing expiatory ceremonies. This re-admission was not approved of by the accused, who formed a faction of the caste; and they, after an interval of six months, distributed in the bazaar to all classes of the public printed papers in which the complainant was described as a "*doshi*," or sinner, which signified that he was a person unfit to be associated with. The accused were charged with the offence of defamation. They pleaded privilege, and it was admitted that they had acted without malice. It was held that the accused had not acted in good faith, and that the publication was not, under the circumstances, privileged and protected by this exception.[2] U, a woman, left her first husband and contracted a secret *pat* marriage with J, but the then *swami* of the community, to which the parties belonged, declared the connection as adulterous. Some years after, another *swami* of the community declared the second marriage valid. Certain members of the community, however, disapproved of this action of the *swami*, and addressed him several communications which elicited no reply from him. Thereupon, twelve of the villagers of the place published in a newspa[illegible] that "J having kept a concubine by name U [illegible] held that they were guilty of defamation, for [illegible] made for the benefit of a portion of the public, still the accused had no privilege to disseminate them to a circle of readers wider than those who could possibly be interested in the allegations.[3] Where the accused published a circular purporting to say that at a *panchayat* held at a certain place it was resolved that the complainant who had been to England was not to be taken into caste and that those of their community, who associated with him, could be taken into the caste only on their undergoing a penance and on consenting to give up all connection with the complainant, and where it was found that no *panchayat* was actually held and the publication was not made in good faith, it was held that the accused was rightly convicted of the offence of defamation. The publication of the circular lowered the character of the complainant in respect of his caste as it represented the complainant to be one with whom to associate would entail excommunication on the members of his brotherhood associating with him.[4]

Caution conveyed in good faith.—The accused, with a number of other persons at a caste meeting, passed a resolution to the effect that "the Nilgiri people do not belong to the caste" (to which the accused and the Maharattas belonged), "but that the complainant seems to belong to the Rangari caste." It was admitted that the complainant was a Maharatta living on the Nilgiris. The members of the meeting arrived at this conclusion after making enquiries. The complainant had notice of the meeting and the resolution was recorded in a book kept by the caste *panchayat*. It was held that under the circumstances the accused were not guilty of defamation.[5] A person was put out of caste by a meeting of his caste fellows for having taken water from the hands of a certain other person. The accused told some members of the caste not to take water from the hands of the person outcasted as if they did so they would be liable to be excommunicated. It was held that the accused was protected by this exception and was not guilty of defamation.[6]

[1] *Palani Asari*, (1882) 1 Weir 614.
[2] *Thiagaraya* v. *Krishnasami*, (1892) 15 Mad. 214.
[3] *Shiryowda*, (1901) 3 Bom. L. R. 188.
[4] *Mukund Ram*, (1909) 6 A. L. J. 472.
[5] *Salar Mannaji Row*, (1887) 1 Weir 614.
[6] *Umed Singh*, (1923) 22 A. L. J. R. 79, 46 All. 64.

PRACTICE.

Evidence.—Prove (1) that the imputation in question consisted of words, spoken or intended to be read, or of signs, etc.

(2) That the imputation concerned the complainant.

(3) That such imputation emanated from the accused.

(4) That he made or published the same.

There must be evidence to show that the publication was made by the accused.[1] The prosecution must affirmatively prove that the defendant published the libel complained of. Admissions as to publication in the written statement of the accused cannot be used to fill up the gap in the prosecution evidence.[2] In a prosecution for libel the only evidence adduced of publication was that the particular issue of the journal containing the libel bore the statement that it was printed and published by the accused. The sworn complaint also stated that the accused published it, and the accused said in the lower Court in his written statement that what was published was a substantially true report without any malicious intention and he did not deny that he published the libel. It was held that there was no legal evidence of publication.[3]

It is incumbent on the complainant to produce evidence to show that the accused made or published the imputation complained of notwithstanding the accused admits the publication when examined under s. 342 of the Code of Criminal Procedure. A Magistrate is neither empowered under that section to put questions to the accused if the prosecution has not let in evidence implicating him in the offence nor is his statement admissible in evidence to fill the gap in the absence of such evidence.[4]

On the prosecution of the editor of a newspaper for defamation by publishing a libel in his paper, an attested copy of a declaration made by the editor under s. 5 of Act XXV of 1867, to the effect that he was the printer and publisher of the newspaper was produced in evidence by the complainant. It was held that the declaration was *prima facie* proof of publication by the editor.[5] If the manuscript of a libel be proved to be in the handwriting of the accused, and it be also proved to have been printed and published, this is sufficient evidence to show that it was published by the accused, although there be no evidence given to show that the printing and publication were by the direction of the accused.[6] Publication is sufficiently proved by the production of a printed copy.[7]

(5) That he intended thereby to harm the reputation of the complainant, or that he knew or had reason to believe that it would do so. The intention of the accused must be gathered from the document complained of as a whole.[8] Intention like any other psychological fact has to be inferred from the act itself. The jury has to see whether the natural result of the act is not to harm the reputation of the persons attacked.[9]

The question of the physical and moral as distinguished from the legal character of the act of a person accused under this section is, like those which arise under other sections of the Code, one to be determined by considerations and inferences drawn from the common experience rather than from rules of legal construction.[10]

It is not an error in law for a Judge to require the accused to prove several distinct imputations contained in a libellous article published by him with the same strictness with which he would be required to prove them if he were the defendant in a civil action.[11]

[1] *Mariano*, (1904) 10 Burma L. R. 304.
[2] *Jeremiah v. Vas*, [1911] 2 M. W. N. 576.
[3] *Ibid.*
[4] *Deva Dayal*, (1922) 4 Lah. 55.
[5] *Ramasami v. Lokanada*, (1886) 9 Mad. 387. See *Stanger*, (1871) L. R. 6 Q. B. 352; *Hart & White*, (1808) 10 East 94.
[6] *Lovett*, (1839) 9 C. & P. 462.
[7] *Sowai Naidu*, (1891) 1 Weir 579.
[8] *Laidman v. Hearsey*, (1885) 7 All. 900.
[9] *Kali Prasanna Kabyabisharad*, (1897) 1 C. W. N. 465.
[10] *Pitamber*, (1879) Unrep. Cr. C. 140.
[11] *Kikabhai Parbhudas*, (1872) 9 B. H. C. 451.

Truth as defence.—Where the accused intends to bring evidence to prove the truth of the defamatory matter, his advocate should cross-examine the complainant upon every matter upon which evidence is intended to be brought. If he does not do so, it is a subject of serious consideration whether he should subsequently be allowed to tender proof as to the material incidents of which he was not cross-examined.[1]

Where the accused having publicly charged a woman with being pregnant by adultery, requested the Court to have the complainant, the woman, medically examined in order that the truth or falsehood of the matter alleged might be satisfactorily established. It was held that there was no law which empowered the Courts to order such an examination in such a case.[2]

Good faith.—The authors of the Code say: "Whether an imputation be or be not made in good faith is a question for the Courts of law. The burden of the proof will lie sometimes on the person who has made the imputation, and sometimes on the person on whom the imputation has been thrown. No general rule can be laid down. Yet scarcely any case could arise respecting which a sensible and impartial judge would feel any doubt. If, for example, a public functionary were to prosecute for defamation a writer who had described him in general terms as incapable, the court would probably require the prosecutor to give some proof of bad faith. If the prosecutor had no such proof to offer, the defendant would be acquitted. If the prosecutor were to prove that the defendant had applied to him for money, had promised to write in his praise if the money were advanced, and had threatened to abuse him if the money were withheld, the Court would, probably, be of opinion that the defendant had not written in good faith, and would convict him.

"On the other hand, if the imputation were an imputation of some particular fact, or an imputation which, though general in form, yet implied the truth of some particular fact which, if true, might be proved, the Court would probably hold that the burden of proving good faith lay on the defendant. Thus if a person were to publish that a collector was in the habit of receiving bribes from the zemindars of his district, and were unable to specify a single case, or to give any authority for his assertion, the courts would probably be of opinion that the imputation had not been made in good faith.

"Again: if a critic described a writer as a plagiarist, the courts would not consider this as defamation without very strong proof of bad faith. But if it were proved that [illegible] old books in order to bear out [illegible] of opinion that he had not [illegible] mation."[3]

Relevant facts.—A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, or relevant facts, though they do not contain the libel itself.[4]

A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true. The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.[5]

A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact of previous publications by A respecting B showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question. The facts that there was no previous quarrel between A and B, and that A repeated the matter complained

[1] *Dhum Singh*, (1884) 6 All. 220.
[2] *Padmon*, (1889) Unrep. Cr. C. 474, Cr. R. No. 33 of 1889.
[3] Note R, p. 184.
[4] Indian Evidence Act, s. 6, ill. (c).
[5] *Ibid* s. 9, ill. (b).

of as he heard of it, are relevant, as showing that A did not intend to harm the reputation of B.[1]

Admissibility of evidence.—A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.[2]

A and B separately sue for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither. A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant between B and C.[3]

Evidence of the complainant having previously acted as alleged in the libel is admissible.[4] When defamation affects a person's general character then evidence of the general reputation of that person may be given to show that there was a reasonable ground for the imputation and thus to reduce the sentence.[5] The accused was convicted for having defamed a public servant by publishing an imputation that the latter had compelled him to pay a bribe in order to avoid a prosecution for a certain offence. The accused wanted to produce evidence as to the complainant having taken bribes on other occasions, and general evidence as to the complainant's reputation, but this was disallowed by the trial Court. It was held that evidence as to the complainant having taken bribes on other specific occasions would be irrelevant, but that the accused was entitled to produce evidence to show that the complainant had the reputation of being a bribe-taker.[6]

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Where a complaint shows that an imputation against the complainant's character has been made and that such imputation is *prima facie* defamatory, a Magistrate is bound to issue summons and is not at liberty to anticipate a case of privilege unless the privilege is distinctly admitted by the complainant.[7] The examination and cross-examination of the complainant should be held in the [illegible] former section on the application of a person discharged or acquitted, when the Court has refused sanction under the latter section.[9]

Jurisdiction.—Where the publication of the defamatory matter is outside British India, the British Courts have no jurisdiction to try the offence.[10] To maintain a prosecution for defamation in a particular Court, there must be a publication of the libel within the local limits of the jurisdiction of that Court. Where the alleged libel was said to be contained in a letter purporting to be written from Bangalore to England, it was held that to maintain a prosecution in the Bangalore Court, there must be evidence that the letter was handed over to somebody at Bangalore to be taken to the addressee or that it was posted at Bangalore.[11]

Complaint by the aggrieved person is necessary.—No Court shall take cognizance of this offence except upon a complaint made by the person aggrieved.[12] Death of the complainant terminates the prosecution. A prosecution for defamation

[8] *Brindaban Chander Das* v. *Ishaquddin Choudhry*, (1906) 13 C. W. N. 550.

[9] *Prafulla Kumar Ghose* v. *Harendra Nath Chatterjee*, (1916) 44 Cal. 970.

[10] *Varnakote Illath Krishnan Nambudri*, (1900) 1 Weir 579.

[11] *Burke* v. *Skipp*, (1923) 45 M. L. J. 754, 33 M. L. T. 168.

[12] Criminal Procedure Code, s. 198.

PRACTICE.

Evidence.—Prove (1) that the matter in question is defamatory (*vide* s. 499).

(2) That the accused printed or engraved it.

(3) That when he did so know he knew or had reason to believe that such matter was defamatory.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by Court of Session, Presidency Magistrate, or Magistrate of the first class.

Destruction of libellous matter.—On a conviction under this section the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.[1]

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, printed or engraved some matter, to wit——, knowing or having good reason to believe that the same was defamatory, and that you thereby committed an offence punishable under s. 501 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*if the case is tried by a Magistrate omit these words*)] on the said charge.

Sale of printed or engraved substance containing defamatory matter.

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

COMMENT.

This section supplements the provisions of the previous section by making the seller of defamatory matter punishable under it.

Ingredients.—This section has two essentials :—

1. Selling or offering for sale any printed or engraved substance.
2. Knowledge that such substance contains defamatory matter.

"It is, no doubt, necessary in order to substantiate a charge under s. 502 to prove that the seller of a printed substance knows its contents, which imports proof that he understands the language used, and to prove that its contents are defamatory, but there appears to be no need, if the contents are defamatory, to prove further that he knows them to be defamatory. In cases where it is necessary to prove against a person that he has committed defamation by publishing an imputation, when the matter published is *per se* defamatory, all that the prosecution is bound to prove, in the first instance, is the fact of publication. When the tendency of the imputation published concerning any person, is to harm the reputation of that person, a Court is fully justified in inferring from the terms of the matter itself that the publisher intended to harm or knew or had reason to believe that such imputation would harm his reputation... But is there no *mens rea* in the definition of the offence falling under s. 502? The definition requires knowledge that the printed substance sold contains defamatory matter. A person who conducts a business in the course of which he is liable to sell books or papers, or the like, which may contain matter which is injurious to the reputation of another person, and may be in fact defamatory as defined in the Penal Code, is bound

[1] Criminal Procedure Code, s. 521 (1).

by reason of the penalty imposed by this section, if not otherwise, to abstain from selling any book or the like, which to his knowledge contains matter which is defamatory. If he sells in ignorance of the contents, he is not guilty of an offence under this section. I[illegible] or paper containing defamatory matter, for the latter are liable criminally as well as civilly, whether or not they know the contents of the printed substance sold."[1]

PRACTICE.

Evidence.—Prove (1) that the matter is defamatory (*vide* s. 4941.

(2) That it is printed or engraved on the substance in question.

(3) That the accused sold, or offered for sale, that substance.

(4) That he then knew that it contained such defamatory matter.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by the Court of Session, Presidency Magistrate, or Magistrate of the first class.

Destruction of libellous matter.—See s. 521, Criminal Procedure Code.

Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, sold or offered for sale any printed (*or* engraved) substance, to wit——, containing defamatory matter knowing that it contained such matter, and that you thereby committed an offence punishable under s. 502 of the Indian Penal Code, and within my cognizance (*or* the cognizance of the Court of Session *or* the High Court).

And I hereby direct that you be tried [by the said Court (*if the case is tried by a Magistrate omit these words*)] on the said charge

[1] Per Plowden, J., in *Sardar Dyal Singh*, (1891) P. R. No. 8 of 1891, pp. 25, 26.

CHAPTER XXII.

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

Criminal intimidation.

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested,[1] with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat,[2] commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

ILLUSTRATION.

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

COMMENT.

Criminal intimidation is closely analogous to extortion. In extortion, the immediate purpose is filthy lucre by obtaining money or money's worth; in criminal intimidation, the immediate purpose is to induce the person threatened to do, or abstain from doing, something which he was not legally bound to do or omit.

Ingredients.—This section has the following essentials :—

1. Threatening a person with any injury
   (*i*) to his person, reputation, or property; or
   (*ii*) to the person or reputation of any one in whom that person is interested.
2. The threat must be with intent
   (*a*) to cause alarm to that person, or
   (*b*) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat, or
   (*c*) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

1. 'Threatens another with any injury to his person, reputation or property, etc.'—The gist of the offence is the effect which the threat is intended to have upon the mind of the person threatened, and it is equally clear that before it can have any effect upon his mind it must be either made to him by the person threatening or communicated to him in some way. The threat referred to in this section must be a threat communicated, or uttered with the intention of its being communicated, to the person threatened for the purpose of influencing his mind.[1]

The question whether the threat amounts to a criminal intimidation or not, does not depend on the nerves of the individual threatened; if it is such a threat

[1] *Ganga Chunder Sen* v. *Gour Chunder*, (1888) 15 Cal. 671, 673.

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if the threat, though addressed to third parties, was intended to reach the prosecutor as the party threatened,[2] *e.g.*, threat to a person's pleader.[3] A communication by a person that he is going to take revenge by false complaints cannot amount to threat or criminal intimidation. A threat, in order to be indictable, must be made with intent to cause alarm to the complainant.[4] To advise others not to deal with a man is an injurious act but it is not a threat and the harm caused is not to property already possessed by that man but rather to his opportunities of future gain.[5]

'Injury.'—See s. 44, *supra*. There can be no criminal intimidation where the injury of which complaint is made is the hardship arising from a conventional punishment which a spiritual superior, acting in the exercise of his authority as regulated by the custom of the caste, is competent to inflict.[6] The harm threatened must be illegal.[7] A certain President of a self-constituted Arbitration Court caused a notice to be issued over his signature to a certain person requesting the latter to be present on a given date and arrange for amicable settlement of a certain claim. The notice concluded with the statement that if the defendant did not give an answer (or file written statement) on that date, the suit would be decreed *ex parte*. It was held that a threat of a decree is a threat of harm to an individual in his person, reputation or property. That the tribunal is incompetent to execute its decree is immaterial. This section says nothing about the capacity of the person making the threat to carry it into execution. Nor does the section say anything about the effect upon the person threatened, and whether or not the complainant knew that the notice was innocuous is equally immaterial. Under s. 44, injury

in that the notice threatened the complainant with such a decree, it threatened the complainant with harm to be caused illegally. The accused was, therefore, held guilty of the offence of criminal intimidation.[8]

'Person.'—That is, the individuality of a human being; individual character or station; bodily form or substance.

'Reputation.'—That is, credit, honour, character, good name.[9]

'Or to the person or reputation of any one in whom that person is interested.'—In the case of injury to a third person in whom the person threatened is interested, the injury should be to his person or reputation. Injury to the property only of the third person does not come within the purview of the section, though injury to the property of the person threatened does.

2. **'Intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, or to omit to do any act...as the means of avoiding the...threat.'**—The threat must be with intent to cause alarm to that person or to cause that person to do or omit to do any act as the means of avoiding the execution of such threat. See s. 43 for the meaning of 'legally bound to do.'

[2] M. & M. 450.

[3] (1865) 1 Weir 622; *Palani Goundan*, (1892) 1 Weir 623.

[4] *Syed Mahomed* v. *Sarvarkhan*, (1882) 5 C. P. L. R. 50.

[5] *Govind Ranji Thousur*, (1900) 2 Bom. L. R. 53.

[6] *Chita Mal*, O. S. C. 146.

[7] *Sri Vidya Sankara Narasimha Bharathi Gurusvamulu*, (1883) 6 Mad. 381.

[8] *Nga Shwe Waing*, (1900) 1 U. B. R. (1897, 1901) 359.

[9] *Priyanath Gupta* v. *Lal Jhi Chowkidar*, (1923) 27 C. W. N. 479.

[9] Wharton's Law Lexicon, 13th Edn. p. 742.

CASES.

Threat of vengeance.—A constable was sent to fetch to a Police Inspector some persons from whom the latter wished to make inquiries regarding an offence. While the constable was taking two persons with him, the accused came up and threatened them both and the constable with the Head Constable's vengeance, and as a consequence the two persons refused to accompany the constable who had to go without them. It was held that the accused had committed this offence.[1]

Threat of excommunication.—Where the accused told the complainant, a member of their caste, that he should give up his field or else they would put him out of caste, it was held that this offence was not committed.[2]

Threat to kill a person.—Where the accused and his brother having had a quarrel, the former ran off and fetched a sword, but was seized by other persons and was disarmed and he then asserted his intention of killing his brother if he was let go, it was held that the words used by the accused could not be construed into a threat within the meaning of this section.[3]

Threat to get a person imprisoned.—Where the accused went to the complainant, a brother of an adult woman, and told him that he had come from the Government, and would get him six months' imprisonment if he did not let his sister go, it was [illegible] r any other section.[4] [illegible] hem implicated and [illegible] into by parties to keep the peace during *Moharram festival*), he was held to have committed this offence.[5]

Threat to get a person dismissed.—Where the accused held out a threat of getting a Head Constable of police dismissed from service, it was held that this did amount to a threat of injury as was punishable under this section.[6]

Threat to ruin another by cases.—Where the accused who threatened to ruin the complainant by cases was convicted of criminal intimidation, it was held that the conviction could not stand. The Court said that had the threat been to ruin the complainant by false cases, the offence would have been committed; but as the threat was to ruin him by cases, it could not be assumed that by cases was meant false cases.[7] A threat by a person, who was called upon to pay house-tax under a warrant for the attachment of his brother's property, that he would take legal steps, was held to be not a threat of injury as defined in the Code.[8]

Compelling a public servant by threats to draw up a false document.—Where the accused in offering resistance to a police-officer compelled him to draw up a document to the effect that a search was conducted and nothing incriminating was found it was held that they were guilty of an offence under this section.[9]

Person informed about threatened injury to another must be interested in that other person.—The accused sent a fabricated petition to the Revenue Commissioner [illegible] if a certain Forest Officer were not removed else- [illegible] that the Commissioner had neither official [illegible] It was held that, as the person to whom [illegible] rested in the person threatened, the act

[1] *Purshotam Vanamali*, (1896) Unrep. Cr. C. 850, Cr. R. No. 18 of 1896.

[2] *Alya Dhurma*, (1870) Unrep. Cr. C. 37, Cr. R. 17th August 1870; *Fakirappa*, (1882) Unrep. Cr. C. 186.

[3] *Data Ram*, (1882) P. R. No. 45 of 1882.

[4] *Moroba Bhaskarji*, (1871) 8 B. H. C. (Cr. C.) 101.

[5] *Ata Husain*, (1885) 6 A. W. N. 41.

[6] *Dada Hanmant Dani*, (1895) 20 Bom. 94.

[7] *Jowahir Pattal* v. *Parbhoo Ahir*, (1902) 30 Cal. 418, 7 C. W. N. 116; *Chithraputra* [illegible] 1 Weir 623.

[illegible]) Crim. Ref. [illegible] and Heaton [illegible] 06. [illegible] J. R. 1047.

intended and done by the accused did not amount to criminal intimidation.[1] A threat to commit suicide is not within the section unless the other person be interested in the person making the threat.[2]

Intentional insult with intent to provoke breach of the peace.

504. Whoever intentionally insults,[1] and thereby gives provocation to, any person,[2] intending or knowing it to be likely that such provocation will cause him to break the public peace,[3] or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENT.

Object.—An imputation not defamatory may be uttered in the hearing of the person who is the object of it, for the purpose of provoking that person to break the public peace. If so, it is punishable under this section. The authors of the Code observe: "There are many cases in which it is fit that unpleasant truth should be told respecting an individual. But there is no case in which it is desirable that such truth should be told in such a way that the telling of it is a gross personal outrage. A person who has detected, or thinks that he has detected, a dishonest misrepresentation in a book has a right to expose it publicly. But he cannot be allowed to intrude into the presence of the author of the book, and to tell him to his face that he is a liar. A person who knows the mistress of a female school to be a woman of infamous character deserves well of society if he states what he knows. But he cannot be allowed to follow her through the streets calling her *by opprobrious names, though he may be able to prove that all those names were* merited. A person who brings to notice the malversation of a public functionary deserves applause. But a person who hangs a public functionary in effigy at that functionary's door, with an opprobrious label, does what cannot be permitted, even though every word on the label, and every imputation which the exhibition was meant to convey, may be perfectly true."[3]

This section provides a remedy for using abusive and insulting language.[4]

Sections 499 and 504.—The difference between an offence under s. 504 and s. 499 lies in the fact that in the latter publication to the prosecutor alone is not sufficient, as such an imputation could not be said to harm the reputation of the person; but according to the former this would be a complete offence. Section 504 corresponds precisely with those cases in which, under the English law, defamatory matter published to the prosecutor alone would be indictable as libellous.

Ingredients.—This section requires:—

1. Intentional insult.
2. *The insult must be such as to give provocation to the person insulted.*
3. Intention that such provocation should cause, or knowledge that such provocation was likely to cause, the person so insulted to break the public peace or to commit any other offence.

1. 'Intentionally insults.'—The word 'insult' signifies, to treat with offensive disrespect, to offer indignity to. Such insult may be inferred not merely from the words used, but also from the tone and manner in which the words are spoken.[5] If the insult alleged consisted of spoken words only, it would be essential that the

[1] *Mangesh Jivaji*, (1887) 11 Bom. 376.
[2] *Nabi Buksh v. Must. Oomra*, (1866) P. R. No. 109 of 1866; *Chikati Gururadu*, (1881) Weir (3rd Edn.) 390.
[3] Note R, p. 185.
[4] *Girish Chunder Mitter v. Jatadhari Sadukhan*, (1899) 26 Cal. 653, 663, F. B.
[5] *Jaykrishna*, (1916) 24 C. L. J. 137, 138, 21 C. W. N. 95, 97.

shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception.—*It does not amount to an offence*, within the meaning of this section, when the person making, publishing or *circulating any such statement*, rumour or report has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.[4]

COMMENT:

This section was substituted by Act IV of 1898. *The Select Committee in* their Report said: "We have inserted the clause proposed by the Government, but we have altered and enlarged the scope of the exception to the clause. No doubt [illegible] red to are of a highly mischievous charac[illegible] under which modern journalism and th[illegible] necessarily carried on, we think that when the statement, rumour or report is published without any criminal intent, it is going too far to require the person who published *it* to prove *its actual truth. To require such proof might be throwing an impossible burden* [illegible]

said: [illegible]

As the clause now stands, I think, it need cause no apprehension to any speaker or journalist who speaks in good faith. It must be borne in mind that the clause does not *strike at mischievous and mendacious* reports generally. It is aimed only at reports calculated to produce mutiny or to induce one section of the population *to commit offences against* another. If a man *takes upon himself to circulate* a report, he surely cannot complain if he is asked to show that his intentions were innocent and that he had reasonable grounds for believing the report."[1]

This section instead of being inserted in Chapter VII, *which deals with offences* relating to the Army and Navy, appears in this Chapter, apparently because the *repealed section contained some of the provisions contained in the present section* and was not limited to offences relating to the Army and Navy.

1. **'Offence against the State.'**—See Chapter VI, ss. *121–130. A tea estate duffadar*, who had recently returned from Nepal, circulated a report among the *garden coolies that a war was impending between* the British Government and [illegible] that Nepalese soldiers were stationed on the frontier, and that the coolies [illegible]

2. **'Against the public tranquillity.'**—See Chapter VIII, ss. 141–160.

3. **'Offence.'**—See s. 40, *supra*.

4. **'Without any such intent as aforesaid.'**—If the statement, rumour, or report is true and is published without any *such intent as is specified in cl. (a), (b)* [illegible]

[1] Gazette of India, 1898, Part VI, p. [illegible]

[2] *Manbir*, (1898) 3 C. W. N. 1.

no such statement, expression or comment, as might fall within the purview of this section, it was held that he could not be convicted.[1]

PRACTICE.

Evidence.—Prove (1) that the accused made, published or circulated the statement, rumour, or report, in question.

(2) That he did so with intent to cause, or which was likely to cause, some officer, soldier, or sailor, to mutiny or otherwise disregard or fail in his duty as such.

(3) That such officer, or soldier, or sailor, belonged to the Army or Navy of His Majesty, or to the Royal Indian Marine, or to the Imperial Service Troops.

Or prove (1) as above; and

(2) That he did so with intent to cause or which was likely to cause fear or alarm to the public or to some section of the public.

(3) That the fear or alarm was such as might induce a person to commit an offence against the State or the public tranquillity.

Or prove (1) as above; and

(2) That he did so with intent to incite, or which was likely to incite, some class or community of persons to commit some offence against some other class or community.

Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Presidency Magistrate, or Magistrate of the first class.

Sanction.—Previous sanction of Government is necessary for prosecution under this section.[2]

Charge.—I (*name and office of Magistrate etc.*), hereby charge you (*name of the accused*) as follows:—

That you, on or about the——day of——, at——, circulated a statement (*or* rumour, *or* report), to wit——, with intent (*specify the clause under which the act comes*), and thereby committed an offence punishable under s. 505 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Punishment for criminal intimidation.

506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

If threat be to cause death or grievous hurt, etc.

and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or transportation, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENT.

This section punishes the offence of criminal intimidation as defined in s. 503.

PRACTICE.

Evidence.—Prove (1) that the accused threatened some person.

[1] *Gupta*, (1924) 6 L. L. J. 162. also *Swami Dayal*, (1907) P. R. No. 8 of 1908.

[2] Criminal Procedure Code, s. 198. See

in the middle of the night, into the room of the complainant, with whom he had previous acquaintance and who used to speak to strangers and give *pan supari* to visitors, it was held that this offence was not committed.[1]

The accused followed in his carriage the complainant's unmarried daughter at various places, and laughed and grinned and stared at her while passing and *repassing in his carriage, and stood up in it and shouted her name and so on.* The Magistrate convicted him under this section. On appeal, the Bombay High Court, confirming the conviction, *observed*: "We *do not think it proper to draw subtle* distinctions to show that these acts do not amount to outraging the modesty of a woman and

are trying t

to say that

Magistrate has taken an incorrect view of the section of the Indian Penal Code under which the accused has been convicted and sentenced."[2] These observations were quoted with approval in a recent case in which the accused, a University graduate, sent by post to the complainant, an English nurse, a letter containing indecent overtures and suggesting that the complainant should take certain action in order to show whether she accepted the terms mentioned in the letter. The complainant went to the Police, and in consequence of what they did, the accused was found to be the person who had sent the letter. It was held that in the circumstances an *inference arose that the accused intended to insult the* modesty of the complainant.[3]

PRACTICE.

Evidence.—Prove (1) that the accused uttered the words, or made the *sound* or gestures, etc., in question.

(2) That such word, sound, or gesture was intended by the accused to be heard or seen by some woman.

(3) That he thereby intended to insult the modesty of that woman.

Or prove—

(1) That the accused intruded upon the privacy of some woman.

(2) As (3) above.

Procedure.—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Presidency Magistrate, or Magistrate of the first class.

Misconduct in public by a drunken person.

510. Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter[1], and there conducts himself in such a manner as to cause annoyance to any person[2], shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

COMMENT.

[illegible] of humanity

[illegible]

arose from his own default, but is answerable equally as if he had been [illegible]

[1] *Phiaz Mahamad*, (1908) 5 Bom. L. R. 502.

[2] *Mahomed Kassem Chisty*, (1911) Criminal Appeal No. 454 of 1910, decided on 18th January 1911, per Chandavarkar and Heaton, JJ.

[3] *Tarak Das Gupta*, (1825) 28 Bom. L. R. 99, 8 Bom. Cr. C.

act was done, in the full possession of his faculties, a principle of law which is embodied in the familiar adage, *qui peccat ebrius luat sobrius.*

Under the Police Act[1] cases of drunkenness are often punished, and the provisions of this section are rarely applied.

Ingredients.—This section requires two essentials :—

1. Appearance of a person in a state of intoxication in
   (i) any public place, or
   (ii) any place which it is a trespass in him to enter.
2. The person so appearing must have conducted himself in such a manner as to cause annoyance to any person

1. **'In a state of intoxication appears in any public place, or in any place which it is a trespass in him to enter.'**—The person must be in a state of intoxication caused by liquor or other drinks or drugs. As to the meaning of 'public place,' see s. 294 ; and as to 'trespass,' see s. 411.

2. **'Conducts himself in such a manner as to cause annoyance to any person.'**—Mere intoxication is not made punishable. It is only when a person appears, in a state of drunkenness, in a public place, as in a street, or goes to a place where he has no right to go, and causes annoyance to the people, that he commits this offence.

PRACTICE.

Evidence.—Prove (1) that the accused appeared in some public place, or some place which it was a trespass in him to enter.

(2) That he was then in a state of intoxication

(3) That he conducted himself in such a manner as to cause annoyance to some person.

Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate—Triable summarily.

A private citizen has the right to arrest under the common law any person as to whom there is reasonable apprehension that he would commit a breach of the peace. The accused, a Village Magistrate, arrested a man who was very drunk and who had torn the sacred thread of a person and had bit the accused in the foot. The accused was convicted under s. 341 for wrongful restraint. It was held, quashing the conviction, that there was ample justification for the accused, not as a Village Magistrate but as a private citizen, to put a restraint upon the drunken and disorderly person who was not only threatening to commit a breach of the peace but was a danger to the other villagers.[2]

[1] Act V of 1861, s. 34 (6)

[2] *Ramaswami Ayyar*, (1921) 44 Mad. 913.

CHAPTER XXIII.

OF ATTEMPTS TO COMMIT OFFENCES.

Punishment for attempting to commit offences punishable with transportation or imprisonment.

511. Whoever attempts to commit an offence punishable by this Code[1] with transportation or imprisonment,[2] or to cause such an offence to be committed,[3] and in such attempt does any act towards the commission of the offence,[4] shall, where no express provision is made[5] by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term[6] provided for that offence, or with such fine as is provided for the offence, or with both.

ILLUSTRATIONS.

(*a*) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(*b*) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

COMMENT.

This is a general provision dealing with attempts to commit offences not made punishable by other specific sections.

By s. 10 of the Indian Army (Amendment) Act (XI of 1918), a similar provision is inserted in the Indian Army Act (VIII of 1911) as s. 39-A.

Scope.—According to the Allahabad High Court this section does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307.[1] The Bombay High Court has, however, held otherwise.[2] The former Chief Court of the Punjab laid down that this section was in terms much wider than s. 307. Under the last-mentioned section the act done must be one capable of causing death, and it must also be the last proximate act necessary to constitute the completed offence; under this section the act may be any act in the course of the attempt towards the commission of the offence.[3]

This section does not apply to cases of dacoity.[4]

Stages of a crime.—In every crime, there is, first, intention to commit it; secondly, preparation to commit it; thirdly, attempt to commit it. If the third stage, that is attempt, is successful, then the crime is complete. If the attempt fails the crime is not complete but the law punishes the person attempting the act. An 'attempt' is made punishable, because every 'attempt,' although it fails of success, must create alarm, which of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment; but as the injury is not as great as if the act had been committed, only half the punishment is awarded.[5]

[1] *Niddha*, (1891) 14 All 38; *Tulsha*, (1897) 20 All. 143.

[2] *Cassidy*, (1867) 4 B. H. C. (Cr. C.) 17.

[3] *Jiwan Das*, (1904) P. R. No. 30 of 1904.

[4] *Koonee*, (1867) 7 W. R. (Cr) 48.

[5] Livingstone.

Every attempt to commit a felony or misdemeanour is under common law a misdemeanour.

An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission.[1]

1. Intention.—Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice.[2] But the law will not take notice of an intent without an act.[3] Mere intention to commit an offence, not followed by any act, cannot constitute an offence[4] The "will is not to be taken for the deed" unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention can only be proved by acts, as "juries cannot look into the breast of criminals."

It is a rule laid down by Lord Mansfield that "so long as an act rests in bare intention it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable."[5] "When a man is charged with doing an act (that is, a wrongful act without any legal justification), of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act."[6]

Although there is no presumption that a person intends what is merely a possible result of his action or a result which, though reasonably certain, is not known to him to be so, still it must be presumed that when a man voluntarily does an act knowing at the time that in the natural course of events a certain result will follow he intends to bring about that result.[7]

2. Preparation.—Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. Where a man, having a wife living, caused the banns of marriage between himself and a woman to be published, it was held that he could not be punished for an attempt to commit bigamy, because the act of causing the publication of the banns of marriage was an act done in the preparation to marry, but did not amount to an attempt to marry. The accused might, before any ceremony of marriage was commenced, have willed not to carry out his criminal intention of marrying her.[8] The provisions of the section do not extend to make punishable as attempts acts done in the mere stage of preparation.[9]

Preparation to commit an offence is punishable only when the preparation is to commit offences under s. 122 (waging war against the King-Emperor) and s. 399 (preparation to commit dacoity)

Preparation may amount to an abetment.[10] But preparation of an offence which leads to nothing does not amount to an abetment under s. 109.[11]

The question whether a certain act is merely one of preparation or one committed in the course of an attempt is a question of fact.[12]

Purchasing of stamp paper.—Mere purchasing of a stamp paper in the name of the person whose name it was intended to forge, was held not to constitute an attempt.[13] But in a subsequent case, on similar facts, the same High Court has held

[1] *Peterson*, (1876) 1 All. 316, 317.

[2] Stephen's General View of the Criminal Law of England, p. 69. (2nd Edn.)

[3] *Dugdale*, (1823) 1 E. & B. 435.

[4] *Baku*, (1899) 1 Bom L. R. 678, 24 Bom. 287.

[5] *Scofield*, (1784) Cald. 397, 403.

[6] Per Ellenborough, C. J. in Di[illegible] [illegible] *Lovell*, (18[illegible]) [illegible] C. & P. 40[illegible].

[7] *Luxman Raghunath*, (1902) 4 Bom. L. R. 280.

[8] *Peterson* sup.; *Padala Venkatasami*, (1881) 3 Mad. 4, 5. See *Srinivasan*, (1902) 25 Mad. 726.

[9] *Ramsarun Chowbey*, (1872) 4 N. W. P. 46, 48.

[10] See *Padala Venkatasami*, sup.

[11] *Surat Bahadur*, (1924) 1 O. W. N. 362.

[12] *MacCrea*, (1893) 15 All. 173.

[13] *Ramsarun Chowbey*, sup. See *Gulab Singh*, (1916) 14 A. L. J. R. 688.

otherwise. M instigated Z to personate C and to purchase in C's name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed C's name on such paper as the purchaser of it. M acted with the intention that such endorsement might be used against C in a judicial proceeding. It was held that the offence of fabricating false evidence had been actually committed, and that M [illegible] of abetting the commission of such offence.[1] The former [illegible] said: "The endorsement of the stamp- [illegible] may be assumed it was the intention of the person who [illegible] to make on the face of the stamp-paper. The offence of forgery had [illegible] not proceeded beyond the stage of preparation, but in the case now before the Court there had been an actual fabrication: something had been done. It is true that no judicial proceeding had been instituted, but the petitioner's pleader is unable to suggest any other object for which the false endorsement should have been procured. The petitioner had undoubtedly threatened Chatter Singh that he would make him pay Rs. 50. He could not have carried out his threat without the intervention of the Court. The object of the endorsement made by the vendor of a stamp is to afford proof of the person to whom it is sold, and in suits brought on documents written on stamp-paper it is the usual course, when the execution of the document is denied, to advert to the endorsement and to the stamp-vendor's memory assisted by the endorsement as evidence of the person to whom the stamp was sold, and therefore as evidence of the probability that the d[illegible]ment was made by the person by whom the paper was procured. I do not s[illegible] the accused should have been discharged. Had the point [illegible] guilty of the offence of which the petitioner has been [illegible] in that in the case before the Court the evidence for the prosecution was [illegible] the inference that the petitioner procured the false endorsement for the purpose of thereafter using it in a judicial proceeding, and consequently that the conviction is not open to the objection taken to it."[2]

In another case, C, calling himself K, went to a stamp-vendor, accompanied by a man named Kalyan, and purchased from him in the name of K a stamped paper. The two men then went to a petition-writer, and C again giving his name as K, they asked the petition-writer to write for them a bond for Rs. 50 payable by K to Kalyan. The petition-writer commenced to write the bond, but, his suspicious having being aroused, did not finish it, but took C and Kalyan to the nearest police-station. It was held that Kalyan was guilty of an attempt to commit the offence under s. 467, and C of abetment of the said attempt.[3] *Ramsarun's case* was distinguished on the ground that nothing was written on the stamp-paper in that case.

False document.—In a case the Madras High Court arrived at the same conclusion as that in *Ramsarun's case*. The accused had conspired with other persons to prepare a document purporting to be a valuable security which he knew would be a false document, and be used for the purposes of fraud. He for that end prepared a draft which he was about to copy on an old stamp paper produced for the purpose, and applied to a witness to supply the Telugu date corresponding to the English date which the document was to contain. It was held that the accused had not passed beyond the stage of preparation, and was not guilty of an attempt to forge.[4] The Court, however, convicted him of abetment.

In a Calcutta case, a person [illegible] ders for the printing of certain receipt forms similar to those used by the [illegible] Company. and corrected the proofs of the same, it be[illegible] intention [illegible] ceipt forms in order to commit a fraud. It was h[illegible] e could n[illegible] ed of an attempt to commit forgery until K [illegible] ome act [illegible] ng one of [illegible] forms a false document,

[1] *Mv* [illegible] *K* (1894) 16 All. 409.
[2] *Per* [illegible] p. 106. [3] *P* [illegible] *sami*, (1881) 3 Mad. 4.

that until a form had been converted into a document, all that was done consisted in mere preparation for the commission of an offence. Garth, C. J., said: "In my opinion, the printed form was not in itself a false document, and that it would not have become a false document, or part of a document (according to the definition in s 464), until the seal or signature of the Bengal Coal Company had been forged upon it, so as to make it appear that such seal or signature was that of the Bengal Coal Company The prisoner, therefore, would not be guilty of the offence of forgery until the printed form had thus been converted into a false document; and for the same reason, I think that he would not be guilty of an attempt to commit forgery until he had done some act towards making one of the forms a false document. If, for instance, he had been caught in the act of writing the name of the Company upon the printed form, and had only completed a single letter of the name, I think that he would have been guilty of the offence charged, because... 'the actual transaction would have commenced, which would have ended in the crime of forgery, if not interrupted.' But as it was, all that he did consisted in mere preparation for the commission of the crime He was no more guilty of an attempt to commit forgery in having the forms printed, than he would have been of an attempt to commit burglary by having a false key made of the house where he intended to commit the offence" Prinsep, J., said: "The acts ..committed do not amount to an attempt, but at most only to a preparation to commit a forgery which might have proceeded no further... There must be something 'commenced which would have ended in the crime if not interrupted'"[1] The definition of 'attempt' as given in the judgment in this case may be regarded as overruled in view of later English decisions on the point [2]

Personation.—Where the accused was found carrying a police jacket under his arm with intent that it should be believed that he was a police constable, it was held that he was not guilty under s. 171 as his act amounted merely to preparation to commit the offence punishable under that section [3]

Obtaining a certificate by false statements.—Where the accused by false statements obtained a certificate entitling him to a refund of *octroi* duty but was arrested before he applied for the refund, it was held that this amounted to a preparation only, for he might have torn up the certificate or changed his mind [4]

Adulteration.—A contractor for the supply of milk to a regimental hospital was found in the hospital compound with about three gallons of stale milk in his possession going in the direction of the place where the cows were about to be milked, this milk being in a can similar to those in which the cows were milked It was held that his act did not amount to more than preparation [5]

Procuring poisonous drug to kill a person.—The accused asked a native doctor to supply her with medicine for the purpose of poisoning her son-in-law It was held that the offence committed was not an attempt to murder, as it was a mere act by way of preparation to commit an offence and was not a transaction which would have necessarily ended in murder if not interrupted, but that such act might be held to be an instigation by the native doctor to abet the accused in the commission of murder, and with reference to s 108, expln 4, might have been punished under ss. 116 and 302 [6]

Administering poison. Where a woman with a view to poison her husband administered to him a substance which was harmless and which could not in any circumstances bring about his death, but which she believed to be poison it was

[1] *Emperor*, (1881) 7 Cal 352, 356, 357
[2] *Brown*, (1889) 24 Q B D 357; *Eagle*, (1892) 17 Ox 491.
[3] *Nga Po Kyaw*, (1904) 1 U B R (P C) 1.
[4] *Ibid*, (1906) 8 All 304
[5] *Sukhi*, (1887) P. R. No 40 of 1887
[6] *Mussi Lallbeeree*, (1882) P. R. No. 24 of 1882.

held that she could not be convicted under this section read with s. 328, as the administration of the harmless substance was not an act towards the administration of the poisonous substance. Her act which was complete in itself and not constituting an offence could not constitute an attempt to commit an offence.[1]

Arming oneself with a weapon to kill another.—The accused, on quarrelling with the complainant, fetched a sword, but was seized and disarmed by others before he could use it. He, however, asserted, while under restraint, his intention of killing the complainant if he were let go. It was held that fetching a sword was not an attempt under this section, since it was not "an act of such an approximate nature as would amount to an attempt to commit murder or grievous hurt; there was, it may be conceded, a preparation towards the commission of some such offence, but mere preparation is not sufficient to complete the offence of attempt under s. 511...It is quite possible that although the prisoner fetched the sword he might not after all have actually used it against the complainant, who was his own brother."[2] Similarly, where the accused raised his knife in a threatening manner manifesting an intention to stab, but did not actually try to stab the complainant, it was held that the act fell short of an attempt to stab.[3]

Suicide.—A woman ran to a well, stating that she would jump into it, and she was caught before she could reach it. The High Court in holding that she could not be convicted of an attempt to commit suicide remarked: "There is no doubt that the accused intended to commit suicide, and that she prepared to carry out that intention and proceeded to the well. She might have, however, still changed her mind, and she was caught before she did anything which might be regarded as the commencement of the offence."[4]

Murder.—A young Brahmin widow was confined of a child. The Chief Constable of Police, acting on information that the accused was about to kill the baby, went to search her house with a number of men, and found her lying on the first floor, and discovered on the second floor a living new-born child wrapped up in a cloth with a cooking pot turned over it. The Sessions Judge convicted the accused of attempt to murder. The High Court, on appeal, reversed the conviction, on the ground that the evidence was insufficient to support it.[5]

Theft.—The accused, with another boy, was seen by a policeman to sit together on some doorsteps near a crowd, and when a well-dressed person came up to see what was going on, one of the accused made a sign to others, and two of them got up and followed the person into the crowd. One of them was seen to lift the tail of the coat of that man, as if to ascertain if there was anything in the pocket, but making no visible attempt to pick the pocket, and to place a hand against the dress of a woman but no actual attempt to insert that hand into the pocket was observed. They then returned to the doorstep and resumed their seats They repeated this two or three times. It was held that this was not sufficient evidence of an attempt to steal.[6]

House-trespass.—A person, who went at night on the roof of the house of another person with a stick and an instrument used for house-breaking, was held to be guilty of house-trespass under s. 447, and not of an attempt to commit house-breaking by night.[7] The Court observed: "Mere presence on the roof of the house cannot be construed into an attempt to commit an offence under s. 511...In order to apply s. 511, Indian Penal Code, it is necessary not merely that there should be an attempt to commit an offence, but likewise that an act was done as such attempt towards the commission of the offence. Mere passing on the roof of the house

[1] *Mt. Rupsir Panku*, (1895) 9 C. P. L. R. (Cr.) 14.

[2] *Data Ram*, (1882) P. R. No. 45 of 1882. See also *Sheru*, (1868) P. R. No. 18 of 1868.

[3] *Tha Do Hla*, (1902) 1 L. B. R. 264.

[4] Per Muttusami Ayyar, J., in *Ramalia*, (1884) 8 Mad. 5, 6.

[5] *Chima*, (1871) 8 B. H. C. (Cr. C.) 164.

[6] *Taylor*, (1871) 25 L. T. 75.

[7] *Wolidad*, (1907) P. R. No. 15 of 1907, followed in *Bahwa Khan*, (1919) 16 L. B. R. 51.

cannot in any sense be termed an act towards the commission of the burglary. It is an act of approach towards the house for the purpose of stealthily effecting an entrance into the premises, but can hardly be said to exceed the limits of mere preparation. While on the roof the accused had yet time to make up his mind to recede or attempt an entrance according as he found his opportunity or the state of vigilance inside the premises. It cannot be said that by his presence on the roof of the house he had finally committed himself to committing the offence of house-breaking."

Cheating.—The forwarding of fictitious consignment notes by a Station Master was held merely to be a preparation to commit the offence of cheating, as it was not done in the attempt to cheat.[1] This view is not sound, though the decision is right as the accused was convicted of abetment. With the object of obtaining money under an insurance policy the accused had recourse to a fraudulent device in order to attract the attention of passers-by and induce them to believe that he had been assaulted, bound, and robbed by burglars. Owing to the intervention of the police, who discovered the fraud, no communication was made to the underwriters, nor was any claim made under the policy. It was held that the accused could not be convicted of an attempt to obtain money by false pretences.[2]

Adultery—Preparation or providing an opportunity is a stage of the proceeding short of attempt and is not punishable by law.[3] An opportunity was made for sexual intercourse by a married woman's going to the accused's shop. She was at once followed, and the shop, as it were, besieged. It was held that the acts done amounted only to preparation and were not punishable as an attempt to commit adultery.[4] The presence of a woman in the same room with the accused was held insufficient to prove any attempt to commit adultery.[5]

Kidnapping—The law allows *locus pœnitentiæ*, and will not hold that a person has attempted a crime until he has passed beyond the stage of preparation.[6] An indirect preparation which does not amount to an act which can be held to be a commencement of the offence does not constitute either a principal offence or an attempt or abetment of the same A minor girl under the age of sixteen years was taken by accused No 1, under the direction of accused No. 2 from Sholapur to Tuljapur (in the Nizam's territory) and there dedicated to goddess Amba, with intent or knowing it to be likely that the minor would be used for the purpose of prostitution. It was held that the intention of either of the accused while they were staying at Sholapur did not constitute any offence, and their removal with the girl to Tuljapur did not by itself constitute an abetment. Ranade, J., said: "In the present case, beyond the mere intention and indirect preparation, there was no distinct offence by way of instigating the act committed out of British India. Mere intention not followed by any act cannot constitute an offence, and an indirect preparation which does not amount to an act which can be held to be a commencement of the offence does not constitute either a principal offence or an attempt or abetment of the same."[7]

Rape.—Facts amounting to preparation only so far as a particular offence is concerned may independently amount to another offence under certain circumstances In a case the accused was convicted by [illegible] to rape On appeal it was contended that the e[illegible] establishing more than an indecent assault. Melv[illegible]

[1] *Raghunath*, (1889) Unrep. Cr. C. 470.
[2] *Robinson*, [1915] 2 K. B. 342
[3] *Paira Ram*, (1902) P. R. No. 25 of 1902
[4] *Ibid.*
[5] *Ghulam Mahomed*, (1879) P. R No 13 of 1879.
[6] *Padala Venkatasami*, (1881) 3 Mad. 4.
[7] *Balu*, (1899) 1 Bom. L. R 678, 681, 24 Bom. 287.

on which we entertain any doubt in this case is whether the prisoner's conduct amounted to an attempt to commit rape. In *Reg.* v. *Lloyd*,[1] Patterson, J., in summing up, said :—' In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part.' We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself ; and we think that a conviction of an attempt at rape ought not to be arrived at unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance. In the present case, having regard to the medical evidence, and to the varying statements made at different times by the complainant, we find it impossible to place entire reliance upon her statement ; and, as to the extent of the violence to which she was subjected, there is no evidence except her own statement. The Sessions Court has not believed her allegation that penetration took place, and has consequently refused to convict the prisoner of rape. We feel a similar hesitation in coming to the conclusion, on the complainant's unsupported statement, that the prisoner's conduct amounted to an attempt to commit rape. He seems to have desisted before he was interrupted ; and no evidence has been given to show that the complainant's person showed marks of violence (while the Civil Surgeon's evidence is to the contrary effect), nor that the clothes, either of the complainant's or the prisoner's showed any stains which would indicate to what point the prisoner's criminality had proceeded."[2] The conviction was made under s. 354.

3. Attempt.—'Attempt' is the direct movement towards the commission after the preparations are made.[3] An attempt to commit a crime must be something more than mere preparation.[4] Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.[5] The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination in 'attempt' as compared with 'preparation.'[6]

"Attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to but falling short of its actual commission ; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted."[7]

The Calcutta High Court in *Riasat Ali's case*[8] laid down that a person could not be convicted of an attempt to commit an offence under this section unless the offence would have been committed if the attempt charged had succeeded. It based its decision on the observations of Cockburn, C. J., in *R.* v. *M'Pherson*[9] (viz., "The word 'attempt' clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed"), and of Blackburn, J., in *R.* v. *Cheeseman*[10] (viz., "If the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime"). In *M'Pherson's case* the accused was indicted for breaking and entering a dwelling house and stealing therein certain goods. All those goods

[1] (1836) 7 C. & P. 318.
[2] *Shankar*, (1881) 5 Bom. 403, 404.
[3] Quoted with approval from Mayne's Criminal Law in *Peterson's case*, (1876) 1 All. 316 ; and *Padala Venkatasami*, (1881) 3 Mad. 4.
[4] *Robinson*, (1915) 2 K. B. 342.
[5] *Eagleton*, (1855) 6 Cox 559
[6] *Mangal*, O. S. C. 76.
[7] Per Woodroffe, J., in *In the matter of the Amrita Bazar Patrika*, (1919) 30 C. L. J. 289, 293, 404.
[8] (1881) 7 Cal. 352.
[9] (1857) Dears. & B. 197, 202, 7 Cox 281.
[10] (1862) L. & C. 140, 145.

had been stolen by other persons before the accused entered the house; but there were other goods of the complainant which the accused might have stolen if he had not been interrupted. The jury acquitted the accused of the felony charged, but found him guilty of breaking and entering the dwelling-house of the complainant and attempting to steal his goods therein. It was held that the conviction was wrong. In *Cheeseman's case* the accused was entrusted by his master with some meat which was to be weighed out and delivered to a customer. By means of a false weight he kept back a part of the meat with intent to steal it; but the fraud was discovered before he had actually moved away with it. It was held that he had committed an attempt to steal the meat. *M'Pherson's case* was followed in *R.* v. *Collins*[1] wherein Cockburn, C. J., again said: "An attempt to commit felony can only in point of law be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit." In this case the accused put his hand into the gown pocket of a lady with intent to steal what he could find there; but the pocket was empty and he could not steal anything. It was held that he could not be convicted of an attempt to steal. But *Collins' case* has been expressly overruled in *R.* v. *Brown*[2] and *R.* v. *Ring*,[3] which lay down that in order to prove that an attempt to commit a felony has been committed, it is not necessary to prove that, had the attempt not been frustrated, the felony would have been committed. In *Brown's case* the accused had pleaded guilty to an indictment charging him with having attempted to commit unnatural offences with domestic fowls. In *Ring's case* the accused were seen to hurry on to the platform of a station just as a train was about to start; they did not go by that train, and separated on reaching the platform. On the arrival of the succeeding train, they crowded round and hustled a woman who was entering a compartment, and one of them was seen endeavouring to find the pocket of her dress. It was held that they were guilty of an attempt to steal. In *Q.* v. *Williams*,[4] two Judges expressly say that they do not assent to the notion that a person cannot be convicted of an attempt to do that which the law says he cannot do. However, in a case[5] decided two years after *Brown's case*, we find the Calcutta High Court re-affirming its decision in *Riasat Ali's case*. The view of the Calcutta High Court is, therefore, not in accordance with the present view of the English law, and, as it is based on the authorities which are expressly overruled, it is no longer good law.

The Allahabad High Court has not followed *Riasat Ali's case*. It has remarked in *Ramsarun's case*[6] and *MacCrea's case*[7] that the rulings of English Judges on the criminal law of England are inapplicable to the interpretation of the Indian Penal Code, which the Courts in India must interpret on the same principles of interpretation as they would employ in the interpretation of any other Act of the legislature. In the latter case A had obtained administration to the estate of his brother H, and had caused a Government promissory note, No. 9764, which belonged to M, to be entered in the letters of administration as part of the estate of the deceased. The note was in the possession of the Controller-General and the accused MacCrea joined A in an attempt to induce that officer to deliver it to him or to A. Letters were written by the accused to that officer but they were not relied on, and the Judge directed the attention of the jury to the acts committed by the accused in making use of the letters of administration granted to A, and in the preparation of a so-called copy of the lost note and its production before the City Magistrate. The scheme failed and the accused was convicted of an attempt to cheat.[8]

[1] (1864) 33 L. J. (M. C.) 177, 178.
[2] (1889) 24 Q. B. D. 357.
[3] (1892) 17 Cox 491.
[4] (1893) 1 Q. B. 320.
[5] *Chandi Pershad* v. *Abdur Rahman*, (1894) 22 Cal. 131, 138.
[6] (1872) 4 N. W. P. 46, 47.
[7] (1893) 15 All. 173, 178.
[8] *Ibid.*, pp. 177, 178.

In *Ramsarun's case*, Turner, J., said: "To constitute then the offence of attempt under this section, there must be an act done with the intention of committing an offence, and for the purpose of committing that offence, and it must be done in *attempting* the commission of the offence.

"Two illustrations of the offence of attempt as defined in this section are given in the Code; both are illustrations of cases in which the offence has been committed. In each we find an act done with the intent of committing an offence, and immediately enabling the commission of the offence, although it was not an act which constituted a part of the offence; and in each we find the intention of the person making the attempt was frustrated by circumstances independent of his own volition.

"From the illustrations it may be inferred that the Legislature did not mean that the act done must be itself an ingredient (so to say) of the offence attempted, and in this respect there appears to me there is a noticeable difference between the definition given in the section under consideration and that given in section 307. To convict a person of an attempt to murder under section 307 it must be shown that he has done some act with such intention, that, if *by that act* he caused death, he would be guilty of murder under section 307, then the act necessary to constitute the attempt is an act which, if it had not fallen short of its object, would have constituted the offence attempted. Similarly, to constitute an attempt under section 308, the act proved must be an act which, had the results contemplated by the doer followed, would have completed the offence attempted; whereas, under the terms of section 511, it is only necessary to prove an act done in the attempt *towards* the commission of the offence, and, as the illustrations show, an act in itself complete, and not falling short of its object, or failing to bring about the result anticipated by the doer.

"The circumstances stated in the illustrations to section 511, Indian Penal Code, would not have constituted attempts under the English law, and I cannot but think that they were introduced in order to show that the provisions of section 511, Ind[illegible] were designed to extend to a much wider range of cases than wc[illegible] law."

In [illegible] v. *Riasat Ali*), the learned Chief Justice appears to have acted upon English precedents, and those precedents, precedents of no modern date. So far as I am concerned, I feel myself unable to follow the English law, because there appears to me a wide difference between the meaning of the word 'attempt' as understood by English lawyers in the phrase 'attempt to commit a felony,' and the word 'attempt' as actually defined in the Indian Penal Code...With all respect therefore to the learned [illegible] the case of *The Queen-Empress* v. *Riasat Ali*, I have no doubt [illegible] lown by them is not a sound and exhaustive [illegible] as used in s. 511." In this case no reference is made to *Q.* v. *Peterson*,[1] in which Pearson, J., followed the American rule that "an attempt can only be manifested by acts which would end in the consummation of the offence, but for the intervention of circumstances independent of the will of the party."

In a Bombay case 'attempt' has been defined as "an intentional preparatory action which fails in object—which so fails through circumstances independent of the person who seeks its accomplishment."[2] "Where a man does an intentional [illegible] external act, something tangible and ostensible of which the law can [illegible]

[1] (1876) 1 All. 316, 317.

[2] Per Jenkins, C. J., in *Luxman Narayan Joshi*, (1899) 2 Bom. L. R. 286, 296.

[3] Per Jenkins, C. J., in *Vinayak Narayan Bhatye*, (1899) 2 Bom. L. R. 304, 307, 308; *Jaimal*, (1924) 1 L. C. 331.

an act showing progress towards the actual commission of the offence. It does not matter that the progress is interrupted.[1]

Stephen[2] says: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begin cannot be defined; but depends upon the circumstances of each particular case." Attempt is also defined as "an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation and possessing, except for failure to consummate, all the elements of the substantive crime."[3]

1. **'Offence punishable by this Code.'**—This leaves untouched attempts to commit, or to cause to be committed, offences under special or local laws which are not also offences under the Code. No criminal liability can be incurred under the Code by an attempt to do an act which, if done, will not be an offence against the Code.[4]

Impossible offence.—"An attempt...is possible, even when the offence attempted cannot be committed; as when a person, intending to pick another person's pocket, thrusts his hand into the pocket, but finds it empty. That such an act would amount to a criminal attempt, appears from the illustrations to section 511. But in doing such an act, the offender's intention is to commit a complete offence, and his act only falls short of the offence by reason of an accidental circumstance which has prevented the completion of the offence ..It is possible to attempt to commit an impossible theft, and so offend against the Code, because theft is itself an offence against the Code, and may, therefore, be attempted within the meaning of the Code."[5]

The trend of recent English decisions, as already observed, is that it is not necessary that it should have been legally or physically possible for the offender to commit the full offence.[6]

2. **'With transportation or imprisonment.'**—Offences punishable with death only, or fine only, are not contemplated by this section.

3. **'To cause such an offence to be committed.'**—This will include an attempt to abet an offence. So it has been held that it is not legally impossible to attempt the abetment of an offence—the abetment of an offence being itself an offence.[7] A common form of such attempt is the soliciting of another to commit an offence. The act done towards the commission of the offence consists in the solicitation itself. It will not affect the offence though the person solicited declines the persuasion.

4. **'Does any act towards the commission of the offence.'**—In each of the two illustrations given under this section there is not merely an act done with the intention to commit an offence, which act is unsuccessful because it could not possibly result in the completion of the offence, but an act is done 'towards the commission of the offence,' that is to say, the offence remains incomplete only because something

[1] *Ganesh Balvant Modak*, (1909) 12 Bom. L. R. 21.

[2] Dig. of Crim. L., Art. 50 (5th Edn.).

[3] *Vide* American and English Encyclopædia of Law, Vol III, p. 250 (2nd Edn.), where several definitions of 'attempt' are given.

[4] *Mangesh Juvaji*, (1887) 11 Bom. 376, 381; *Boston*, (1910) P. R. No 2 of 1911

[5] Per Birdwood, J., in *Mangesh Juvaji*, sup., pp. 380, 381; *Mt. Rupsir Paulus*, (1895) 9 C. P. L. R. (Cr.) 14, does not lay down sound law. In that case a woman with a view to poison her husband administered to him a substance which was harmless and which could not in any circumstances bring about his death, but which she believed to be poison. It was held that she could not be convicted under ss. 511 and 328 as the administration of the harmless substance was not an act towards the administration of a poisonous substance; and that her act which was complete in itself and not constituting an offence, could not constitute an attempt to commit an offence.

[6] *Brown*, (1889) 24 Q. B. D. 357; *Ring*, (1892) 17 Cox 491, 61 L. J. (M. C.) 116; *Williams*, [1893] 1 Q. B. 320.

[7] *Spier*, (1887) P. R. No. 49 of 1887.

yet remains to be done, which the person intending to commit the offence is unable to do by reason of circumstances independent of his own volition. Thus, in ill. (*a*) the act of breaking open the box is done towards the commission of the theft of the jewels. The theft itself, that is the actual removal of the jewels, still remains to be done and it remains undone only because it turns out that there are no jewels to remove. In ill. (*b*) Z fails to comply with the essentials of theft simply because there is nothing in the pocket.

False evidence.—*Where the accused dug a hole intending to place salt in it, in* order that the discovery of the salt might be used in evidence against the prosecutor in a judicial proceeding, it was held that he was guilty of an attempt to fabricate false evidence, because by digging the pit he did an act towards the commission of the offence.[1]

Counterfeiting coin.—The accused with intent to coin counterfeit half dollars of Peru, caused to be made and procured in England dies necessary for the purpose of making such counterfeit coin, but which would not alone produce it, but the accused intended to procure the rest of the necessary apparatus for the purpose and with the intention of using the entire apparatus, when procured, in making the counterfeit coin. It was found that the accused intended to make only a few of the counterfeit coins in England by way of trying whether the apparatus would answer before sending it out to Peru to be there used in making counterfeit coin. It was held that to make a few coins in England with the object stated would be to commit the offence of making counterfeit foreign coin and that the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence.[2]

Unnatural offence.—The accused sent to H a letter with intent to incite H to commit an unnatural offence. H was a boy at school and he had received two other letters from the accused which he had read, but he had not read the one on which the charge was framed and which he had handed over to the school authorities. It was held that the sending the letter proved the attempt to incite, although it might be doubtful whether it could be said to amount to inciting or *soliciting*, inasmuch as H was not aware of its contents.[3]

Bribery.—Where B, who was employed as a clerk in the Pension Department, in an interview with A, who was an applicant for [illegible] ion, after referring to his own influence in that department, and instancing appea[illegible]s in which, by that influence, increased pensions had been obtained, pr[illegible] to intimate that anything might be effected by payment, and, on the overtu[illegible]ing rejected, concluded by declaring that A would rue and repent the rejection of it, it was held that the offence of attempting to obtain a bribe was consummated.[4] A person who offers to pay gratification to a public servant is punishable under ss. 116, 161, and 511.[5]

Cheating.—M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, statin[illegible] other halves were lost, and enquiring what steps [illegible] taken for the [illegible] the value of the notes. The Currency Office hav[illegible] uiry, discov[illegible] amount of the notes had been paid to the ho[illegible] halves, [illegible] notes had been withdrawn from circulation [illegible] sent M th[illegible] of claim to be filled up and returned to it. [illegible] the [illegible] the Currency Office never contemplated payi[illegible] of the [illegible] w[illegible] filled signed [illegible] return[illegible] the C[illegible] It was [illegible] altho[illegible] no inte[illegible] of [illegible] to [illegible] of t[illegible] guil[illegible] to [illegible] titioner inde[illegible] [illegible]ain[illegible] to [illegible] [illegible]elope

[1] A[illegible] W. P. [illegible] [4] *Ba*[illegible] All.
[2] B[illegible] [illegible]) Dear[illegible] No.
[3] *Ra*[illegible] [illegible] 9. [illegible]

Rs. 530 containing two pieces of waste paper, intending to use the receipt for the same as evidence of payment of Rs. 530 towards the liquidation of his debt to the complainant. It was held that the petitioner was guilty of an attempt to cheat.[1]

The accused, having contracted to deliver a certain quantity of good cotton *to the complainant, delivered instead for acceptance by the complainant a quantity* of bad cotton, that is, cotton heavily adulterated with rubbish in such a manner that the fraud would be likely to escape the ordinary inspection. The complainant's agent, to whom delivery was offered, suspected the character of the goods and declined to accept them. The accused were, on these facts, convicted of the offence of attempting to cheat. On appeal they were acquitted by the Sessions Judge on the ground that the acts of the accused did not amount to an attempt to cheat but only to a preparation for cheating. It was held, setting aside the order of acquittal, that there was a complete case of an attempt to cheat, and the only [illegible] at an attempt and did not proceed to the [illegible] who was sought to be cheated was cautious [illegible] d did all they could to perfect their offence, that is to say, an overt act was begun which would have led to the finished offence, but for an interruption arising independently of the will of the accused.[2] A manufactured spurious trinkets, and took them to N saying they were of gold (which they were not) and that they were stolen property (which was also not true) and that he (A) did not like to sell them in the bazaar and asked him to buy. N did not buy, but A was arrested It was argued that no attempt to cheat had been proved, because more had to be done by A, such as weighing the articles, etc, before wrongful loss would fall upon N. It was held that the act of A amounted to an attempt to cheat.[3] The first accused insured his paddy in certain godowns with three Fire [illegible] own, he first sent to the [illegible] subsequently presented [illegible] s as to the quantity of paddy stored in the godowns and destroyed by the fire. It was held that the sending of the notices was an act of preparation but when the accused followed up these notices with the actual claim papers, he committed himself to a representation of fact which being false to his knowledge must be regarded as an overt act towards the commission of the offence of cheating—an act which had gone beyond the stage of preparation.[4] The accused sent two anonymous letters to the complainant, a well-to-do Mahomedan purporting to come from the Deity at Nagore directing him to pay certain sums of money to a person specified in the letters and threatening him with ruin and death from Divine displeasure if he failed to do so. He showed two more letters to the complainant purporting to have been received by him from the Nagore Deity wherein he was commanded to explain the serious situation and to receive Rs. 300 from the complainant and finally followed it up with a letter saying that that was the last communication that the complainant would receive and that dire consequences would follow without further warning. Th [illegible] not believe the letters. It [illegible][5] accused informed an octroi superintendent that there were sixteen maunds of an article in a cart, whereas there were only six, and by this act he induced the superintendent to grant him a refund of the duty on sixteen maunds of the article instead of six maunds, and where this was discovered before any money was paid to the accused; it was held that the accused was guilty

[1] *Arura*, (1912) P. L. R. No. 299 of 1913.
[2] *Mansing Days Patil*, (1913) 15 Bom. L. R. 568, 2 Bom. Cr. C. 80.
[3] *Abdullah*, (1914) P. R. No. 14 of 1914.
[4] *Maung Po Hmyin*, (1923) 2 Rang. 53.
[5] *Doraswamy Ayyar*, (1925) 48 Mad. 774, [1925] M. W. N. 113.

Melting sovereigns.—The accused, a professional melter of gold and silver, was found near the heated furnace in his workshop with a crucible containing molten silver and 580 sovereigns close at hand. He was, on these facts, found guilty of the [illegible] gns punishable under Rules 21-A and 28 of [illegible] Rules, 1915. It was held that he was guilty of attempt to melt sovereigns for the only act that remained unperformed to complete the offence of melting the sovereigns was the final act of putting the sovereigns into the molten silver in the crucible.[1]

Abduction.—Where the accused lifted a woman on her refusing to accompany them from the bed of her husband where she was sleeping on the roof of the house and on alarm being given dropped her there and made good their escape; it was held that the offence of abduction was not completed but the accused were guilty of an attempt to abduct her.[2]

Act too remote.—The words 'does any act towards the commission of the offence' must not be construed to include all acts, however remote, which tend towards the commission of the offence. The thing done may be too small or it may proceed too short a way towards the accomplishment of the offence for the law to notice it as an attempt (*vide* ills. to s. 307). "It is difficult, and perhaps impossible, to lay down a clear and definite rule, to define what is, and what is not such an act done, in furtherance of a criminal intent, as will constitute an offence. Many acts, coupled with the intent, would not be sufficient. For instance, if a man intends to commit a murder, and is seen to walk towards the place of the contemplated scene, that would not be enough."[3] It has been laid down, "Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."[4] The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. Thus, it is a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack [illegible] go to the stack, with the intention of setting fire to it, and light a lucifer [illegible] that purpose, but abandons the attempt because he finds that he is being [illegible]

In a village, incendiarism had occurred on several occasions [illegible] a ball of rag with a piece of burning charcoal within it. The [illegible] was discovered to have a ball of that description concealed [illegible] contained burning charcoal. It was held, but not unanimously [illegible] of an attempt to commit mischief by fire. Glover J. [illegible] tained a piece of unlighted charcoal only, I should have [illegible] been no sufficient commencement of any act which [illegible] of mischief by fire, and that the prisoner would [illegible] person who, intending to murder some other person [illegible] ing him, buys a gun or poison and [illegible] guous, and not so immediately connected [illegible] punishable under s. 511 of the Penal Code [illegible] causing mischief by fire was [illegible] party carrying it had no opportunity [illegible] going about at night provided [illegible] mischief by fire, intends to [illegible] move towards the [illegible]

[1] *Abu Hamu*, (19[illegible]) [illegible] 5 Bom. Cr. C. 62.
[2] *Alla*, (192[illegible]) [illegible]
[3] Per Jervis, [illegible] (1855) Dears. 2[illegible]

'attempt.'" Mitter, J., on the other hand, said: "The only fact proved against the prisoner is that he was apprehended with a ball of rag containing a piece of lighted charcoal in his possession; but this fact is no more consistent with the intention of setting fire to a human dwelling than with that of setting fire to a stack of hay or to something else. There is not a particle of evidence on the record to show that the prisoner intended to destroy any particular object by fire, and in the absence of such evidence it is impossible to say that he intended to destroy a building used as a human dwelling . . . The mere fact of being in possession of a ball, like the one which was found with the prisoner, is by no means sufficient to warrant a conviction for attempting to cause mischief by fire. In order to support a conviction for attempting to commit an offence of the nature described in s. 511, it is not only necessary that the prisoner should have done an overt act 'towards the commission of the offence,' but that the act itself should have been done '*in the attempt*' to commit it. The Sessions Judge says that the very fact that the prisoner went out of his house with the ball which was found in his possession, was an overt act, 'towards the commission of the offence,' but the question is, was there any attempt to commit a particular offence, and if so, was the act done 'in such attempt'? I am of opinion, that both these questions ought to be answered in the negative. Suppose a man goes out of his house into the street with a loaded gun in his possession, and suppose even that there is evidence to show that he did so with the intention of shooting Z. If Z is not found in the street, or when found no attempt is made to shoot him either from fear or repentance, or from any other cause, can it be said that the man is guilty of attempting to murder Z? The going out of one's house with a loaded gun and with the intention of shooting a particular individual might be in one sense considered as an act done towards the shooting of that individual; but so long as nothing further is done, so long as there is no attempt to shoot him, and no overt act done '*in such attempt*,' it is impossible to hold that there has been an attempt to murder. There can be no doubt that the man, who goes out of his house in such a manner and with such an intention, does an act which is highly reprehensible and improper, and the legislature might have, if it thought fit, declared it punishable as an offence; but in the absence of such a declaration, it is not for us to say that the author of that act ought not to go unpunished . . The distinctions made by the legislature between the offences of 'attempting to commit dacoity,' 'making preparations for dacoity,' and 'assembling together for the purpose of committing dacoity,' seem to support this view very strongly."[1]

An act too remote, or quite foreign to the end proposed, or too small for the law's notice, creates no apparent danger and perturbation in the peaceful order of things, and therefore is not sufficient in attempt.[2] But where a person does an act, the natural consequence of which is criminal, but such consequence is prevented by extraneous causes, he is nevertheless to be taken to have intended that the natural consequence of his act should result, that is to say, he is to be considered as having intended to commit the crime which would have resulted had he not been prevented from completing his act. Where, therefore, in support of a conviction for attempting to discharge a loaded fire-arm with intent to do grievous bodily harm, the evidence was that the accused had presented a loaded revolver at another person, but had been prevented from discharging it by a third person, it was held that the accused intended to do that which he was prevented from doing; and that there was sufficient evidence to support the conviction.[3] Similarly, where the accused pointed at the prosecutor a revolver loaded in some of its chambers with ball cartridges, but not in others, saying that he would shoot him, and he pulled the trigger of the revolver, but the hammer fell upon a chamber

[1] *Dogal Barro*, (1869) 3 Beng. L. R. (A. Cr. J.) 55, 56.

[2] Bishop's New Criminal Law, Vol. I, s. 739 (8th Edn.)

[3] *Duckworth*, (1892) 17 Cox 495.

which contained an empty cartridge case, it was held that the accused could be convicted of attempting to discharge a loaded arm with intent to murder.[1] Where the acts committed by the accused consisted in running after the complainant with an axe in his hand and raising it to the shoulder when about four foot-steps from the complainant, but before there was time to do anything further in pursuance of his purpose the axe was snatched out of the accused's hands, it was held that the accused was not guilty of an attempt to commit murder as neither of his acts could *per se* have caused death, but that he was guilty of an offence to cause grievous hurt punishable under this section read with s. 326.[2]

In *Ramsarun's case*,[3] Turner, J., said: "I do not hold that the provisions of this section would extend to make punishable as attempts acts done in the mere stage of preparation. Although such acts are doubtless done towards the commission of the offence, they are not done *in the attempt* to commit the offence in the construction which I think should be put on the term 'attempt' as used in this section. I regard that term as here employed as indicating the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done, or omitted, which of itself is a necessary constituent of the offence attempted." But in *MacCrea's case*,[4] Knox, J., after remarking that Turner, J., arrived at that conclusion not without some doubt, observes: "I do not hold, and have no hesitation in saying, that s. 511 was never meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it and done towards its commission.

"It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be, beyond all doubt, equally an attempt with the ninety and ninth act in the series.

"Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed. The attempt to defraud a widow of valuable security commenced by an act of criminal intimidation committed in such attempt and towards the fraud does not cease to be an attempt because the perpetrator repents and abstains from completing the attempt.

"The question whether the act is an act of preparation or an act in the attempt and towards commission is a fact to be determined upon the evidence. It is in most cases a question for the jury to distinguish between an act before attempt has begun, an act after attempt begun, and towards commission of the offence attempted, and an act independent of the attempt altogether."

Blair, J., also in the same case, remarks:[5] "The definition of 'attempt' is conveyed in s. 511, Indian Penal Code... It seems to me that that section uses the

[1] *Jackson*, (1890) 17 Cox 104.
[2] *Jiwan Das*, (1904) P. R. No. 30 of 1904.
[3] (1872) 4 N. W. P. 46, 48
[4] (1893) 15 All. 173, 179.
[5] *Ibid*, p. 181.

word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and, though the Act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, etc., shall be punishable. The term 'any act' excludes the notion that the *final* act short of actual commission is alone punishable, and the notion that any of the other acts would be without the range of this section is probably derived from the rulings in the English cases...

"The difficulty with s. 511 might easily have been removed by saying that *where in such an attempt, using the word in the larger sense, any person does* any act towards the commission of an offence he shall be held to have committed an '*attempt*' *within the meaning of this section. That I take to be the real* meaning and drift of the section, differentiating in a marked manner the definition of 'attempt' in the Indian Penal Code and the accepted English doctrine."

The Bombay High Court, agreeing with the opinion of Knox, J., has held that this section does not relate only to the penultimate act, but to all preceding acts if they were done with the intent to commit or facilitate the commission of the act.[1]

The Calcutta High Court has, in an early case,[2] *laid down:* "*In order to* support a conviction for attempting to commit an offence of the nature described *in s. 511, it is not only necessary that the prisoner should have done an overt act* 'towards the commission of the offence,' but that the act itself (that is the overt act) should have been done '*in the attempt*' to commit it (that is, the offence)."

The former Chief Court of the Punjab decided that from the moment when an intention was formed to commit an offence, every act done which facilitated *the commission of the offence, and which was done with that object in view,* was, in one sense, an act done towards the commission of the offence, but the doing of every such act did not constitute an attempt to commit the offence. *It must in* every case be a question depending upon the circumstances, whether a particular act done (with the requisite intention) towards the commission of an offence was sufficiently proximate to its commission to constitute an attempt, or was so remote as to merely constitute preparation for its commission.[3]

5. 'Where no express provision is made by this Code.'—This section does not apply to cases of attempts made punishable by express provisions of the Code. The attempts specially provided for are—

Sec. 121, attempt to wage war against the Queen.

Sec. 124, attempt wrongfully to restrain the Governor-General and other high officials with intent to induce or compel them to exercise or refrain from exercising *any of their lawful powers.*

Sec. 125, attempt to wage war against the Government of an Asiatic Power in alliance or at peace with the King.

Sec. [illegible] war.

Sec. [illegible] gratification.

Sec. 162, attempt to obtain a gratification in order by corrupt or illegal means to influence a public servant.

Sec. 163, attempt to obtain a gratification for exercising personal influence over a public servant.

Sec. 196, corrupt attempt to use as true, evidence known to be false.

[1] *Anant Vinayak Puranik,* (1900) 2 Bom. L. R. 653, 25 Bom. 90.

[2] Per Mitter, J., in *Doyal Bawri,* (1869) 3 Beng. L. R. (A. Cr. J.) 55, 57. See *Hurjee Mull* [illegible] (1903) 8 C. W. N. 278 [illegible] No. 13 [illegible] (1925) 4 B. L. J. 85.

Secs. 198 and 200, corrupt attempt to use as true, a certificate or declaration known to be false in a material point.

Sec. 213, attempt to obtain a gratification to screen an offender from punishment.

Secs. 239 and 240, attempt to induce a person to receive a counterfeit coin.

Sec. 241, attempt to induce a person to receive as genuine a counterfeit coin which, when the offender took it, he did not know to be counterfeit.

Secs. 307 and 308, attempt to commit murder and culpable homicide.

Sec. 309, attempt to commit suicide.

Secs. 385, 387 and 389, attempt to put a person in fear of injury or accusation in order to commit extortion.

Sec. 391, conjoint attempt of five or more persons to commit a robbery.

Secs. 393, 394 and 398, attempt to commit robbery.

Sec. 460, attempt by one of many joint house-breakers by night to cause death or grievous hurt.

6. 'For a term of transportation...which may extend to one-half of the longest term, etc.'—In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years (s. 67).

Section 75.—The offences which fall under this section must be punished entirely irrespective of s. 75.[1] See Comment on s. 75, p. 111

PRACTICE.

Evidence.—Prove (1) that the accused attempted to commit some offence punishable with transportation or imprisonment under the Indian Penal Code, or that he attempted to cause such offence to be committed

(2) That in such attempt he did some act towards the commission of that offence.

The Court should be satisfied that the offender had in his mind the design to commit a certain offence, and that he had begun to move towards an execution of his purpose: there must also be proof of some act, not of an ambiguous kind, but directly approximating to the commission of the offence. When the offender's design is made manifest by any such act, it becomes an attempt cognizable as an offence, and punishable under this section.

Procedure.—Same as for the offence attempted.

Where an accused person has been indicted for committing any offence the jury may find him not guilty of committing, but guilty of attempting to commit, the offence under this section [2]

Punishment.—A was convicted of an attempt to commit rape, and was sentenced by the Judge to rigorous imprisonment for seven years, which he converted, under s. 59, to transportation for the same term It was held that, under ss. 376 and 511 of the Indian Penal Code, a sentence of imprisonment for the offence committed could not be for a longer term than five years, and such sentence could not be converted, under s 59, to transportation for a longer term [3]

In the case of a conviction of attempting to commit house-breaking by night with intent to commit theft, a sentence of whipping was annulled as being illegal.[4]

Charge.—The charge should make mention of this section and the section declaring the punishment for the offence attempted to be committed.[5]

It should run thus:—

[1] *Bharosi*, (1895) 17 All. 123.

[2] Criminal Procedure Code, s. 238.

[3] *Joseph Merian*, (1868) 1 Beng. L. R. (A. Cr. J.) 5, 10 W. R. (Cr.) 10.

[4] *Yella valad Parshia*, (1864) 3 B. H. C. (Cr. C.) 37. See the Whipping Act (IV of 1909)

[5] 1 W. R. (Cr. L.) 11.

I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That you, on or about the——day of——, at——, attempted to commit (*specify the offence attempted*), and in such attempt did a certain act towards the commission of the said offence, to wit (*specify the act done*); and that you thereby committed an offence punishable under section——(*specify the section punishing the offence attempted*) and s. 511 of the Indian Penal Code, and within my cognizance [*or* within the cognizance of the Court of Session (*or* the High Court)].

And I hereby direct that you be tried [by the said Court (*in cases tried by a Magistrate omit these words*)] on the said charge.

APPENDIX.

THE ELECTION OFFENCES AND INQUIRIES ACT.

(ACT No. XXXIX OF 1920).

WHEREAS it is expedient to provide for the punishment of malpractices in connection with elections, and to make further provision for the conduct of inquiries in regard to disputed elections to legislative bodies constituted under the Government of India Act; It is hereby enacted as follows:—

PRELIMINARY.

Short title and extent

1. (1) This Act may be called the Indian Elections Offences and Inquiries Act, 1920; and

(2) It extends to the whole of British India.

PART I.

AMENDMENT OF THE INDIAN PENAL CODE AND CODE OF CRIMINAL PROCEDURE

[The amendments in the Penal Code are introduced in the text at proper places]

PART II.

ELECTION INQUIRIES AND OTHER MATTERS.

Definitions

4 In this Part, unless there is anything repugnant in the subject or context,—

(a) "costs" means all costs, charges and expenses of, or incidental to, an inquiry,

(b) "election" means an election to either chamber of the Indian legislature or to a Legislative Council constituted under the Government of India Act;

(c) "inquiry" means an inquiry in respect of an election by Commissioners appointed for that purpose by the Governor-General, Governor or Lieutenant-Governor,

(d) "pleader" means any person entitled to appear and plead for another in a Civil Court, and includes an advocate, a vakil, and an attorney of a High Court

Powers of commissioners.

5 Commissioners appointed to hold an inquiry shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters:—

(a) discovery and inspection,

(b) enforcing the attendance of witnesses, and requiring the deposit of their expenses,

property in British India, or to enable any other person by means thereof to endanger life or cause serious injury to property in British India; shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished with transportation for a term which may extend to twenty years, to which fine may be added, or with imprisonment for a term which may extend to seven years, to which fine may be added.

NOTE.

This section substantially reproduces the provisions of s. 3 of the Explosive Substances Act, 1883 (46 & 47 Vic., c. 3).

The word 'unlawfully' signifies 'not for a lawful object'; and the word 'maliciously' means intentionally and without justification or excuse or claim of right.[1] The latter word occurs in ss. 219-220 of the Indian Penal Code.

The 'explosive substance' need not be such as to enable a person by means thereof alone without the aid of other substances, to cause danger to life or injury to property The term 'explosive substance' includes any part of any apparatus, machine, or implement intended to be used or adopted for causing or aiding in causing any explosive substance

Punishment for making or possessing explosives under suspicious circumstances.

5. Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punishable with transportation for a term which may extend to fourteen years, to which fine may be added, or with imprisonment for a term which may extend to five years, to which fine may be added.

NOTE.

Under this section it is not necessary to come to any more definite finding than that the accused had possession of the explosive substance under suspicious circumstances.[2]

Where a bomb was found in the house of a person it was held that it was not necessary for the prosecution to prove that the accused had himself placed the bomb at the place where it was found; that it was sufficient to prove that it was found there, and that it remained for the accused to rebut the legal inference which followed under this section.[3]

Punishment of abettors.

6. Any person who by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission of any offence under this Act shall be punished with the punishment provided for the offence.

Restriction on trial of offences.

7. No Court shall proceed to the trial of any person for any offence against this Act except with the consent[1] of the Local Government or the Governor-General in Council.

[1] *Amrita Lal Hazra*, (1915) 42 Cal. 957.
[2] *Chukkapalli Ramayya*, (1919) 20 M. L. J. 657, 7 M. L. T. 314, [1919] M. W. N. 77.
[3] *Amar Singh*, (1919) 1 L. L. J. 173.

NOTE.

Where a complaint was filed by a Sub-Inspector of Police before the Sub-Divisional Magistrate of an offence under s. 399 of the Penal Code, and the facts disclosed also an offence under s. 4 (*b*) of this Act of which the Magistrate could not then take cognizance for want of the consent of Government under s. 7 of the Act, and a complaint was subsequently filed by the Superintendent of Police, with such consent obtained, before the Additional District Magistrate, it was held that the latter had jurisdiction to take cognizance of the offence and that the initiation and continuation of the proceedings by him were legal notwithstanding that he had not withdrawn the original case to his own file.[1]

1. '*Consent.*'—*The consent under this section should state briefly the facts* which constitute the offence and authorize the trial of the accused person upon those facts as constituting, in the opinion of the consenting authority, an offence under one or other sections of the Act. It is for the Court to decide finally whether upon the facts stated in the order of consent a particular offence has been committed and the mere fact that the consenting authority is of opinion that the facts constitute an offence under one section of the Act, is in itself no bar to a conviction of the person upon the same facts of another offence under another section.[2]

[1] *Lalit Chandra Chanda Choudhury*, (1911) 39 Cal. 119.

[2] *Amar Singh*, (1919) P. R. No. 31 of 1919

THE FUGITIVE OFFENDERS ACT, 1881.

(44 & 45 Vic., c. 69).

An Act to amend the Law with respect to Fugitive Offenders in Her Majesty's Dominions, and for other purposes connected with the trial of offenders.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; (that is to say).

Short title.

1. This Act may be cited as the Fugitive Offenders Act, 1881.

PART I.

Return of Fugitives.

Liability of fugitive to be apprehended and returned.

2. Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive.

A fugitive may be so apprehended under an endorsed warrant or a provisional warrant.

Endorsing of warrant for apprehension of fugitive.

3. Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be; (that is to say),

(1) A judge of a superior court in such part; and

(2) In the United Kingdom a Secretary of State and one of the magistrates of the metropolitan police court in Bow Street; and

(3) In a British possession the governor of that possession,

if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act. the warrant so endorsed shall be a sufficient authority to apprehend the fugitive in the part of Her Majesty's dominions in which it is endorsed, and bring him before a magistrate.

Provisional warrant for apprehension of fugitive.

4. A magistrate of any part of Her Majesty's dominions may issue a provisional warrant for the apprehension of a fugitive who is or is suspected of being in or on his way to that part on such information, and under such circumstances, as would in his

opinion justify the issue of a warrant if the offence of which the fugitive is accused had been committed within his jurisdiction, and such warrant may be backed and executed accordingly

A magistrate issuing a provisional warrant shall forthwith send a report of the issue, together with the information or a certified copy thereof, if he is in the United Kingdom, to a Secretary of State, and if he is in a British possession, to the Governor of that possession, and the Secretary of State or Governor may, if he think fit, discharge the person apprehended under such warrant.

Dealing with fugitive when apprehended.

5. A fugitive when apprehended shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be (including the power to remand and admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction.

If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State, and if in a British possession to the governor of that possession

Where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*, or other like process.

A fugitive apprehended on a provisional warrant may be from time to time remanded for such reasonable time not exceeding seven days at any one time as under the circumstances seems requisite for the production of an endorsed warrant.

Return of fugitive by warrant

6 Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of *habeas corpus* or other like process is issued with reference to such fugitive by a superior court, after the final decision of the court in the case,

(1) if the fugitive is so committed in the United Kingdom, a Secretary of State; and

(2) if the fugitive is so committed in a British possession, the governor of that possession,

may, if he thinks it just, by warrant under his hand, order that fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody, and conveyed

by sea or otherwise to the said part of Her Majesty's dominions, to be dealt with there in due course of law as if he had been there apprehended, and such warrant shall be forthwith executed according to the tenor thereof.

The governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on payment or tender of a reasonable amount for expenses, shall receive such fugitive and detain him for such reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant.

Discharge of person apprehended if not returned within one month.

7. If a fugitive who, in pursuance of this part of this Act, has been committed to prison in any part of Her Majesty's dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given, if the said part is the United Kingdom to a Secretary of State, and if the said part is a British possession to the governor of the possession, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody.

Sending back of persons apprehended if not prosecuted within six months or acquitted.

8. Where a person accused of an offence and returned in pursuance of this part of this Act to any part of Her Majesty's dominions, either is not prosecuted for the said offence within six months after his arrival in that part, or is acquitted of the said offence, then if that part is the United Kingdom a Secretary of State, and if that part is a British possession the Governor of that possession, may, if he think fit, on the request of such person, cause him to be sent back free of cost and with as little delay as possible to the part of Her Majesty's dominions in or on his way to which he was apprehended.

Offences to which this part of this Act applies.

9. This part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour.

This part of this Act shall apply to an offence notwithstanding that by the law of the part of Her Majesty's dominions in or on his way to which the fugitive is or is suspected of being it is not an offence, or not an offence to which this part of this Act applies; and all the provisions of this part of this Act, including those relating to a provisional warrant and to a committal to prison, shall be construed as if the offence were in such last-mentioned part of Her Majesty's dominions an offence to which this part of this Act applies.

Powers of superior court to discharge fugitive when case frivolous or return unjust.

10. Where it is made to appear to a superior Court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just.

Power of Lord Lieutenant in Ireland.

11. In Ireland the Lord Lieutenant or Lords Justices or other chief governor or governors of Ireland, also the chief secretary of such Lord Lieutenant may, as well as a Secretary of State, execute any portion of the powers by this part of this Act vested in a Secretary of State.

PART II.

Inter-Colonial Backing of Warrants, and Offences.

(*Application of part of Act.*)

Application of part of Act to group of British possessions.

12. This part of this Act shall apply only to those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

It shall be lawful for Her Majesty from time to time by Order in Council to direct that this part of this Act shall apply to the group of British possessions mentioned in the Order, and by the same or any subsequent Order to except certain offences from the application of this part of this Act, and to limit the application of this part of this Act by such conditions, exceptions, and qualifications as may be deemed expedient.

Backing of Warrants.

Backing of one British possession of warrant issued in another of same group.

13. Where in a British possession of a group to which this part of this Act applies a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that possession, and such person is or is suspected of being in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing magistrate, the person named in the warrant, and bring him before the endorsing magistrate or some other magistrate in the same British possession.

14. The magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the British possession in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by a warrant under the hand of the magistrate making it, and may be executed according to the tenor thereof.

Return of prisoner apprehended under backed warrant.

A magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has in the case of a person apprehended under a warrant issued by him.

15. Where a person required to give evidence on behalf of the prosecutor or defendant on a charge for an offence punishable by law in a British possession of a group to which this part of this Act applies, is or is suspected of being in or on his way to any other British possession of the same group, a judge, magistrate, or other officer who would have lawful authority to issue a summons, requiring the attendance of such witness, if the witness were within his jurisdiction, may issue a summons for the attendance of such witness, and a magistrate in any other British possession of the same group, if satisfied that the summons was issued by some judge, magistrate, or officer having lawful authority as aforesaid, may endorse the summons with his name; and the witness, on service in that possession of the summons, so endorsed, and on payment or tender of a reasonable amount for his expenses, shall obey the summons, and in default shall be liable to be tried and punished either in the possession in which he is served or in the possession in which the summons was issued, and shall be liable to the punishment imposed by the law of the possession in which he is tried for the failure of a witness to obey such a summons. The expression "summons" in this section includes any subpœna or other process for requiring the attendance of a witness.

Backing in one British possession of summons, etc., of witness issued in another possession of same group.

16. A magistrate in a British possession of a group to which this part of this Act applies, before the endorsement in pursuance of this part of this Act of a warrant for the apprehension of any person, may issue a provisional warrant for the apprehension of that person, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which

Provisional warrant in group of British possessions.

such person is accused were an offence punishable by the law of the said possession, and had been committed within his jurisdiction, and such warrant may be backed and executed accordingly; provided that a person arrested under such provisional warrant shall be discharged unless the original warrant is produced and endorsed within such reasonable time as may under the circumstances seem requisite.

Discharge of prisoner not returned within one month to British possession of same group.

17. If a prisoner in a British possession whose return is authorised in pursuance of this part of this Act is not conveyed out of that possession within one month after the date of the warrant ordering his return, a magistrate or a superior Court, upon application by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the person holding the warrant and to the chief officer of the police of such possession or of the province or town where the prisoner is in custody, may, unless sufficient cause is shown to the contrary, order such prisoner to be discharged out of custody.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to appeal to a superior court.

Sending back of prisoner not prosecuted or acquitted to British possession of same group.

18. Where a prisoner accused of an offence is returned in pursuance of this part of this Act to a British possession, and either is not prosecuted for the said offence within six months after his arrival in that possession or is acquitted of the said offence, the governor of that possession, if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the British possession in or on his way to which he was apprehended.

Refusal to return prisoner where offence too trivial.

19. Where the return of a prisoner is sought or ordered under this part of this Act, and it is made to appear to a magistrate or to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or court seems just.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to an appeal to a superior court.

PART III.

Trial, etc., of Offences.

Offences committed on boundary of two adjoining British possessions.

20. Where two British possessions adjoin, a person accused of an offence committed on or within the distance of five hundred yards from the common boundary of such possessions may be apprehended, tried, and punished in either of such possessions.

Offences committed on journey between two British possessions.

21. Where an offence is committed on a person or in respect of any property in or upon any carriage, cart, or vehicle whatsoever employed in a journey, or on board any vessel whatsoever employed in a navigable river, lake, canal, or inland navigation, the person accused of such offence may be tried in any British possession through a part of which such carriage, cart, vehicle, or vessel passed in the course of the journey or voyage during which the offence was committed; and where the side, bank, centre, or other part of the road, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage is the boundary of any British possession, a person may be tried for such offence in any British possession of which it is the boundary:

Provided that nothing in this section shall authorise the trial for such offence of a person who is not a British subject, where it is not shown that the offence was committed in a British possession.

Trial of offence of false swearing or giving false evidence.

22. A person accused of the offence (under whatever name it is known) of swearing or making any false deposition, or of giving or fabricating any false evidence, for the purposes of this Act, may be tried either in the part of Her Majesty's dominions in which such deposition or evidence is used, or in the part in which the same was sworn, made, given, or fabricated, as the justice of the case may require.

Supplemental provision as to trial of person in any place.

23. Where any part of this Act provides for the place of trial of a person accused of an offence, that offence shall, for all purposes of and incidental to the apprehension, trial, and punishment of such person, and of and incidental to, any proceedings and matters preliminary, incidental to, or consequential thereon, and of and incidental to the jurisdiction of any court, constable, or officer with reference to such offence, and to any person accused of such offence, be deemed to have been committed in any place in which the person accused of the offence can be tried for it; and such person may be punished in accordance with the Courts (Colonial) Jurisdiction Act, 1874.

Issue of search warrant.

24. Where a warrant for the apprehension of a person accused of an offence has been endorsed in pursuance of any part of this Act in any part of Her Majesty's dominions, or where any part of the Act provides for the place of trial of a person accused of an

offence, every court and magistrate of the part in which the warrant is endorsed or the person accused of the offence can be tried shall have the same power of issuing a warrant to search for any property alleged to be stolen or to be otherwise unlawfully taken or obtained by such person, or otherwise to be the subject of such offence, as that court or magistrate would have if the property had been stolen or otherwise unlawfully taken or obtained, or the offence had been committed wholly within the jurisdiction of such court or magistrate.

Removal of prisoner by sea from one place to another.

25. Where a person is in legal custody in a British possession either in pursuance of this Act or otherwise, and such person is required to be removed in custody to another place in or belonging to the same British possession, such person, if removed by sea in a vessel belonging to Her Majesty or any of Her Majesty's subjects, shall be deemed to continue in legal custody until he reaches the place to which he is required to be removed; and the provisions of this Act with respect to the re-taking of a prisoner who has escaped, and with respect to the trial and punishment of a person guilty of the offence of escaping or attempting to escape, or aiding or attempting to aid a prisoner to escape, shall apply to the case of a prisoner escaping while being lawfully removed as aforesaid, in like manner as if he were being removed in pursuance of a warrant endorsed in pursuance of this Act.

PART IV.

SUPPLEMENTAL.

Warrants and Escape.

Endorsement of warrant.

26. An endorsement of a warrant in pursuance of this Act shall be signed by the authority endorsing the same, and shall authorise all or any of the persons named in the endorsement, and of the persons to whom the warrant was originally directed, and also every constable, to execute the warrant within the part of Her Majesty's dominions or place within which such endorsement is by this Act made a sufficient authority, by apprehending the person named in it, and bringing him before some magistrate in the said part or place, whether the magistrate named in the endorsement or some other.

For the purposes of this Act every warrant, summons, subpœna, and process, and every endorsement made in pursuance of this Act thereon, shall remain in force, notwithstanding that the person signing the warrant or such endorsement dies or ceases to hold office

Conveyance of fugitives and witnesses.

27 Where a fugitive or prisoner is authorised to be returned to any part of Her Majesty's dominions in pursuance of Part One or Part Two of this Act, such fugitive or prisoner may be sent thither in any ship belonging to Her Majesty or to any of Her subjects. For the purpose aforesaid, the authority signing the warrant

for the return may order the master of any ship belonging to any subject of Her Majesty bound to the said part of Her Majesty's dominions to receive and afford a passage and subsistence during the voyage to such fugitive or prisoner, and to the person having him in custody, and to the witnesses, so that such master be not required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of such tonnage.

The said authority shall endorse or cause to be endorsed upon the agreement of the ship such particulars with respect to any fugitive prisoner or witness sent in her as the Board of Trade from time to time require. Every such master shall, on his ship's arrival in the said part of Her Majesty's dominions, cause such fugitive or prisoner, if he is not in the custody of any person, to be given into the custody of some constable, there to be dealt with according to law.

Every master who fails on payment or tender of a reasonable amount for expenses to comply with an order made in pursuance of this section, or to cause a fugitive or prisoner committed to his charge to be given into custody as required by this section, shall be liable on summary conviction to a fine not exceeding fifty pounds, which may be recovered in any part of Her Majesty's dominions in like manner as a penalty of the same amount under the Merchant Shipping Act, 1854, and the Acts amending the same.

Escape of prisoner from custody.

28. If a prisoner escape, by breach of prison or otherwise, out of the custody of a person acting under a warrant issued or endorsed in pursuance of this Act, he may be re-taken in the same manner as a person accused of a crime against the law of that part of Her Majesty's dominions to which he escapes may be re-taken upon an escape.

A person guilty of the offence of escaping or of attempting to escape, or of aiding or attempting to aid a prisoner to escape, by breach of prison or otherwise, from custody under any warrant issued or endorsed in pursuance of this Act, may be tried in any of the following parts of Her Majesty's dominions, namely, the part to which and the part from which the prisoner is being removed, and the part in which the prisoner escapes and the part in which the offender is found.

Evidence.

Depositions to be evidence, and authentication of depositions and warrants.

29. A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act.

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence.

Warrants and depositions, and copies thereof, and official certificates of or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act if they are authenticated in manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate, or officer of the part of Her Majesty's dominions in which the same are issued, taken, or made, and are authenticated either by the oath of some witness, or by being sealed with the official seal of a Secretry of State, or with the public seal of a British possession, or with the official seal of a Governor of a British possession, or of a Colonial Secretary, or of some Secretary or minister administering a department of the Government of a British possession

And all courts and magistrates shall take judicial notice of every such seal as is in this section mentioned, and shall admit in evidence without further proof the documents authenticated by it.

Miscellaneous.

Provision as to exercise of jurisdiction by Magistrates

30. The jurisdiction under Part One of this Act to hear a case and commit a fugitive to prison to await his return shall be exercised,—

(1) In England, by a chief magistrate of the metropolitan police courts or one of the other magistrates of the metropolitan police court at Bow Street; and

(2) In Scotland, by the sheriff or sheriff substitute of the country of Edinburgh; and

(3) In Ireland, by one of the police magistrates of the Dublin metropolitan police district; and

(4) In a British possession, by any judge, justice of the peace, or other officer having the like jurisdiction as one of the magistrates of the metropolitan police court in Bow Street, or by such other court, judge, or magistrate as may be from time to time provided by an Act or ordinance passed by the legislature of that possession.

If a fugitive is apprehended and brought before a magistrate who has no power to exercise the jurisdiction under this Act in respect of that fugitive, that magistrate shall order the fugitive to be brought before some magistrate having that jurisdiction, and such order shall be obeyed.

Power as to making and revocation of Orders in Council.

31. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes of this Act, and to revoke and vary any Order so made, and every Order so made shall, while it is in force, have the same effect as if it were enacted in this Act.

An Order in Council made for the purposes of this Act shall be laid before Parliament as soon as may be after it is made if Parliament is then in session, or if not, as soon as may be after the commencement of the then next session of Parliament.

Power of legislature of British possession to pass laws for carrying into effect this Act.

32. *If the legislature of a British possession pass any Act or ordinance—*

(1) *For defining the offences committed in that possession to which this Act or any part thereof is to apply;* or

(2) For determining the Court, judge, magistrate, officer, or person by whom and the manner in which any jurisdiction or power under this Act is to be exercised; or

(3) For payment of the costs incurred in returning a fugitive or a prisoner, or in sending him back if not prosecuted or if acquitted or otherwise, in the execution of this Act; or

(4) In any manner for the carrying of this Act or any part thereof into effect in that possession,

it shall be lawful for Her Majesty by Order in Council to direct, if it seems to Her Majesty in Council necessary or proper for carrying into effect the objects of this Act, that such Act or Ordinance, or any part thereof, shall with or without modification or alteration be recognised and given effect to throughout Her Majesty's dominions and on the high seas as if it were part of this Act.

Application of Act.

Application of Act to offences at sea or triable in several parts of Her Majesty's dominions.

33. Where a person accused of an offence can, by reason of the nature of the offence, or of the place in which it was committed, or otherwise, be, under this Act or otherwise, *tried for or in respect of the* offence in more than one part of Her Majesty's dominions, a *warrant for the apprehension of such person may be issued* in any part of Her Majesty's dominions in which he can, if he happens to be there, be tried; and each part of this Act shall apply as if the offence has been committed in the part of Her Majesty's dominions where such warrant is issued, and such person may be apprehended and returned in pursuance of this Act, notwithstanding that in the place in which he is apprehended a Court has jurisdiction to try him:

Provided that if such person is apprehended in the United Kingdom a Secretary of State, and if he is apprehended in a British possession, the governor of such possession, may, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interest of justice so to do, order such person to be tried in the part of Her Majesty's dominions in which he is apprehended, and in such case any warrant previously issued for his return shall not be executed.

Application of Act to convicts.

34. Where a person convicted by a Court in any part of Her Majesty's dominions of an offence committed either in Her Majesty's dominions or elsewhere, is unlawfully at large before the expiration of his sentence, each part of this Act shall apply

to such person, so far as is consistent with the tenor thereof, in like manner as it applies to a person accused of the like offence committed in the part of Her Majesty's dominions in which such person was convicted.

Application of Act to removal of person triable in more than one part of Her Majesty's dominions.

35. Where a person accused of an offence is in custody in some part of Her Majesty's dominions, and the offence is one for or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may under this Act or otherwise be tried in some other part of Her Majesty's dominions, in such case a superior court, and also if such person is in the United Kingdom a Secretary of State, and if he is in a British possession the Governor of that possession, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interest of justice so to do, may by warrant direct the removal of such offender to some other part of Her Majesty's dominions in which he can be tried, and the offender may be returned, and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a fugitive returned in pursuance of Part One of this Act, and the warrant were a warrant for the return of such fugitive, and the provisions of this Act shall apply accordingly.

Application of Act to foreign jurisdiction.

36. It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Act shall apply as if, subject to the conditions, exceptions, and qualifications (if any) contained in the Order, any place out of Her Majesty's dominions in which Her Majesty has jurisdiction, and which is named in the Order, were a British possession, and to provide for carrying into effect such application.

Application of Act to, and execution of warrant in United Kingdom, Channel Islands, and Isle of Man.

37. This Act shall extend to the Channel Islands and Isle of Man as if they were part of England and of the United Kingdom, and the United Kingdom and those Islands shall be deemed for the purpose of this Act to be one part of Her Majesty's dominions; and a warrant endorsed in pursuance of Part One of this Act may be executed in every place in the United Kingdom and the said Islands accordingly.

Application of Act to past offences.

38. This shall apply where an offence is committed before the commencement of this Act, or, in the case of Part Two of this Act, before the application of that part to a British possession or to the offence, in like manner as if such offence had been committed after such commencement or application.

Definitions and Repeal.

Definition of terms.

"Secretary of State."

39. In this Act unless the context otherwise requires,—

The expression "Secretary of State" means one of Her Majesty's Principal Secretaries of State;

"British possession."

The expression "British possession" means any part of Her Majesty's dominions, exclusive of the United Kingdom, the Channel Islands and Isle of Man; all territories and places within Her Majesty's dominions which are under one Legislature shall be deemed to be one British possession and one part of Her Majesty's dominions:

"Legislature."

The expression "legislature," where there are local legislatures as well as central legislatures, means the central legislature only:

"Governor."

The expression "Governor" means any person or persons administering the Government of a British possession, and includes the Governor and Lieutenant Governor of any part of India:

"Constable."

The expression "constable" means, out of England, any policeman or officer having the like powers and duties as a constable in England:

"Magistrate."

The expression "magistrate" means, except in Scotland, any justice of the peace, and in Scotland means a sheriff or sheriff substitute and in the Channel Islands, Isle of Man, and a British possession means any person having authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial:

"Offence punishable on indictment."

The expression "offence punishable on indictment" means, as regards India, an offence punishable on a charge or otherwise:

"Oath."

The expression "oath" includes affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing, and the expression "swear" and other words relating to an oath or swearing shall be construed accordingly:

"Deposition."

The expression "deposition" includes any affidavit, affirmation, or statement made upon oath as above defined.

"Superior court."

The expression "superior court" means:

(1) In England, Her Majesty's Court of Appeal and High Court of Justice; and

(2) In Scotland, the High Court of Justiciary; and

(3) In Ireland, Her Majesty's Court of Appeal and Her Majesty's High Court of Justice at Dublin; and

(4) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or Ordinance of that possession.

Commencement of Act.

40. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-two, which date is in this Act referred to as the commencement of this Act.

Repeal of Act in Schedule.

41. The Act specified in the Schedule to this Act is hereby repealed as from the commencement of this Act.

Provided that this repeal shall not affect—

(*a*) Any warrant duly endorsed or issued, nor anything duly done or suffered before the commencement of this Act; nor

(*b*) Any obligation or liability incurred under an enactment hereby repealed; nor

(*c*) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor

(*d*) Any legal proceeding or remedy in respect of any such warrant, obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such warrant may be endorsed and executed, and any such legal proceeding and remedy may be carried on, as if this Act had not passed.

SCHEDULE.

Year and Chapter.	Title.
6 and 7 Vict., c. 34.	An Act for the better apprehension of certain offenders.

"British possession."

The expression "British possession" means any part of Her Majesty's dominions, exclusive of the United Kingdom, the Channel Islands and Isle of Man; all territories and places within Her Majesty's dominions which are under one Legislature shall be deemed to be one British possession and one part of Her Majesty's dominions:

"Legislature."

The expression "legislature," where there are local legislatures as well as central legislatures, means the central legislature only:

"Governor."

The expression "Governor" means any person or persons administering the Government of a British possession, and includes the Governor and Lieutenant Governor of any part of India:

"Constable."

The expression "constable" means, out of England, any policeman or officer having the like powers and duties as a constable in England:

"Magistrate."

The expression "magistrate" means, except in Scotland, any justice of the peace, and in Scotland means a sheriff or sheriff substitute and in the Channel Islands, Isle of Man, and a British possession means any person having authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial:

"Offence punishable on indictment."

The expression "offence punishable on indictment" means, as regards India, an offence punishable on a charge or otherwise:

"Oath."

The expression "oath" includes affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing, and the expression "swear" and other words relating to an oath or swearing shall be construed accordingly:

"Deposition."

The expression "deposition" includes any affidavit, affirmation, or statement made upon oath as above defined.

"Superior court."

The expression "superior court" means:

(1) In England, Her Majesty's Court of Appeal and High Court of Justice; and

(2) In Scotland, the High Court of Justiciary; and

(3) In Ireland, Her Majesty's Court of Appeal and Her Majesty's High Court of Justice at Dublin; and

(4) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or Ordinance of that possession.

Commencement of Act.

40. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-two, which date is in this Act referred to as the commencement of this Act.

Repeal of Act in Schedule.

41. The Act specified in the Schedule to this Act is hereby repealed as from the commencement of this Act.

be punished with imprisonment for a term which may extend to six months, or with fine, or both.

(2) Whoever manages or assists in the management of an unlawful association, or promotes or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

NOTE.

The accused visited a village and addressed the people at the village gate. He stated that the British *raj* had come to an end or at any rate was about to do so, and exhorted the people to hold a *diwan* and take steps to establish an independent State at that village. After staying at the village for two or three days he went away and immediately after his departure an unlawful association was formed of which his son was made the Secretary, and his brother, the Vice-President, other office-holders being also appointed. The accused also told the people that he had given Rs. 2,000 towards the movement which had been paid to his son and people could go to the latter to have their names registered. It appeared that Rs. 860 had actually been paid by the accused to his son at that time, which payment was apparently made as a subscription and for the purpose of being utilized for the objects of the association, the formation of which accused was advocating. The question was whether the accused's words and actions constituted an offence under this Act, or the Penal Code. It was held that the accused's act did not come within the purview of either clause (1) or (2) of s. 17 of this Act, as he did not contribute to the funds or assist in the management of an *existing* association. It was held, however, that the accused 'instigated' the formation of an association which was unlawful under s. 15 (2) (a) of this Act, and therefore abetted its formation (ss. 107 and 108 of the Indian Penal Code) and as any one becoming a member of that association or contributing funds to it would be guilty of an offence under s. 17 (1) of this Act, accused's act amounted to an abetment of an offence. It was further held that as this abetment was of the commission of an offence by a class of persons exceeding ten, the accused had brought himself within the ambit of s. 117 of the Penal Code and was liable to the punishment provided therein.[1]

Continuance of association.

18. An association shall not be deemed to have ceased to exist by reason only of any formal act of dissolution or change of title, but shall be deemed to continue so long as any actual combination for the purposes of such association continues between any members thereof.

[1] *Mihan Singh*, (1923) 5 Lah. 1.

THE INDIAN CRIMINAL LAW AMENDMENT ACT.

(ACT No. XIV OF 1908.)

WHEREAS it is expedient to provide for the more speedy trial of certain offences, and for the prohibition of associations dangerous to the public peace; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Indian Criminal Law Amendment Act, 1908.

(2) It extends to the Provinces of Bengal and of Eastern Bengal and Assam; but the Local Government of any other Provinces may, at any time, by notification in the official Gazette and extend the whole or any part thereof to that Province.

[*Clause 3 repealed by Act V of 1922, s. 3.*]

[Clause (2) was amended by Act XXXVIII of 1920.]

PART I.

[*Repealed by Act V of 1922, s. 3.*]

PART II.

Unlawful Associations.

Definitions.

15. In this Part:—

(1) "association" means any combination or body of persons, whether the same be known by any distinctive name or not; and

(2) "unlawful association" means an association—

(*a*) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or

(*b*) which has been declared to be unlawful by the Local Government[1] under the powers hereby conferred.

Power to declare association unlawful.

16. If the Local Government[1] is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Local Government[1] may, by notification in the official Gazette, declare such association to be unlawful.

Penalties.

17. (1) Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations of any such association, shall

[1] Substituted for the words "Governor-General in Council" by Act XXXVIII of 1920.

CHAPTER II.

Surrender of Fugitive Criminals in case of Foreign States.

Requisition for surrender.

3. (1) Where a requisition is made to the Government of India or to any Local Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State, who is in, or who is suspected of being in British India, the Government of India or the Local Government, as the case may be, may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the crime if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case.

NOTE.

An order issued under this sub-section by the Government of Bengal upon a requisition made to the Government of India is held to be invalid, and cannot be "ratified" by a subsequent order of the Government of India. Where, however, the latter order directs the Magistrate in pursuance of the former order "and of the statutory provisions in that behalf to enquire into the said case," the Government gives valid effect to its intention, and the Magistrate has jurisdiction to enquire. The only Government competent to issue the order for inquiry is the Government to whom the foreign State has made a requisition. This function must be performed strictly, and cannot be delegated.[1]

Summons or warrant for arrest.

(2) The Magistrate so directed shall issue a summons or warrant for the arrest of the fugitive criminal according as the case appears to be one in which a summons or warrant would ordinarily issue.

Inquiry by Magistrate.

(3) When such criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by the Court of Session or High Court, and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive criminal, including any evidence to show that the crime of which such criminal is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

Committal.

(4) If the Magistrate is of opinion that a *prima facie* case is made out in support of the requisition, he may commit the fugitive criminal to prison to await the orders of the Government of India or the Local Government, as the case may be.

NOTE.

The Magistrate must report the case to the Local Government.[2]

Bail.

(5) If the Magistrate is of opinion that a *prima facie* case is not made out in support of the requisition, or if the case is one which is bailable under the provisions of the Code of Criminal Procedure for the time being in force, the Magistrate may release the fugitive criminal on bail.

[1] *Rudolf Stallmann*, (1911) 39 Cal. 164.

[2] *Ram Sahai*, (1868) P. R. No. 10 of 1868.

THE INDIAN EXTRADITION ACT.

(ACT XV OF 1903).

WHEREAS it is expedient to provide for the more convenient administration in British India of the Extradition Acts, 1870 and 1873, and for the Fugitive Offenders Act, 1881;

and whereas it is also expedient to amend the law relating to the extradition of criminals in cases to which the Extradition Acts, 1870 and 1873, do not apply;

It is hereby enacted as follows:—

CHAPTER I.

Preliminary.

Short title.

1. (1) This Act may be called the Indian Extradition Act, 1903.

Extent and commencement.

(2) It extends to the whole of British India (including British Baluchistan, the Santhal Parganas and the Parganas of Spitie); and

(3) It shall come into force on such day as the Governor-General in Council, by notification in the Gazette of India, may direct.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

(a) "European British subject" means a European British subject as defined by the Code of Criminal Procedure for the time being in force:

(b) "extradition offence" means any such offence as is described in the first schedule.

(c) "Foreign State" means a State to which, for the time being, the Extradition Acts, 1870 and 1873, apply:

(d) "High Court" means the High Court as defined by the Code of Criminal Procedure for the time being in force:

(e) "Offence" includes any act wheresoever committed which would, if committed in British India, constitute an offence: and

(f) "Rules" include prescribed forms.

NOTE.

Clause (c).—Chandradagore is a 'Foreign State' as defined by this clause, and the provisions of Chapter II thereof must be followed before a fugitive offender can be surrendered to the French authorities.[1]

Clause (e).—As to the wider interpretation assigned to the word 'offence' see *Adams*.[2]

[1] *Callington*, (1920) 48 Cal. 329.

[2] (1903) 26 Mad. 607.

NOTE.

A Magistrate is not warranted in keeping people in custody on a mere allegation that criminal proceedings against them are pending in a foreign state. Unless proper steps be taken against persons detained under the Act, they must be released.[1]

Power to Magistrate to issue warrant of arrest in certain cases.

4. (1) Where it appears to any Magistrate of the first class or any Magistrate specially empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is a fugitive criminal of a Foreign State, he may, if he thinks fit, issue a warrant for the arrest of such person, on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the crime of which he is accused or has been convicted had been committed within the local limits of his jurisdiction.

NOTE.

A Magistrate may issue a warrant when the person to be arrested is within his jurisdiction. Section 4 merely provides a preliminary procedure. Under it an arrest may be effected before the receipt of the requisition mentioned in s. 3, otherwise the criminal might escape The two sections do not overlap.[2]

Issue of warrant to be reported forthwith.

(2) The Magistrate shall forthwith report the issue of a warrant under this section to the Local Government.

Person arrested not to be detained unless order received

(3) A person arrested on a warrant issued under this section shall not be detained more than two months unless within that period the Magistrate receives an order made with reference to such person under section 3, (sub-section 1).

Bail.

(4) In the case of a person arrested or detained under this section the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the crime of which he is accused or has been convicted.

Power of Government to refuse to issue order under section 3 when crime of political character.

5. (1) If the Government of India or any Local Government is of opinion that the crime of which any fugitive criminal of a Foreign State is accused or alleged to have been convicted is of a political character, it may, if it thinks fit, refuse to issue any order under section 3, (sub-section 1).

Power of Government to discharge any person in custody at any time.

(2) The Government of India or the Local Government may also at any time stay any proceedings taken under this Chapter and direct any warrant issued under this Chapter to be cancelled and the person for whose arrest such warrant has been issued to be discharged.

[1] *Kaladgi Magistrate's Return*, (1877) Unrep. Cr. C. 124.

[2] *Rudolf Stallmann*, (1911) 39 Cal. 164.

NOTE.

The High Court has the fullest discretion, having regard to the provisions relating to bail in the Criminal Procedure Code, to grant bail to a prisoner against whom proceedings are pending under this Act.[1]

Magistrate's report.

(6) The Magistrate shall report the result of his inquiry to the Government of India, or the Local Government, as the case may be, and shall forward, together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Government.

NOTE.

This sub-section is not a substitute for and does not interfere with proceedings taken under s. 491 of the Code of Criminal Procedure. Section 491 is applicable to cases under the Indian Extradition Act.[2]

Reference to High Court if Government thinks necessary.

(7) If the Government of India or the Local Government, as the case may be, is of opinion that such report or written statement raises an important question of law, it may make an order referring such question of law to such High Court as may be named in the order, and the fugitive criminal shall not be surrendered until such question has been decided.

Warrant for surrender.

(8) If, upon receipt of such report and statement or upon the decision of any such question, the Government of India or the Local Government, as the case may be, is of opinion that the fugitive criminal ought to be surrendered, it may issue a warrant for the custody and removal of such criminal and for his delivery at a place and to a person to be named in the warrant.

Lawfulness of custody and retaking under warrant for surrender.

(9) It shall be lawful for any person to whom a warrant is directed in pursuance of sub-section (8), to receive, hold in custody and convey the person mentioned in the warrant, to the place named in the warrant, and, if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of British India may be re-taken upon an escape.

Discharge of fugitive criminal committed to prison after two months.

(10) If such a warrant as is prescribed by sub-section (8) is not issued and executed in the case of any fugitive criminal, who has been committed to prison under sub-section (4), within two months after such committal, the High Court may, upon application made to it on behalf of such fugitive criminal, and upon proof that reasonable notice of the intention to make such application has been given to the Government of India or the Local Government, as the case may be, order such criminal to be discharged, unless sufficient cause is shown to the contrary.

[1] *Rudolf Stallmann*, (1911) 39 Cal. 164. (1911) 38 Cal. 547.
[2] *Ibid*, distinguishing *Rudolf Stallmann*.

NOTE.

A Magistrate is not warranted in keeping people in custody on a mere allegation that criminal proceedings against them are pending in a foreign state. Unless proper steps be taken against persons detained under the Act, they must be released.[1]

Power to Magistrate to issue warrant of arrest in certain cases.

4. (1) Where it appears to any Magistrate of the first class or any Magistrate specially empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is a fugitive criminal of a Foreign State, he may, if he thinks fit, issue a warrant for the arrest of such person, on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the crime of which he is accused or has been convicted had been committed within the local limits of his jurisdiction.

NOTE.

A Magistrate may issue a warrant when the person to be arrested is within his jurisdiction. Section 4 merely provides a preliminary procedure. Under it an arrest may be effected before the receipt of the requisition mentioned in s. 3, otherwise the criminal might escape. The two sections do not overlap.[2]

Issue of warrant to be reported forthwith.

(2) The Magistrate shall forthwith report the issue of a warrant under this section to the Local Government.

Person arrested not to be detained unless order received.

(3) A person arrested on a warrant issued under this section shall not be detained more than two months unless within that period the Magistrate receives an order made with reference to such person under section 3, (sub-section 1)

Bail.

(4) In the case of a person arrested or detained under this section the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the crime of which he is accused or has been convicted.

Power of Government to refuse to issue order under section 3 when crime of political character

5 (1) If the Government of India or any Local Government is of opinion that the crime of which any fugitive criminal of a Foreign State is accused or alleged to have been convicted is of a political character, it may, if it thinks fit, refuse to issue any order under section 3, (sub-section 1).

Power of Government to discharge any person in custody at any time.

(2) The Government of India or the Local Government may also at any time stay any proceedings taken under this Chapter and direct any warrant issued under this Chapter to be cancelled and the person for whose arrest such warrant has been issued to be discharged.

[1] *Kalaji Magistrate's Return*, (1877) Unrep. Cr. C. 124.

[2] *Rudolf Stallmann*, (1911) 39 Cal. 164.

6. The expressions "the Police Magistrate" and "the Secretary of State" in section 3 of the Extradition Act, 1870, shall be read as referring respectively to the Magistrate directed to inquire into a case under section 3 of this Act, and to the Government of India or the Local Government, as the case may be.

References to "Police Magistrate" and "Secretary of State" in section 3 of Extradition Act 1870.

CHAPTER III.

Surrender of Fugitive Criminals in case of States other than Foreign States.

7. (1) Where an extradition offence has been committed or is supposed to have been committed by a person, not being a European British subject, in the territories of any State not being a Foreign State and such person escapes into or is in British India, and the Political Agent in or for such State issues a warrant, addressed to the District Magistrate of any district in which such person is believed to be, or if such person is believed to be in any Presidency-town to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant such Magistrate shall act in pursuance of such warrant and may give directions accordingly.

Issue of warrant by Political Agents in certain cases.

NOTE.

Extradition is only a means of bringing the accused before the tribunal having jurisdiction. Extradition proceedings could never limit the jurisdiction of the Court if there is nothing on the face of the proceedings to warrant the conclusion that any limitation has been imposed. The mere circumstance that one particular offence is mentioned when extradition is demanded does not necessarily lead to the conclusion that extradition is allowed for the purpose of the trial only on that charge, and on no other charge whatever. And in any event it could not exclude a trial and conviction on any charge, which the facts disclosed in the extradition proceedings would suffice to sustain.[1]

A District Magistrate who is addressed with a view to the execution of a warrant issued by a Political Agent of a Native State under clause (1) of this section must act in pursuance of such warrant and has no authority to ascertain whether a *prima facie* case exists against the accused or not.[2] Where a warrant has been issued by the Political Agent under this section its execution by the District Magistrate in British India, in accordance with the Act, is an executive act, and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal, but if the latter considers himself aggrieved thereby, he can invoke the action of the Government under s. 15.[3]

On a requisition made to him by a Native State, the Political Agent, who was also a District Magistrate, issued a warrant under this section to arrest the accused. The latter surrendered of his own accord and the warrant was returned unexecuted. The Political Agent then issued a certificate under s. 188 of the Cri[illegible] [illegible] tried in British India. Subsequently, [illegible] and the Political Agent accordingly ordered the accused to be [illegible] It was held that it was not open to the Political Agent to re-call the certificate issued by him

[1] *Khoda Uma*, (1892) 17 Bom. 369, 374, 375.

[2] *Giyan Chand*, (1908) *P. R. No. 3 of 1909.*

[3] *Gulli Sahu*, (1914) 42 Cal. 793.

under s. 168 of the Criminal Procedure Code, 1898, and that the order passed by him allowing the trial in the Native State was unsustainable.[1]

Power to grant bail.—A British Indian Magistrate to whom a warrant has been addressed under this section has no power to admit to bail a person arrested under it apart from the provisions of ss. 8 and 8A.[2]

Execution of such warrant.

(2) A warrant issued as mentioned in sub-section (1) shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants, and the accused person, when arrested, shall be produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, who shall record any statement made by him; such accused person shall then, unless released in accordance with the provisions of this act, be forwarded to the place and delivered to the person or authority indicated in the warrant.

NOTE.

Where the accused were charged with receiving property stolen in the commission of a dacoity in Indore but it appeared that the property was received in British India, it was held that the accused could not be surrendered under the warrant of the Political Agent.[3]

Proclamation and attachment in case of persons absconding.

(3) The provisions of the Code of Criminal Procedure for the time being in force in relation to proclamation and attachment in the case of persons absconding shall, with any necessary modifications, apply where any warrant has been received by a District Magistrate under this section as if the warrant had been issued by himself.

Release on giving security.

8. (1) Where a Political Agent had directed by endorsement on any such warrant that the person for whose arrest it is issued may be released on executing a bond with sufficient sureties for his attendance before a person or authority indicated in this behalf in the warrant at a specified time and place the Magistrate to whom the warrant is addressed shall on such security being given release such person from custody.

Magistrate to retain bond.

(2) When security is taken under this section, the Magistrate shall certify the fact to the Political Agent who issued the warrant, and shall retain the bond.

Re-arrest in case of default.

(3) If the person bound by any such bond does not appear at the time and place specified, the Magistrate may, on being satisfied as to his default, issue a warrant directing that he be re-arrested and handed over to any person authorized by the Political Agent to take him into custody.

[1] *Vazirsaheb Allisaheb Jhagirdar*, (1912) 14 Bom. L. R. 377, 1 Bom. Cr. C. 140.

[2] *In re Murlidhar Bhagwandas*, (1918) 20 Bom. L. R. 1009.

[3] *Hukam Chand*, (1873) P. R. No. 14 of 1873.

(4) In the case of any bond executed under this section, the Magistrate may exercise the powers conferred by the Code of Criminal Procedure for the time being in force in relation to taking a deposit in lieu of the execution of a bond and with respect to the forfeiture of bonds and the discharge of sureties.

Deposit in lieu of bond, and forfeiture of bond.

NOTE.

Where a person was arrested upon a warrant issued by a Political Agent under this Act, and was placed before a Magistrate, and such Magistrate passed an order releasing him on bail and directing him to appear before the Political Agent on a certain date, although there was no endorsement on the warrant, giving the Magistrate power to pass such an order, it was held that in the absence of such an endorsement under this section the Magistrate had no authority to pass such an order.[1]

8-A. Notwithstanding anything contained in section 7, sub-section (2) or in section 8, when an accused person arrested in accordance with the provisions of section 7 is produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, and the statement (if any) of such accused person has been recorded, such Magistrate may, if he thinks fit, before proceeding further report the case to the Local Government and, pending the receipt of orders on such report, may detain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required.

Power to report case for order of local Government.

9. Where a requisition is made to the Government of India or to any Local Government by or on behalf of any State not being a Foreign State, for the surrender of any person accused of having committed an offence in the territories of such State, such requisition shall (except in so far as relates to the taking of evidence to show that the offence is of a political character or is not an extradition crime) be dealt with in accordance with the procedure prescribed by section 3 for requisitions made by the Government of any Foreign State as if it were a requisition made by any such Government under that section:

Requisitions by States not being Foreign States.

Provided that, if there is a Political Agent in or for any such State, the requisition shall be made through such Political Agent.

NOTE.

This section only applies when a requsition has been made to the Government of India or to a Local Government and not when a warrant has been addressed to the District Magistrate.[2]

10. (1) If it appears to any Magistrate of the first class or any Magistrate empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is accused or suspected of having committed an offence in any State not being a Foreign State and that such person may lawfully be surrendered to such State, or that a warrant may be issued for his arrest under

Power to Magistrates to issue warrants of arrest in certain cases.

[1] *Raj Kumar Dutt* v. *Tokhal Sijo*, (1907) 12 C. W. N. 602, 7 C. L. J. 171.

[2] *Jaipal Bhagat*, (1921) 1 Pat. 57.

section 7, the Magistrate may, if he thinks fit, issue a warrant for the arrest of such person on such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the offence had been committed within the local limits of his jurisdiction.

Issue of warrant to be reported forthwith

(2) The Magistrate shall forthwith report the issue of a warrant under this section, if the offence appears or is alleged to have been committed in the territories of a State for which there is a Political Agent, to such Political Agent, and in other cases to the Local Government.

Limit of time of detention of person arrested.

(3) A person arrested on a warrant issued under this section shall not, without the special sanction of the Local Government, be detained more than two months, unless within such period the Magistrate receives an order made with reference to such person in accordance with the procedure prescribed by section 9, or a warrant for the arrest of such person under section 7.

Bail.

(4) In the case of a person arrested or detained under this section, the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner [illegible] such person were accused of committing in British India the offence [illegible] he is charged.

NOTE.

This section applies only if the warrant issued under s. 7 is [illegible] not being one of the offences mentioned in Schedule I of this Act [illegible] charge does not fall within s. 7.[1] Where a person is arrested [illegible] s. 54 (g) of the Criminal Procedure Code or under s. [illegible] 1902, and detained by a Magistrate under s. [illegible] to release the arrested person on bail under s. [illegible]

Surrender of person accused of, or undergoing sentence for offence in British India

11. (1) A person accused of an [illegible] the offence for which [illegible] sentence under [illegible] be surrendered [illegible] Political [illegible] on behalf [illegible] 9, except on the condition [illegible] of India or the Local [illegible] trial for the offence [illegible] treaty

Provided that [illegible] the execution of a [illegible]

[1] *Jaspal Bhawar* [illegible]

(2) On the surrender of a person undergoing sentence under a conviction in British India, his sentence shall be deemed to be suspended until the date of his re-surrender, *when it shall revive* and have effect for the portion thereof which was unexpired at the time of his surrender.

Suspension of sentence on surrender.

12. The provisions of this Chapter with reference to accused persons shall, with any necessary modifications, apply to the case of a person who having been convicted of an offence in the territories of any State not being a Foreign State, has escaped into or is in British India before his sentence has expired.

Application of Chapter to convicted persons.

13. Every person who is accused or convicted of abetting or attempting to commit any offence shall be deemed, for the purposes of this Chapter, to be accused or convicted of having committed such offence, and shall be liable to be arrested and surrendered accordingly.

Abetment and attempt.

14. It shall be lawful for any person to whom a warrant is directed in pursuance of the provisions of this Chapter, to receive, hold in custody and convey the person mentioned in the warrant, to the place named in the warrant, and, if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of British India may be re-taken upon an escape.

Lawfulness of custody and re-taking under warrant issued under Chapter.

15. The Government of India or the Local Government, may, by order, stay any proceedings taken under this Chapter, and may direct any warrant issued under this Chapter to be cancelled, and the person for whose arrest such warrant has been issued to be discharged.

Power of Government to stay proceedings and discharge persons in custody.

NOTE.

The Bombay High Court has laid down that this section ousts the jurisdiction of the High Court to inquire into the propriety of the warrant, but leaves open the question of the High Court's power to interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal.[1] Similarly, the Calcutta High Court agreeing with this view holds that where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but is in fact without jurisdiction, such order is revisable by the Court at the instance of the party whose liberty is affected by it.[2] The Patna High Court has held that although this section empowers the Government of India and the Local Government to stay proceedings taken under Chapter III of the Act and to direct any warrant to be cancelled and the accused person to be arrested, this does not oust the jurisdiction of the High Court to interfere in a case where action under the Act has not been taken under a valid warrant.[3]

There is no provision in this Act making an inquiry by a competent British Court in British India, into the truth of the accusation, whether in the presence of the accused or otherwise, a condition precedent to the issue and execution of the warrant of the Political Agent under this section.[4]

[1] *Huseinally Niazally*, (1905) 7 Bom. L. R. 463.
[2] *Gulli Sahu*, (1913) 41 Cal. 400.
[3] *Jaipal Bhagat*, (1921) 1 Pat. 57.
[4] *Huseinally Niazally*, supra.

Application of Chapter to offences committed before its commencement.

16. The provisions of this Chapter shall apply to an offence or to an extradition offence, as the case may be, committed before the passing of this Act, and to an offence in respect of which a Court of British India has concurrent jurisdiction.

Receipt in evidence of exhibits, depositions and other documents.

17. (1) In any proceedings under this Chapter, exhibits and depositions, (whether received or taken in the presence of the person against whom they are used or not) and copies thereof, and official certificates of facts and judicial documents stating facts, may, if duly authenticated, be received as evidence.

Authentication of the same.

(2) Warrants, depositions or statements on oath which purport to have been issued, received or taken by any Court of Justice outside British India, or copies thereof, and certificates of or judicial documents stating the fact of, conviction before any such Court, shall be deemed duly authenticated,—

(a) if the warrant purports to be signed by a Judge, Magistrate or officer of the State where the same was issued or acting in or for such State:

(b) if the depositions or statements or copies thereof purport to be certified under the hand of a Judge, Magistrate or officer of the State where the same were taken, or acting in or for such State, to be the original depositions or statements or to be true copies thereof, as the case may require:

(c) if the certificate of, or judicial document stating the fact of, a conviction purports to be certified by a Judge, Magistrate or officer of the State where the conviction took place or acting in or for such State:

(d) if the warrants, depositions, statements, copies, certificates and judicial documents, as the case may be, are authenticated, by the oath of some witness or by the official seal of a minister of the State where the same were respectively issued, taken or given.

Definition of "warrant."

(3) For the purposes of this section "warrant" includes any judicial document authorizing the arrest of any person accused or convicted of an offence.

NOTE

In all cases where enquiries are held by a Magistrate with a view to extraditing an accused person, it would be desirable that they should, if possible, be present thereat.[1]

Chapter not to derogate from treaties.

18 Nothing in this Chapter shall derogate from the provisions of any treaty for the extradition of offenders, and the procedure provided by any such treaty shall be followed in any case to which it applies, and the provisions of this Act shall be modified accordingly.

[1] *Hussinally Niamally*, (1905) 7 Bom. L. R. 463.

NOTE.

The offence of cheating is an extradition offence so far as British India is concerned in view of this section, notwithstanding its omission from Article 4 of the Treaty between the British Indian Government and the Hyderabad State.[1]

CHAPTER IV.

Rendition of Fugitive Offenders in His Majesty's Dominions.

Application of Fugitive Offenders Act, 1881.

19. For the purpose of applying and carrying into effect in British India the provisions of the Fugitive Offenders Act, 1881, the following provisions are hereby made :—

(a) the powers conferred on "Governors" of British possessions may be exercised by any Local Government :

(b) the powers conferred on a "Superior Court" may be exercised by any Judge of a High Court :

(c) the powers conferred on a "Magistrate" may be exercised by any Magistrate of the first class or by any Magistrate empowered by the Local Government in that behalf : and

(d) the offences committed in British India to which the Act applies, are piracy, treason, and any offence punishable under the Indian Penal Code with rigorous imprisonment for a term of twelve months or more or with any greater punishment.

CHAPTER V.

Offence committed at Sea.

Requisition of surrender in case of offence committed at sea.

20. Where the Government of any State outside India makes a requisition for the surrender of a person accused of an offence committed on board any vessel on the high seas which comes into any port of British India, the Local Government and any Magistrate having jurisdiction in such port and authorized by the Local Government in this behalf may exercise the powers conferred by this Act.

CHAPTER VI.

Execution of commissions issued by Criminal Courts outside British India.

Execution of commissions issued by Criminal Courts outside British India.

21. The testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in any country or place outside British India in like manner as it may be obtained in any civil matter under the provisions of the Code of Civil Procedure for the time being in force with respect to commissions, and the provisions of that Code relating thereto shall be construed as if the term "suit" included a criminal proceeding :

[1] *In re Murlidhar Bhagwandas*, (1918) 20 Bom. L. R. 1009.

Provided that this section shall not apply when the evidence is required for a Court or tribunal in any State outside India other than a British Court and the offence is of a political character.

CHAPTER VII.

Supplemental.

Power to make rules.

22. (1) The Governor-General in Council may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the removal of prisoners accused or in custody under this Act, and their control and maintenance until such time as they are handed over to the persons named in the warrant as are entitled to receive them;

(*b*) the seizure and disposition of any property which is the subject of, or required for proof of, any alleged offence to which this Act applies;

(*c*) the pursuit and arrest in British India, by officers of the Government or other persons authorized in this behalf, of persons accused of offence committed elsewhere; and

(*d*) the procedure and practice to be observed in extradition proceedings.

(3) Rules made under this section shall be published in the Gazette of India and shall thereupon have effect as if enacted by this Act.

Detention of persons arrested under section 54, clause *seventhly*, Act V of 1898.

23. Notwithstanding anything in the Code of Criminal Procedure, 1898, any person arrested without an order from a Magistrate and without a warrant, in pursuance of the provisions of section 54, clause *seventhly*, of the said Code, may, under the orders of a Magistrate within the local limits of whose jurisdiction such arrest was made, be detained in the same manner and subject to the same restrictions as a person arrested on a warrant issued by such Magistrate under section 10.

Repeals

24. The Acts mentioned in the second schedule are repealed to the extent specified in the fourth column thereof.

THE FIRST SCHEDULE.

EXTRADITION OFFENCES.

[*See Section 2, clause (b), and Chapter III (Surrender of Fugitive Criminals in case of States other than Foreign States).*]

[The sections referred to are the sections of the Indian Penal Code.]

Frauds upon creditors (section 206).

Resistance to arrest (section 224.)

Offences relating to coin and stamps (sections 230 to 263-A).

Culpable homicide (sections 299 to 304).

Attempt to murder (section 307).

Thagi (sections 310, 311).

Causing miscarriage, and abandonment of child (sections 312 to 317).

Causing hurt (sections 323 to 333).

Wrongful confinement (sections 347, 348).

Kidnapping and slavery (sections 360 to 373).

Rape and unnatural offences (sections 375 to 377).

Theft, extortion, robbery, etc., (sections 378 to 414).

Cheating (sections 415 to 420).

Fraudulent deeds, etc., (sections 421 to 424).

Mischief (sections 425 to 440).

Lurking house-trespass (sections 443, 446).

Forgery, using forged documents, etc., (sections 463 to 477-A).

Desertion from any unit of Indian State Forces declared by the Governor-General in Council, by notification in the Gazette of India, to be a unit desertion from which is an extradition offence.[1]

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assault on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

Any offence against any section of the Indian Penal Code or against any other law which may, from time to time, be specified by the Governor-General in Council by notification in the Gazette of India, either generally for all States or specially for any one or more States.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

(*See Section 24.*)

Year.	No.	Short title.	Extent of repeal.
1879	XXI	The Foreign Jurisdiction and Extradition Act, 1879.	*So much as is unrepealed.*
1885	IX	*The Extradition (India) Act, 1885.*	*The whole Act.*
1896	V	The Foreign Jurisdiction and Extradition Act, (1879) Amendment Act, 1896.	The whole Act.

[1] Substituted by Act XVI of 1922, s. 2.

THE INDIAN MERCHANDISE MARKS ACT, 1889.

(ACT No. IV OF 1889.)

WHEREAS it is expedient to amend the law relating to fraudulent marks on merchandise; It is hereby enacted as follows:—

Title, extent and commencement:

1. (1) This Act may be called "The Indian Merchandise Marks Act, 1889."

(2) It extends to the whole of British India;

(3) It shall come into force on the first day of April, 1889.

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "trade mark" has the meaning assigned to that expression in s. 478 of the Indian Penal Code as amended by this Act:

(2) "trade description" means any description, statement or other indication, direct or indirect,—

(a) as to the number, quantity, measure, gauge, or weight or any goods, or

(b) as to the place or country in which, or the time at which, any goods were made or produced, or

(c) as to the mode of manufacturing or producing any goods, or

(d) as to the material of which any goods are composed, or

(e) as to any goods being the subject of an existing patent, privilege, or copyright;

and the use of any numeral, word or mark which according to the custom of the trade is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act:—

(3) "false trade description" means a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description untrue in a material respect, and the fact that a trade description is a trade mark or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act.

(4) "goods" means anything which is the subject of trade or manufacture; and

(5) "name" includes any abbreviation of a name.

Trade Descriptions.

4. (1) The provisions of this Act respecting the application of a false trade description to goods or respecting goods to which a false trade description is applied,

shall extend to the application to goods of any such numerals, words, or marks, or arrangement or combination thereof, whether including a trade-mark or not, as are or is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are, and to goods having such numerals, words or marks or arrangement or combination, applied thereto.

Provisions supplemental to the definition of false trade description.

(2) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression "false name or initials" means as applied to any goods any name or initials,—

(a) not being a trade-mark, or part of a trade-mark, and

(b) being identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials.

(3) A trade description which denotes or implies that there are contained in any goods to which it is applied more yards, feet or inches than there are contained therein standard yards, standard feet or standard inches is a false trade description.

Application of trade description.

5. (1) A person shall be deemed to apply a trade description to goods who—

(a) applies it to the goods themselves, or

(b) applies it to any covering, label, reel or other thing in or with which the goods are sold or are exposed or had in possession for sale or any purpose of trade or manufacture, or

(c) places, encloses or annexes any goods which are sold, or are exposed or had in possession for sale or any purpose of trade or manufacture, in, with or to any covering, label, reel or other thing to which a trade description has been applied, or

(d) uses a trade description in any manner reasonably calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.

(2) A trade description shall be deemed to be applied whether it is woven, impressed or otherwise worked into or annexed or affixed to the goods or any covering, label, reel or other thing.

(3) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper, and the expression "label" includes any band or ticket.

NOTE.

The improper use of a trade-name may fall under this section and be punishable under s. 6 or s. 7 as a false trade description.[1]

[1] *Anath Nath Dey*, [1912] 40 Cal. 281.

Penalty for applying a false trade description.

6. If a person applies a false trade description to goods, he shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Penalty for selling goods to which a false trade description is applied.

7. If a person sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, he shall, unless he proves—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade description, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently, be punished with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Unintentional Contravention of the Law relating to Marks and Descriptions

Unintentional contravention of the law relating to marks and descriptions.

8. Where a person is accused under section 482 of the Indian Penal Code of using a false trade-mark or property-mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in section 480 or section 481 of that Code, as the case may be, or under section 6 of this Act of applying to goods any false trade description, or under section 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade-mark or property-mark, and proves—

(a) that in the ordinary course of business he is employed, on behalf of other person, to apply trade-marks or property-marks, or trade descriptions, or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade-marks or property-marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and

(b) that he took reasonable precautions against committing the offence charged, and

(c) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(*d*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied, he shall be acquitted.

Forfeiture of Goods.

Forfeiture of goods.

9. (1) When a person is convicted under section 482 of the Indian Penal Code of using a false trade-mark, or under section 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade-mark applied thereto, or under section 487 or section 488 of that Code of making, or making use of, a false mark, or under section 6 or section 7 of this Act of applying a false trade description to goods or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or is acquitted on proof of the matter or matters specified in section 486 of the Indian Penal Code or section 7 or section 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things, by means of or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(2) When a forfeiture is directed on a conviction, and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(3) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

Amendment of the Sea Customs Act, 1878.

Amendment of section 18, Act VIII of 1878.

10. (1) For clause (*d*) of section 18 of the Sea Customs Act, 1878, the following shall be substituted, namely :—

"(*d*) goods having applied thereto a counterfeit trade-mark within the meaning of the Indian Penal Code, or a false trade description within the meaning of the Indian Merchandise Marks Act, 1889 :

"(*e*) goods made or produced beyond the limits of the United Kingdom and British India and having applied thereto any name or trade-mark being, or purporting to be,.....of, the name or trade-mark of any person who is a manufacturer, dealer or trader in the United Kingdom or in British India, unless—

(*i*) the name or trade-mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place beyond the limits of the United Kingdom and British India, and

(*ii*) the country in which that place is situated is in that indication indicated in letters as large and conspicuous as any letter in the name or trade-mark, and the same language and character as the name or trade-mark."

(2) To section 18 of the Sea Customs Act, 1878, as amended by sub-section (1), the following shall be added, namely :—

"(*f*) piece-goods, such as are ordinarily sold by length or by the piece, which—

(i) have not conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, and

(ii) have been manufactured beyond the limits of India, or

(iii) having been manufactured within those limits have been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Indian Factories Act, 1881."

Addition of a section after section 19, Act VIII of 1878.

11. The following shall be added after s. 19 of the Sea Customs Act, 1878, namely :—

"19-A. (1) Before detaining any such goods as are or may be specified in or under s. 18 or s. 19, as the case may be, or taking any further proceedings with a view to the confiscation thereof under this Act, the Chief Customs-officer or other officer appointed by the local Government in this behalf may require the regulations under the section, whether as to information, security, conditions or other matters, to be complied with and may satisfy himself in accordance with those regulations that the goods are such as are prohibited to be imported.

(2) The Governor-General in Council may make regulations, either general or special, respecting the detention and confiscation of goods the importation of which is prohibited, and the conditions, if any, to be fulfilled before such detention and confiscation, and may by such regulations determine the information, notices and security to be given, and the evidence requisite for any of the purposes of this section and the mode of verification of such evidence.

(3) Where there is on any goods a name which is identical with, or a colourable imitation of, the name of a place in the United Kingdom or British India, that name, unless accompanied in equally large and conspicuous letters, and in the same language and character, by the name of the country in which such place is situate, shall be treated for the purposes of ss. 18 and 19 as if it were the name of a place in the United Kingdom or British India.

(4) Such regulations may apply to all goods the importation of which is prohibited by s 18 or under s. 19, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

(5) The regulations may provide for the informant reimbursing any public officer and the Secretary of State for India in Council all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(6) All regulations under this section shall be published in the Gazette of India and in the Calcutta, Fort St. George, Bombay and Burma Gazettes."

Stamping of Length of Piece goods manufactured in British India.

Stamping of length of piece-goods manufactured in British India.

12. (1) Piece-goods, such as are ordinarily sold by length or by the piece which have been manufactured in premises which are a factory as defined in the Indian Factories Act, 1881, shall not be removed from those premises without having conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece.

(2) If any person removes or attempts to remove any such piece-goods from any such premises without the length of each piece being stamped in the manner mentioned in sub-section (1), every such piece, and everything used for the packing or removal thereof, shall be forfeited to Her Majesty, and such person shall be punished with fine which may extend to one thousand rupees.

Supplemental Provisions.

Evidence of origin of goods imported by sea.

13. In the case of goods brought into British India by sea, evidence of the port of shipment shall, in a prosecution for an offence against this Act or s. 18 of the Sea Customs Act, 1878, as amended by this Act, be *prima facie* evidence of the place or country in which the goods were made or produced.

Costs of defence or prosecution.

14. (1) On any such prosecution as is mentioned in the last foregoing section or on any prosecution for an offence against any of the sections of the Indian Penal Code, as amended by this Act, which relate to trade, property and other marks, the Court may order costs to be paid to the defendant by the prosecutor or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

(2) Such costs shall, on application to the Court, be recoverable as if they were a fine.

NOTE.

The appellate Court can award the costs of appeal under this section.[1]

Limitation of prosecution.

15. No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

Authority of the Governor-General in Council to issue instructions as to administration of this Act.

16. (1) The Governor-General in Council may, by notification in the Gazette of India and in local official Gazettes, issue instructions for observance by Criminal Courts in giving effect to any of the provisions of this Act.

(2) Instructions under sub-section (1) may provide among other matters, for the limits of variation, as regards number, quantity, measure, gauge or weight, which are to be recognized by Criminal Courts as permissible in the case of any goods.

[1] *Ganpat Sitaram Mukadam*, (1914) 16 Bom. L. R. 78.

Implied warranty on sale of marked goods.

17. On the sale or in the contract for the sale of any goods to which a trade mark or mark or trade description has been applied, the seller shall be deemed to warrant that the mark is a genuine mark and not counterfeit or falsely used, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the seller and delivered at the time of the sale or contract to and accepted by the buyer.

Savings.

18. (1) Nothing in this Act shall exempt any person from any suit or other proceeding which might, but for anything in this Act, be brought against him.

(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any suit or other proceeding, but such discovery or answer shall not be admissible in evidence against such person in any such prosecution as is mentioned in s. 14.

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in British India who in good faith acts in obedience to the instructions of such master, and on demand made by or on behalf of the prosecutor, has given full information as to his master and as to the instructions which he has received from his master.

Definition of piece-goods.

19. For the purpose of s. 12 of this Act and clause (*f*) of s. 18 of the Sea Customs Act, 1878, as amended by this Act, the Governor-General in Council, may, by notification in the Gazette of India, declare what classes of goods are included in the expression "piece-goods, such as are ordinarily sold by length or by the piece."

Determination of character of goods by sampling

20. (1) The Governor-General in Council may make rules, for the purposes of this Act to provide, with respect to any goods which purport or are alleged to be of uniform number, quantity, measure, gauge or weight, for the number of samples to be selected and tested and for the selection of the samples.

(2) With respect to any goods for the selection and testing of samples of which provision is not made in any rules for the time being in force under sub-section (1) the Court or Officer of Customs, as the case may be, having occasion to ascertain the number, quantity, measure, gauge or weight of the goods, shall, by order in writing, determine the number of samples to be selected and tested and the manner in which the samples are to be selected.

(3) The average of the results of the testing in pursuance of rules under sub-section (1) or of an order under sub-section (2) shall be *prima facie* evidence of the number, quantity, measure, gauge or weight, as the case may be, of the goods.

(4) If a person having any claim to or in relation to, any goods of which samples have been selected and tested in pursuance of rules under sub-section (1) or of an order under sub-section (2), desires that any further samples of the goods be selected and tested, they shall, on his written application and on the payment in advance by him to the Court or Officer of Customs, as the case may be, of such sums for defraying the cost of the further selection and testing as the Court or officer may from time to time require, be selected and tested to such extent as may be permitted by rules to be made by the Governor-General in Council in this behalf or as, in the case of goods with respect to which provision is not made in such rules, the Court or Officer of Customs may determine in the circumstances to be reasonable, the samples being selected in manner prescribed under sub-section (1), or in sub-section (2), as the case may be.

(5) The average of the results of the testing referred to in sub-section (3) and of the further testing under sub-section (4) shall be conclusive proof of the number, quantity, measure, gauge or weight, as the case may be, of the goods.

(6) Rules under this section shall be made after previous publication.

Information as to commission of offence.

21. An officer of the Government whose duty it is to take part in the enforcement of this Act shall not be compelled in any Court to say whence he got any information as to the commission of any offence against this Act.

Punishment of abetment in India of acts done out of India.

22. If any person, being within British India, abets the commission, without British India, of any act which, if committed in British India, would, under this Act, or under any section of that part of Chapter XVIII of the Indian Penal Code which relates to trade, property and other marks, be an offence he may be tried for such abetment in any place in British India in which he may be found, and be punished therefor with the punishment to which he would be liable if he had himself committed in that place the act which he abetted.

THE INDIAN STATES (PROTECTION AGAINST DISAFFECTION) ACT.

THE following Act which was made by the Governor-General under the provisions of section 67-B of the Government of India Act and has received the *assent of His Majesty signified by an order of His Majesty in Council is hereby* published for general information :—

An Act to prevent the dissemination by means of books, newspapers and other documents of matter calculated to bring into hatred or contempt, or to excite disaffection against, Princes or Chiefs of States in India or the Governments or Administrations established in such States.

WHEREAS it is expedient to prevent the dissemination by means of books, newspapers and other documents of matter calculated to bring into hatred or contempt, or to excite disaffection against, Princes or Chiefs of States in India or the Governments or Administrations established in such States; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called the Indian States (Protection against Disaffection) Act, 1922.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "book" and "newspaper" have the meanings respectively assigned to them by the Press and Registration of Books Act, 1867;

(*b*) "disaffection" includes disloyalty and all feelings of enmity; and

(*c*) "document" includes any painting, drawing, photograph, or other visible representation.

Penalty.

3. (1) Whoever edits, prints or publishes, or is the author of, any book, newspaper or other document which brings or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards, any Prince or Chief of a State in India or the Government or Administration established in any such State, shall be punishable with imprisonment which may extend to five years, or with fine, or with both.

(2) No person shall be deemed to commit an offence under this section in respect of any book, newspaper or other document which, without exciting or being intended to excite hatred, contempt or disaffection, contains comments expressing disapprobation of the measures of any such Prince, Chief, Government or Administration as aforesaid with a view to obtain their alteration by lawful means, or disapprobation of the administrative or other action of any such Prince, Chief, Government or Administration.

(4) If a person having any claim to or in relation to, any goods of which samples have been selected and tested in pursuance of rules under sub-section (1) or of an order under sub-section (2), desires that any further samples of the goods be selected and tested, they shall, on his written application and on the payment in advance by him to the Court or Officer of Customs, as the case may be, of such sums for defraying the cost of the further selection and testing as the Court or officer may from time to time require, be selected and tested to such extent as may be permitted by rules to be made by the Governor-General in Council in this behalf or as, in the case of goods with respect to which provision is not made in such rules, the Court or Officer of Customs may determine in the circumstances to be reasonable, the samples being selected in manner prescribed under sub-section (1), or in sub-section (2), as the case may be.

(5) The average of the results of the testing referred to in sub-section (3) and of the further testing under sub-section (4) shall be conclusive proof of the number, quantity, measure, gauge or weight, as the case may be, of the goods.

(6) Rules under this section shall be made after previous publication.

Information as to commission of offence.

21. An officer of the Government whose duty it is to take part in the enforcement of this Act shall not be compelled in any Court to say whence he got any information as to the commission of any offence against this Act.

Punishment of abetment in India of acts done out of India.

22. If any person, being within British India, abets the commission, without British India, of any act which, if committed in British India, would, under this Act, or under any section of that part of Chapter XVIII of the Indian Penal Code which relates to trade, property and other marks, be an offence he may be tried for such abetment in any place in British India in which he may be found, and be punished therefor with the punishment to which he would be liable if he had himself committed in that place the act which he abetted.

THE INDIAN STATES (PROTECTION AGAINST DISAFFECTION) ACT.

THE following Act which was made by the Governor-General under the provisions of section 67-B of the Government of India Act and has received the assent of His Majesty signified by an order of His Majesty in Council is hereby published for general information :—

An Act to prevent the dissemination by means of books, newspapers and other documents of matter calculated to bring into hatred or contempt, or to excite disaffection against, Princes or Chiefs of States in India or the Governments or Administrations established in such States.

WHEREAS it is expedient to prevent the dissemination by means of books, newspapers and other documents of matter calculated to bring into hatred or contempt, or to excite disaffection against, Princes or Chiefs of States in India or the Governments or Administrations established in such States; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called the Indian States (Protection against Disaffection) Act, 1922

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Definitions.

2 In this Act, unless there is anything repugnant in the subject or context,—

(a) "book" and "newspaper" have the meanings respectively assigned to them by the Press and Registration of Books Act, 1867 ;

(b) "disaffection" includes disloyalty and all feelings of enmity ; and

(c) "document" includes any painting, drawing, photograph, or other visible representation.

Penalty.

3. (1) Whoever edits, prints or publishes, or is the author of, any book, newspaper or other document which brings or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards, any Prince or Chief of a State in India or the Government or Administration established in any such State, shall be punishable with imprisonment which may extend to five years, or with fine, or with both.

(2) No person shall be deemed to commit an offence under this section in respect of any book, newspaper or other document which, without exciting or being intended to excite hatred, contempt or disaffection, contains comments expressing disapprobation of the measures of any such Prince, Chief, Government or Administration as aforesaid with a view to obtain their alteration by lawful means, or disapprobation of the administrative or other action of any such Prince, Chief, Government or Administration.

Power to forfeit certain publications or to detain them in course of transmission through post.

4. The provisions of sections 99-A to 99-G of the Code of Criminal Procedure, 1898, and of sections 27-B to 27-D of the Indian Post Office Act, 1898, shall apply in the case of any book, newspaper or other document containing matter in respect of which any person is punishable under section 3 in like manner as they apply in the case of a book, newspaper or document containing seditious matter within the meaning of those sections.

Courts by which and conditions subject to which offence may be tried.

5. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall proceed to the trial of any offence under section 3, and no Court shall proceed to the trial of any such offence except on complaint made by, or under authority from, the Governor-General in Council.

THE PENAL SERVITUDE ACT.

(Act No. XXIV of 1855).

Preamble.

Whereas, by reason of the difficulty of providing a place to which Europeans or Americans can, with safety to their health, be sent for the purpose of undergoing sentences of transportation or of imprisonment for long terms it has become expedient to substitute other punishments for that of transportation * * * ; It is enacted as follows :—

No European or American to be sentenced to transportation.

1. * * * * No European or American shall be liable to be sentenced, or ordered, by any Court within the territories * * under the Government of * * India *, to be transported.

Terms of penal servitude instead of the present terms of transportation.

2. Any person who, but for the passing of this Act, would, by any law now in force, or which may hereafter be in force, in any part of the said territories, be liable to be sentenced or ordered, by any such Court, to be transported, shall, if a European or American, be liable to be sentenced or ordered to be kept in penal servitude for such term as hereinafter mentioned.

The terms of penal servitude to be awarded by any sentence or order instead of the term of transportation to which any such offender would, but for the passing of this Act, be liable, shall be as follows : (that is to say)—

Instead of transportation for seven years, or for a term not exceeding seven years, penal servitude for the term of four years.

Instead of any term of transportation exceeding seven years and not exceeding ten years, penal servitude for any term not less than four and not exceeding six years.

Instead of any term of transportation exceeding ten years and not exceeding fifteen years, penal servitude for any term not less than six and not exceeding eight years.

Instead of any term of transportation exceeding fifteen years, penal servitude for any term not less than six and not exceeding ten years.

Instead of transportation for the term of life, penal servitude for the term of life.

And in every case where, at the discretion of the Court, one of any two or more of the terms of transportation hereinbefore mentioned might have been awarded, the Court shall have the like discretion to award one of the two or more terms of penal servitude hereinbefore mentioned, in relation to such terms of transportation.

Discretion of Courts as to alternative punishments.

3. Provided always that nothing herein contained shall interfere with or affect the authority or discretion of any Court in respect of any punishment which such Court may now award or pass on any offender other than transportation; but, where such other punishment may be awarded at the discretion of the Court instead of transportation or in addition thereto, the same may be awarded instead of, or (as the case may be) in addition to, the punishment substituted for transportation by this Act.

Effect of pardon granted upon condition of penal servitude.

4. If any offender sentenced by any Court within the said territories to the punishment of death shall have mercy extended to him, upon condition of his being kept in penal servitude for life, or for any term of years, all the provisions of this Act shall be applicable to such offender in the same manner as if he had been lawfully sentenced under this Act to the term of penal servitude specified in the condition.

5. [*Power to substitute penal servitude for transportation.*] *Rep. by the Prisoners Act, 1871 (V of 1871).*

6. [*Mode of dealing with person under sentence of penal servitude.*] *Rep. by the Prisoners Act, 1871 (V of 1871).*

7. [*Application of enactments respecting transportation and imprisonment with hard labour.*] *Rep. by the Prisoners Act, 1871 (V of 1871).*

8. [*Removal of convicts under sentence of imprisonment from one prison to another.*] *Rep. by the Presidency Jails Act, 1871 (V of 1867).*

9, 10, 11 and 12. [*Licenses to convicts under sentence of penal servitude to be at large.*] *Rep. by the Prisoners Act, 1871 (V of 1871.)*

Act not to affect the provisions of certain English statutes.

13. Nothing in this Act is intended to alter or affect the provisions of the 12 and 13 Victoria, Chapter 43, or any Act of Parliament passed in the United Kingdom of Great Britain and Ireland since the 28th of August, 1833, or which may hereafter be passed.

Sentence when proof that a person is a European or an American.

14. Any sentence or order upon any person describing him as a European or American shall be deemed, for the purposes of this Act, to be conclusive of the fact that such person is a European or American within the meaning of this Act.

Interpretation clause.

15. The word "European," as used in this Act, shall be understood to include any person usually designated a European British subject. Words in the singular number or the masculine gender shall be understood to include several persons as well as one person, and females as well as males, unless there be something in the context repugnant to such construction.

16. [*Commencement of Act.*] *Rep. by the Repealing Act, 1870 (XIV of 1870).*

THE POLICE (INCITEMENT TO DISAFFECTION) ACT.

(ACT No. XXII OF 1922.)

WHEREAS it is expedient to penalize the spreading of disaffection among the police and other kindred offences; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Police (Incitement to Disaffection) Act, 1922.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas

(3) It shall come into force in any province or part of a province on such date as the Local Government may, by notification in the local official Gazette, direct.

Definition.

2. In this Act, the expression "member of a police-force" means any person appointed or enrolled for the performance of police duties under any enactment specified in the Schedule

Penalty for causing disaffection, etc.

3. Whoever intentionally causes or attempts to cause, or does any act which he knows is likely to cause, disaffection towards His Majesty or the Government established by law in British India amongst the members of a police-force, or induces or attempts to induce, or does any act which he knows is likely to induce, any member of a police-force to withhold his services or to commit a breach of discipline shall be punished with imprisonment which may extend to six months, or with fine which may extend to two hundred rupees, or with both

Explanation—Expressions of disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, or of disapprobation of the administrative or other action of the Government, do not constitute an offence under this section unless they cause or are made for the purpose of causing or are likely to cause disaffection

Saving of acts done by police associations and other persons for certain purposes.

4 Nothing shall be deemed to be an offence under this Act which is done in good faith—

(*a*) for the purpose of promoting the welfare or interests of any member of a police-force by inducing him to withhold his services in any manner authorised by law; or

(*b*) by or on behalf of any association formed for the purpose of furthering the interests of members of a police-force as such, where the association has been authorized or recognized by the Government and the act done is done under any rules or articles of the association which have been approved by the Governme

Sanction to trial of offences by subordinate Courts.

5. No Court shall proceed to the trial of any offence under this Act except with the previous sanction, or on the complaint, of the District Magistrate or, in the case of a Presidency town or the town of Rangoon, of the Commissioner of Police.

Trial of cases.

6. (1) No Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try any offence under this Act.

(2) Notwithstanding anything contained in Chapter XXII of the Code of Criminal Procedure, 1898, no offence under this Act shall be triable summarily.

THE SCHEDULE.

(*See Section 2.*)

Year.	No.	Short title.
		Acts of the Governor-General in Council.
1859	XXIV	The Madras District Police Act, 1859
1861	V	The Police Act, 1861.
1887	XV	The Burma Military Police Act, 1887.
1888	III	The Police Act, 1888.
1892	V	The Bengal Military Police Act, 1892.
		Madras Act.
1888	III	The Madras City Police Act, 1888.
		Bombay Acts.
1890	IV	The Bombay District Police Act, 1890.
1902	IV	The City of Bombay Police Act, 1902.
		Bengal Acts.
1866	II	The Calcutta Suburban Police Act, 1866.
,,	IV	The Calcutta Police Act, 1866.
1890	III	The Calcutta Port Act, 1890
1920	II	The Eastern Frontier Rifles (Bengal Battalion) Act, 1920
		Burma Act.
1899	IV	The Rangoon Police Act, 1899.
		Assam Act.
1920	I	The Assam Rifles Act, 1920.
		Regulation by the Governor-General in Council.
1888	II	The Andaman and Nicobar Islands Military Police Regulation, 1888.

THE PREVENTION OF SEDITIOUS MEETINGS ACT.

(ACT No. X OF 1911).

An Act to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity.

WHEREAS it is expedient to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity, It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called the Prevention of Seditious Meetings Act, 1911.

(2) It extends to the whole of British India, but shall have operation only in such Provinces or part of Provinces as the Governor-General in Council may from time to time notify in the Gazette of India.

Power of Local Government to notify proclaimed areas.

2. (1) The Local Government may, with the previous sanction of the Governor-General in Council, by notification in the local official Gazette, declare the whole or any part of a Province, in which this Act is for the time being in operation, to be a proclaimed area

(2) A notification made under sub-section (1) shall not remain in force for more than six months, but nothing in this sub-section shall be deemed to prevent the Local Government, with the previous sanction of the Governor-General in Council, from making any further notifications in respect of the same area from time to time as it may think fit.

Definition.

3. (1) In this Act, the expression "public meeting" means a meeting which is open to the public or any class or portion of the public.

(2) A meeting may be a public meeting notwithstanding that it is held in a private place and notwithstanding that admission thereto may have been restricted by ticket or otherwise.

Notice to be given of public meetings.

4. (1) No public meeting for the furtherance or discussion of any subject likely to cause disturbance or public excitement, or for the exhibition or distribution of any writing or printed matter relating to any such subject, shall be held in any proclaimed area—

(a) unless written notice of the intention to hold such meeting and of the time and place of such meeting has been given to the District Magistrate or the Commissioner of Police, as the case may be, at least three days previously ; or

Sanction to trial of offences by subordinate Courts.

5. No Court shall proceed to the trial of any offence under this Act except with the previous sanction, or on the complaint, of the District Magistrate or, in the case of a Presidency town or the town of Rangoon, of the Commissioner of Police.

Trial of cases.

6. (1) No Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try any offence under this Act.

(2) Notwithstanding anything contained in Chapter XXII of the Code of Criminal Procedure, 1898, no offence under this Act shall be triable summarily.

THE SCHEDULE.

(*See Section 2.*)

Year.	No.	Short title.
		Acts of the Governor-General in Council.
1859	XXIV	The Madras District Police Act, 1859.
1861	V	The Police Act, 1861.
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		Madras Act.
1888	III	The Madras City Police Act, 1888.
		Bombay Acts.
1890	IV	The Bombay District Police Act, 1890.
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1866	II	The Calcutta Suburban Police Act, 1866.
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		Burma Act.
1899	IV	The Rangoon Police Act, 1899.
		Assam Act.
1920	I	The Assam Rifles Act, 1920.
		Regulation by the Governor-General in Council.
1888	II	The Andaman and Nicobar Islands Military Police Regulation, 1888.

THE PREVENTION OF SEDITIOUS MEETINGS ACT.

(ACT No. X OF 1911).

An Act to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity.

WHEREAS it is expedient to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Prevention of Seditious Meetings Act, 1911.

(2) It extends to the whole of British India, but shall have operation only in such Provinces or part of Provinces as the Governor-General in Council may from time to time notify in the Gazette of India.

Power of Local Government to notify proclaimed areas.

2. (1) The Local Government may, with the previous sanction of the Governor-General in Council, by notification in the local official Gazette, declare the whole or any part of a Province, in which this Act is for the time being in operation, to be a proclaimed area.

(2) A notification made under sub-section (1) shall not remain in force for more than six months, but nothing in this sub-section shall be deemed to prevent the Local Government, with the previous sanction of the Governor-General in Council, from making any further notifications in respect of the same area from time to time as it may think fit.

Definition

3. (1) In this Act, the expression "public meeting" means a meeting which is open to the public or any class or portion of the public.

(2) A meeting may be a public meeting notwithstanding that it is held in a private place and notwithstanding that admission thereto may have been restricted by ticket or otherwise

Notice to be given of public meetings.

4. (1) No public meeting for the furtherance or discussion of any subject likely to cause disturbance or public excitement, or for the exhibition or distribution of any writing or printed matter relating to any such subject, shall be held in any proclaimed area—

(a) unless written notice of the intention to hold such meeting and of the time and place of such meeting has been given to the District Magistrate or the Commissioner of Police, as the case may be, at least three days previously; or

(b) unless permission to hold such meeting has been obtained in writing from the District Magistrate or the Commissioner of Police, as the case may be.

Power of Magistrate to cause report to be taken.

(2) The District Magistrate or any Magistrate of the first class authorized by the District Magistrate in this behalf may, by order in writing, depute one or more Police officers, not being below the rank of a Head Constable, or other persons, to attend any such meeting for the purpose of causing a report to be taken of the proceedings.

Exception.

(3) Nothing in this section shall apply to any public meeting held under any statutory or other express legal authority, or to public meetings or to public meetings convened by a Sheriff or class of public meetings exempted for that purpose by the Local Government by general or special order.

Power to prohibit public meetings.

5. The District Magistrate or the Commissioner of Police, as the case may be, may at any time, by order in writing, of which public notice shall forthwith be given, prohibit any public meeting in a proclaimed area if, in his opinion, such meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquillity.

Penalties.

6. (1) Any person concerned in the promotion or conduct of a public meeting held in a proclaimed area contrary to the provisions of section 4 shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) Any public meeting which has been prohibited under section 5 shall be deemed to be an unlawful assembly within the meaning of Chapter VIII of the Indian Penal Code and of Chapter IX of the Code of Criminal Procedure, 1898.

Penalty for delivery of speeches in public places.

7. Whoever, in a proclaimed area, in a public place or a place of public resort, otherwise than at a public meeting held in accordance with, or exempted from, the provisions of section 4, without the permission in writing of the Magistrate of the District or of the Commissioner of Police, as the case may be, previously obtained, delivers any lecture, address or speech on any subject likely to cause disturbance or public excitement to persons then present, may be arrested without warrant, and shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

Cognizance of offences.

8. No Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class or Sub-divisional Magistrate shall try any offence against this Act.

Repeals.

9. The Prevention of Seditious Meetings Act, 1907, and the Continuing Act, 1910, are hereby repealed.

THE REFORMATORY SCHOOLS ACT.

(ACT No. VIII OF 1897.)

An Act to amend the law relating to Reformatory Schools and to make further provision for dealing with youthful offenders.

Preamble.

WHEREAS it is expedient to amend the law relating to Reformatory Schools and to make further provision for dealing with youthful offenders; It is hereby enacted as follows:—

I. *Preliminary.*

Title, commencement and extent.

1. (1) This Act may be called the Reformatory Schools Act, 1897; and

(2) It shall come into force at once.

(3) This section and s. 2 shall extend to the whole of British India. The other sections shall extend in the first instance to the whole of British India except the territories for the time being administered by the Lieutenant-Governor of the Punjab and the Chief Commissioner of Coorg, but either of the said Local Governments may at any time, by notification in the local official Gazette, extend those sections to their territories from such day as may be fixed in any such notification.

Repeal of Act.

2. (1) The Reformatory Schools Act, 1876, is hereby repealed.

(2) But all proceedings taken, orders passed, officers appointed or authorized and rules made under the said Act shall, as far as may be, be deemed to have been respectively passed, appointed or authorized and made under this Act.

(3) Any enactment or document referring to the said Act shall, as far as may be, be construed to refer to his Act, or to the corresponding portions thereof.

Section 399 of Act X of 1882 repealed on date fixed by a notification under s. 1, sub-sec. (3).

3. From the date fixed by any notification issued under s. 1, sub-sec (3), s 399 of the Code of Criminal Procedure, 1882, shall be repealed in the province to which the notification relates

4. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "Youthful offender" means any boy who has been convicted of any offence punishable with transportation or imprisonment and who, at the time of such conviction, was under the age of fifteen years:

(*b*) "Inspector-General" includes any officer appointed by the Local Government to perform all or any of the duties imposed by this Act on the Inspector-General: and

(*c*) "District Magistrate" shall include a Chief Presidency Magistrate.

II.—*Reformatory Schools.*

Power to establish and discontinue Reformatory Schools.

5. *With the previous sanction of the Governor-General* in Council, the Local Government may—(*a*) establish and maintain *Reformatory Schools* at such places as it may think fit;

(*b*) use as *Reformatory Schools kept by persons willing to act in conformity* with such rules, consistent with this Act, as the Local Government may prescribe in this behalf;

(*c*) direct that any school so established or used shall cease to exist as a Reformatory School or to be used as such.

Requisites of schools.

6. Every school so established or used must provide—

(*a*) sufficient means of separating the inmates at night;

(*b*) proper sanitary arrangements, water-supply, food, clothing and bedding for the youthful offenders detained therein;

(*c*) the means of giving such youthful offenders industrial training;

(*d*) an infirmary or proper place for reception of such youthful offenders when sick.

Inspection of Reformatory Schools.

7. (1) Every school intended to be established or used as a Reformatory School shall, before being used as such, be inspected by the Inspector-General, and if he finds that the requirements of s 6 have been complied with, and that, in his opinion, such school is fitted for the reception of such youthful offenders as may be sent there under *this Act, he shall certify to that effect and such certificate shall be published* in the local official Gazette, together with an order of the Local Government establishing the *school as a Reformatory School or directing that it shall be used* as such, and the school shall thereupon be deemed to be a Reformatory School.

(2) Every such school shall, from time to time, and at least once in every year, be visited by the said Inspector-General, who shall send to the Local Government a report on the condition of the school in such form as the Local Government may prescribe.

Power of Courts to direct youthful offenders to be sent to Reformatory Schools.

8. (1) Whenever any youthful offender is sentenced to transportation or imprisonment, and is, in the judgment of the Court by which he is sentenced, a proper person to be an inmate of a Reformatory School, the Court may, subject to any rules made by the Local Government, direct that, instead of undergoing his sentence, he shall be sent to such a school, and be there detained for a period which shall be not less than three or more than seven years.

(2) The powers so conferred on the Court by this section shall be exercised only by (*a*) the High Court, (*b*) a Court of Session, (*c*) a District Magistrate, and (*d*) any Magistrate specially empowered by the Local Government in this behalf,

and may be exercised by such Courts whether the case comes before them originally or on appeal.

(3) *The Local Government may make rules for*—

(a) defining what youthful offenders should be sent to Reformatory Schools, having regard to the nature of their offences or other considerations, and

(b) regulating the periods for which youthful offenders may be sent to such schools according to their ages or other considerations.

Proceedings where Magistrate is not empowered to pass an order under section 8.

9. (1) When any Magistrate not empowered to pass an order under the last foregoing section is of opinion that a youthful offender convicted by him is a proper person to be an inmate of a Reformatory School, he may, without passing sentence, record such opinion and submit his proceedings and forward the youthful offender to the District Magistrate to whom he is subordinate.

(2) The Magistrate to whom the proceedings are so submitted may make *such further inquiry (if any)* as he may think fit and pass such sentence and order for the detention in a Reformatory School of the youthful offender, or otherwise, as he might have passed if such youthful offender had been originally tried by him.

Power of Magistrate to direct boys under fifteen sentenced to imprisonment to be sent to Reformatory Schools.

10. The officer in charge of a prison in which a youthful offender is confined, in execution of a sentence of imprisonment, may bring him, if he has not then attained the age of fifteen years, before the *District Magistrate within whose jurisdiction such prison is* situate, and such Magistrate may, if such youthful offender appears to be a proper person to be an inmate of a Reformatory School, direct that, instead of undergoing the residue of his sentence, he shall be sent to a Reformatory School, and there detained for a period which shall be subject to the same limitations as are prescribed by or under s. 8, with reference to the period of detention thereby authorized.

Preliminary enquiry and finding as to age of youthful offender.

11. (1) Before directing any youthful offender to be sent to a Reformatory School under section 8, section 9, or section 10, the Court or Magistrate shall inquire into the question of his age and, after taking such evidence (if any) as may be deemed necessary, *shall record a finding thereon, stating his age as nearly as may be.*

(2) A similar inquiry shall be made and finding recorded by every Magistrate not empowered to pass an order under section 8 before submitting his proceedings and forwarding the *youthful offender to the District Magistrate as required by* section 9, sub-section (1).

Government to determine Reformatory School to which such offenders shall be sent.

12. Every youthful offender directed by a Court or Magistrate to be sent to a Reformatory School shall be sent to such Reformatory School as the Local Government may, by general or special order, appoint for the reception of youthful offenders so dealt with by such Court or Magistrate:

Provided that, if accommodation in a Reformatory School is not immediately available for such youthful offender, he may be detained in the juvenile ward or such other suitable part of a prison as the Local Government may direct—

(a) until he can be sent to a Reformatory School, or

(b) until the term of his original sentence expires,

whichever event may first happen. Should the term of his original sentence first expire, he shall thereupon be released, but should he be sent to a Reformatory School, then the period of dentention previously undergone shall be treated as detention in a Reformatory School.

Persons found to be over eighteen years not to be detained in Reformatory Schools.

13 (1) If at any time after a youthful offender has been sent to a Reformatory School it appears to the Committee of Visiters or Board of Management, as the case may be, that the age of such youthful offender has been understated in the order for detention, and that he will attain the age of eighteen years before the expiration of the period for which he has been ordered to be detained, they shall report the case for the orders of the Local Government.

(2) No person shall be detained in a Reformatory School after he has been found by the Local Government to have attained the age of eighteen years.

Discharge or removal by order of Government.

14. The Local Government may at any time order any youthful offender—

(a) to be discharged from a Reformatory School;

(b) to be removed from one Reformatory School to another such school situate within the territories subject to such Government: Provided that the whole period of his detention in a Reformatory School shall not be increased by such removal.

Power to Governor-General in Council to direct use of Reformatories in one province for reception of youthful offenders from another.

15. (1) The Governor-General in Council may by general or special order direct that any Reformatory School situated in one province shall be available for the reception of youthful offenders directed to be sent to any Reformatory School by any Court or Magistrate in any other province.

(2) Any such order may also provide for the removal of the youthful offender, and the cost of his maintenance, and may give any such further directions as may be necessary.

Certain orders not subject to appeal or revision.

16. Nothing contained in the Code of Criminal Procedure, 1882, shall be construed to authorize any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of an youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment.

III.—Management of Reformatory Schools.

Appointment of Superintendent and Committee of Visitors or Board of Management.

17. (1) For the control and management of every Reformatory School, the Local Government shall appoint either (*a*) a Superintendent and a Committee of Visitors, or (*b*) a Board of Management.

(2) Every Committee and every Board so appointed must consist of not less than five persons, of whom two at least shall be natives of India.

(3) The Local Government may suspend or remove any Superintendent or any Member of a Committee or Board so appointed.

Superintendent may license youthful offenders to employers of labour.

18. (1) Every Superintendent so appointed may, with the sanction of the Committee, by license under his hand, permit any youthful offender sent to a Reformatory School, who has attained the age of fourteen years, to live under the charge of any trustworthy and respectable person named in the license, or any officer of Government or of a Municipality, being an employer of labour and willing to receive and take charge of him, on the condition that the employer shall keep such youthful offender employed at some trade, occupation or calling.

(2) The license shall be in force for three months and no longer, but may, at any time and from time to time until the expiration of the period for which the youthful offender has been directed to be detained, be renewed for three months at a time.

Cancellation of license.

19. The license shall be cancelled at the desire of the employer named in the license

Determination of license.

20. If during the term of the license the employer named therein dies, or ceases from business or to employ labour, or the period for which the youthful offender has been directed to be detained in the Reformatory School expires, the license shall thereupon cease and determine.

Cancellation of license in case of ill-treatment.

21. If it appears to the Superintendent that the employer has ill-treated the youthful offender, or has not adequately provided for his lodging and maintenance, the Superintendent may cancel the license.

Superintendent to be deemed guardian of youthful offenders.

22. (1) The Superintendent of a Reformatory School shall be deemed to be the guardian of every youthful offender detained in such school, within the meaning of Act No. XIX of 1850 (*concerning the binding of apprentices*).

Power to apprentice youthful offender.

(2) If it appears to the Superintendent that any youthful offender licensed under s. 18 has behaved well during one or more periods of his license, the Superintendent may, with the sanction of the Committee, apprentice him under the provisions of the said Act and on such apprenticement the right to detain such youthful offender

in a Reformatory School shall cease, and the unexpired term (if any) of his sentence shall be cancelled.

Duties of Committee of Visitors.

23. (1) Every Committee of Visitors appointed under s. 17 for a Reformatory School shall, at least once in every month,

(a) visit the school to hear complaints, and see that the requirements of s. 6 have been complied with, and that the management of the school is proper in all respects;

(b) examine the punishment-book;

(c) bring any special cases to the notice of the Inspector-General; and

(d) see that no person is illegally detained in the school.

(2) If any member of a Committee of Visitors so appointed fails or neglects, during a period of six consecutive months, to visit the school and assist in the discharge of the duties aforesaid, he shall cease to be a member of such Committee.

Powers of Board of Management.

24. If, in exercise of the power conferred by s. 17, the Local Government appoints a Board of Management for any Reformatory School, such Board shall have the powers and perform the functions of the Superintendent under ss. 18 to 22, both inclusive; and the license mentioned in s. 18 may be under the hand of their Chairman; and they shall be deemed to be the guardians of the youthful offenders detained in such school.

Power to appoint Trustees or other Managers of a School to be a Board of Management.

25. The Local Government may declare any body or Trustees or Managers of a school, who are willing to act in conformity with the rules referred to in s. 5, clause (b), to be a Board of Management under this Act, and thereupon such body or managers shall have all the powers and perform all the functions of such Board of Management.

Power of Board to make rules.

26. (1) With the previous sanction of the Local Government, every Board of Management of a Reformatory School may from time to time make rules consistent with this Act—

(i) to prescribe the articles which are to be deemed to be "prohibited articles"; and

(ii) to regulate—

(a) the conduct of business of the Board;

(b) the management of the school;

(c) the education and industrial training of youthful offenders;

(d) visits to, and communication with, youthful offender;

(e) the terms and conditions under which any articles declared by the Board to be "prohibited articles" may be introduced into or removed out of the school;

(f) the manner in which such articles are to be removed when introduced without due authority;

(g) the conditions and limitations under which such articles may be supplied outside the school to any youthful offender under order of detention therein;

(h) the conditions on which the possession by any such youthful offender of such articles may be sanctioned;

(i) the penalties to be imposed for the supply or possession of such articles when supplied or possessed without due authority;

(j) the punishment of offences committed by youthful offenders; and

(k) the granting of licenses for the employment of youthful offenders.

(2) In the absence of a Board of Management the Local Government may make rules consistent with this Act to regulate for any Reformatory School the matters mentioned in any clause of sub-section (1), other than clause (ii) (a), and also the mode in which the Committee of Visitors shall conduct their business.

IV.—Offences in relation to Reformatory Schools.

Penalty for introduction or removal or supply of prohibited articles and communication with youthful offenders.

27. Whoever, contrary to any rule made under s. 26, introduces or removes or attempts by any means whatever to introduce or remove into or from any Reformatory School, or supplies or attempts to supply outside the limits of any Reformatory School, to any youthful offender under order of detention therein,

any prohibited article, and every officer or person in charge of a Reformatory School who, contrary to any such rule, knowingly suffers any such article to be introduced into or removed from any Reformatory School, to be possessed by any youthful offender detained therein, or to be supplied to any such youthful offender outside its limits,

and whoever, contrary to any such rule, communicates or attempts to communicate with any such youthful offender,

and whoever abets any offence made punishable under this section,

shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees, or to both.

Penalty for abetting escape of youthful offender.

28. Whoever abets an escape, or an attempt to escape, on the part of a youthful offender from a Reformatory School, or from the employer of such youthful offender, shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding two hundred rupees, or with both.

Arrest of escaped youthful offender.

29. A Police-officer may, without orders from a Magistrate and without a warrant, arrest any youthful offender sent to a Reformatory School under this Act, who has escaped from such school or from his employer, and take him back to such school or to his employer.

V.—Miscellaneous.

30. *Repealed by Act III of 1905, Schedule III.*

Power to deal in other ways with youthful offenders including girls.

31. (1) Notwithstanding anything contained in this Act or in any other enactment for the time being in force, any Court may, if it shall think fit, instead of sentencing any youthful offender to transportation or imprisonment or directing him to be detained in a Reformatory School, order him to be—

(a) discharged after due admonition, or

(b) delivered to his parent, or to his guardian or nearest adult relative, or such parent, guardian or relative executing a bond, with or without sureties, as the Court may require, to be responsible for the good behaviour of the youthful offender for any period not exceeding twelve months.

(2) For the purposes of this section the term "youthful offender" shall include a girl.

(3) The powers conferred on the Court by this section shall be exercised only by Courts empowered by or under s. 8.

(4) When any youthful offender is convicted by a Court not empowered to act under this section and the Court is of opinion that the powers conferred by this section should be exercised in respect of such youthful offender, it may record such opinion and submit the proceedings and forward the youthful offender to the District Magistrate to whom such Court is subordinate.

(5) The District Magistrate to whom the proceedings are so submitted may thereupon make such order or pass such sentence as he might have made or passed if the case had originally been tried by him.

Procedure when youthful offender under detention in a Reformatory School is again convicted and sentenced.

32. When a youthful offender during his period of detention in a Reformatory School is again convicted by a Criminal Court the sentence of such Court shall commence at once, notwithstanding anything to the contrary in s. 397 of the Code of Criminal Procedure, 1882, but the Court shall forthwith report the matter to the Local Government, which shall have power to deal with the matter in any way in which it thinks fit.

THE SLAVE TRADE ACT.

(39 & 40 Vic., c. 46.)

Certain offenders on High Seas punished as though offence committed in India.

1. If any person, being a subject of Her Majesty or of any Prince or State in India in alliance with Her Majesty, shall, upon the High Seas or in any part of Asia or Africa which Her Majesty may from time to time think fit to specify by any Order in Council in this behalf, commit any of the offences defined in ss. 367, 370 and 371, (in the schedule to this Act respectively recited) of Act XLV of 1860, passed by the Governor-General of India in Council and called "The Indian Penal Code," or abet within the meaning of the fifth chapter of the said Penal Code the commission of any such offence, such person shall be dealt with, in respect of such offence or abetment, as if the same had been committed in any place within British India in which he may be or may be found.

Sec. 1 may be made to apply to future amendments of this Act.

2. If the Governor-General of India in Council shall, at a meeting for making laws and regulations, amend the provisions of the said sections 367, 370, and 371 of the said Penal Code, or any of them or the said fifth chapter thereof so far as relates to the abetment of any of the offences forbidden by such sections, or make any further provisions for preventing or suppressing the making, buying or selling of slaves or any of the offences comprised in the said three sections, the Secretary of State for India shall, unless Her Majesty has disallowed such amendment or further provision, lay a copy of the amending Act before each House of Parliament, and after the same shall have lain on the table of both Houses of Parliament for the space of forty days, it shall be lawful for Her Majesty, unless either House of Parliament shall present an address to Her Majesty to the contrary, to direct by Order in Council that the provisions of the first section of this Act shall apply to the law so amended or enlarged, and the same shall be applicable accordingly

Powers of High Court for purpose of obtaining evidence

3 For the purpose of obtaining evidence of the commission of the offences made punishable by this Act or any Act of Parliament relating to slavery or the slave trade, every High Court in India shall have, as respects the persons in the first section of this Act referred to, and as respects any British colony, settlement, plantation, or territory, wherein any witness may be, the same powers as are conferred on the Court of Queen's Bench by the fourth section of an Act made and passed in the Session of Parliament holden in the sixth and seventh years of Her Majesty's reign, chapter ninety-eight, with respect to such British Colonies, settlements, plantations, and territories as are therein referred to.

And every High Court may, if it thinks fit, issue such commission as is mentioned in section 330 of Act X of 1872, passed by the Governor-General of India in Council, and called, "The Code of Criminal Procedure," to any Consular Officer of Her Majesty in the parts of Asia or Africa specified in any order of Her Majesty in Council under s. 1 of this Act, or to any Political officer or agent of the Governor-General of India in Council or of any Indian Government in the said parts or in the dominions of any Prince or State in India in alliance with Her Majesty, or to any Magistrate in Her Majesty's Indian dominions.

And the depositions taken by virtue of the said powers or under such commission shall be deemed by every Court of original or appellate jurisdiction in India in any trial or proceeding under this Act or any Act of Parliament relating to slavery or the slave trade to be as good and competent evidence as if the witnesses deposing had been present and examined *viva voce* and had made oath or affirmation as required by law.

Subjects of certain Indian Princes made amenable to certain Orders in Council.

4. And whereas by certain Orders of Her Majesty in Council made by virtue of an Act made and passed in the Session of Parliament holden in the sixth and seventh years of Her Majesty's reign, chapter ninety-four, which Orders are dated respectively the ninth August one thousand eight hundred and sixty-six and the fourth November one thousand eight hundred and sixty-seven, it is ordered that the provisions of such Orders relating to British subjects shall extend and apply to all subjects of Her Majesty, whether by birth or by naturalisation, and also to all persons enjoying Her Majesty's protection in the several dominions mentioned in such Orders respectively:

It is hereby declared and enacted that for the purposes of the said Orders in Council, and of any Orders in Council which Her Majesty may hereafter think fit to make by virtue of the said Act of the sixth and seventh years of Her Majesty's reign, chapter ninety-four, all subjects of the several Princes and States in India in alliance with Her Majesty, residing and being in the several dominions comprised in such orders respectively, are and shall be deemed to be persons enjoying Her Majesty's protection therein.

NOTE.

By an Order in Council, dated the 30th April 1877,[1] this statute is extended to the following parts of Asia and Africa:—

(*a*) The territories of the Khan of Khelat and of the Sultan of Muscat in Mekran and Arabia.

(*b*) The coasts of Baluchistan and of the Bunder Abbas Districts and the shores of the Persian Gulf.

(*c*) The coasts of Arabia from Ras Mussendom to Cape Bal-el-Mandeb.

(*d*) The territories of the following tribes near Aden, *viz.*:—

The Abdali	The Howshabi	The Subahi
The Foodli	The Alawi	The Gafai
The Akrabi	The Amir	The Oulaki

[1] Published in the *London Gazette*, No. 24466, p. 3447, on the 1st June, 1877.

(*e*) The Coast of Africa from Ras Sejarmo to Delagoa Bay.

(*f*) The territories of the Sultan of Zanzibar.

(*g*) The sea and islands within ten degrees of latitude and longitude from such coast and shores respectively.

By the Slave Trade Offences (India) Order in Council, dated 14th October 1913, this Act is made applicable to the territories of the Kaiti, Wahidi, Behan, Andali and Beda tribes near Aden, and to the territories of the Mahri tribe of Kishin and Scotra.[1]

[1] Gazette of India, Part I, p. 1113, for 1913.

THE TERRITORIAL WATERS JURISDICTION ACT, 1878.

(41 & 42 Vic., c. 73).

An Act to regulate the Law relating to the trial of offences committed on the sea within a certain distance of the coasts of Her Majesty's Dominions.

WHEREAS the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

Amendment of the law as to the jurisdiction of the Admiral.

2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

Restriction on institution of proceedings for punishment of offence.

3. Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

Provisions as to procedure.

4 On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or

certificate of the Secretary of State or Governor as is required by this Act has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act.

Proceedings before a justice of the peace or other magistrate, previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act.

Saving as to jurisdiction.

5. *Nothing in this Act contained shall be construed to be in derogation of* any rightful jurisdiction of Her Majesty, her heirs or successors, *under the law of nations, or to affect or prejudice any jurisdiction* conferred by Act of Parliament or now by law existing *in relation to foreign ships or in relation to persons on board such ships*

Saving as to piracy.

6. This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

Definitions.

7. In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them; that is to say,

"Jurisdiction of the Admiral."

"The jurisdiction of the Admiral," as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer:

"United Kingdom."

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands:

"The territorial waters of Her Majesty's dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial Sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions:

"Territorial waters of Her Majesty's dominions.

"Governor," as respects India, means the Governor-General or the Governor of any presidency; and where a British possession consists of several constituent colonies, means the Governor-General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession, means the officer for the time being administering the government of such possession; also any person acting for or in the capacity of Governor shall be included under the term "Governor."

"Governor."

"Offence" as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force:

"Offence."

"Ship" includes every description of ship, boat, or other floating craft:

"Ship."

"Foreign ship" means any ship which is not a British ship.

"Foreign ship."

THE WHIPPING ACT.

(ACT No. IV OF 1909.)

WHEREAS it is expedient to consolidate and amend the law relating to the punishment of whipping; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Whipping Act, 1909; and

(2) It extends to the whole of British India, inclusive of British Baluchistan and the Santhal Parganas.

Whipping added to punishments described in Act XLV 1860.

2. In addition to the punishments described in s. 53 of the Indian Penal Code, offenders are also liable to the punishment of whipping.

NOTE.

The Indian Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act formed a part of the Penal Code from the date of its enactment [1]

Offences punishable with whipping in lieu of other punishment.

3. Whoever commits any of the following offences, namely:—

(a) theft, as defined in s. 378 of the Indian Penal Code, other than theft by a clerk or servant of property in possession of his master;

(b) theft in a building, tent or vessel, as defined in s. 380 of the said Code;

(c) theft after preparation for causing death or hurt, as defined in s. 382 of the said Code;

(d) lurking house-trespass, or house-breaking, as defined in ss. 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section;

(e) lurking house-trespass by night, or house-breaking by night, as defined in ss. 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section.

may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the said Code

NOTE.

When punishment is inflicted under this Act, the charge must state the liability, and the judgment should set out the grounds thereof [2]

Under this section the offender in lieu of punishment provided by the Penal Code may be punished with whipping. The punishment under the Penal Code cannot be inflicted in addition

[1] *Maniruddin v. Gour Chandra Shamadar*, R. App. 18. (1871) 7 Beng. L. R. 165, F. B., (1870) 5 M. H. C.

[2] *Badiya*, (1882) 5 Mad. 155.

to whipping.[1] Under the next section the offender may be punished with whipping in lieu of or in addition to any other punishment to which he may be liable.

Offences punishable with whipping in lieu of or in addition to other punishment.

4. Whoever—

(a) abets, commits or attempts to commit, rape as defined in s. 375 of the Indian Penal Code;

(b) compels, or induces any person by fear of bodily injury, to submit to an unnatural offence as defined in s. 377 of the said Code;

(c) voluntarily causes hurt in committing or attempting to commit robbery, as defined in s. 390 of the said Code;

(d) commits dacoity as defined in s. 391 of the said Code;

may be punished with a whipping in lieu of or in addition to any other punishment to which he may, for such offence, abetment or attempt be liable under the said Code.

NOTE.

This section must be read subject to ss. 391 and 393 of the Code of Criminal Procedure. Under the former section no accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months. Under the latter section certain exemptions are specified.

Juvenile offenders when punishable with whipping.

5. Any juvenile offender who abets, commits or attempts to commit—

(a) any offence punishable under the Indian Penal Code, except offences specified in Chapter VI and in ss. 153-A and 505 of that Code and offence punishable with death, or

(b) any offence punishable under any other law with imprisonment which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf,

may be punished with whipping in lieu of any other punishment to which he may for such offence, abetment or attempt be liable.

Explanation.—In this section the expression "juvenile offender" means an offender whom the Court, after making such enquiry (if any) as may be deemed necessary, shall find to be under sixteen years of age, the finding of the Court in all cases being final and conclusive.

NOTE.

This section is not intended to override the provisions of ss. 3 and 4 which apply to juvenile offenders, but these sections specify certain offences only for which whipping may be inflicted; but under this section a juvenile offender may be punished with whipping for an offence mentioned in clauses (a) and (b).

The sentence of whipping under this section may be passed *in lieu of* and not *in addition to* any other punishment to which the accused may be liable.

[1] *Dagadu*, (1891) 16 Bom. 357.

The following notice[1] has been issued by the Governor-General in Council in pursuance of clause (*b*)—

No. 1008.—In exercise of the powers conferred by s. 5, clause (*b*), of the Whipping Act, 1909 (IV of 1909), and in supersession of the Home Department notification No. 1650, dated the 27th September 1920, the Governor-General in Council is pleased to specify the offences under the enactments and rules mentioned in the schedule hereto annexed, being offences punishable under the said enactments and rules with imprisonment, as offences for the abetment or commission of, or attempt to commit which, juvenile offenders may be punished with whipping in accordance with the provisions of the said section.

SCHEDULE.

General Acts.

1. The Police Act, 1861 (V of 1861), section 34
2. The Public Gambling Act, 1867 (III of 1867), sections 4, 13 and 15.
3. The Cattle Trespass Act, 1871 (I of 1871), section 24.
4. The Northern India Canal and Drainage Act, 1873 (VIII of 1873), section 70, clauses (1) and (2)
5. The Opium Act, 1878 (I of 1878) section 9
6. The Indian Forest Act, 1878 (VII of 1878), sections 25, 32 and 62 and rules made [illegible]

[illegible]

8. The Indian Salt Act, 1882 (XII of [illegible] 85 (XIII [illegible] 1890 (IX [illegible] 129 [illegible] Animals Act, 1890 (XI of 1890), sections 3, 4 and 5
12. The Prisons Act, 1894 (IX of 1894), section 42
13. The Excise Act, 1896 (XII of 1896), sections 45, 46, 49 and 51
14. The Indian Fisheries Act, 1897 (IV of 1897), sections 4 and 5
15. The Reformatory Schools Act, 1897 (VIII of 1897), sections 27 and 28
16. The Indian Post Office Act, 1898, (VI of 1898), sections 61, 62 and 68.
17. The Ancient Monuments Preservation Act, 1904 (VII of 1904), section 16
18. The Indian Electricity Act, 1910 (IX of 1910), section 40
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20. The Cantonment Code, 1912, [illegible] 67 (1) [illegible]

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1. The Madras District Police Act, 1859 XXII of 1859, section 47
2. The Madras Forest Act, 1882 (Madras Act V of 1882), sections 21, 22 and 50 and rule made under sections 22 and 23, for the [illegible]
5. The Towns Nuisances Act, 1889 (Madras Act III of 1889), sections 3, 5 and 7.
6. The Madras Salt Act, 1889 (Madras Act IV 1889), section 74

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1. The Bombay Abkari Act, 1878 (Bombay Act V of 1878), sections 47 and 48.
2. The Bombay Prevention of Gambling Act, 1887 (Bombay Act IV of 1887), sections 5 and 12.
3. The Bombay District Police Act, 1890 (Bombay Act IV of 1890), sections 62, 70 and 71
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1. The Howrah Offences Act, 1857 (XXI of 1857), section 20
2. The Calcutta Suburban Police Act, 1866 (Bengal Act II of 1866), section 41
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4. The Bengal Public Gambling Act, 1867 (Bengal Act II of 1867), sections 4, 11 and 13
5. The Bengal Irrigation Act, 1876 (Bengal Act III of 1876), section 93.
6. The Bengal Embankment Act, 1882 (Bengal Act II of 1882), section 77.
7. The Bengal Excise Act, 1909 (Bengal Act V of 1909), sections 46 and 52

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1. The United Provinces Excise Act, 1910 (United Provinces Act IV of 1910), sections 60, 6 sub-s. (4), (5), (6), (7), (9), (11), (1) and (3)

Punjab

1. The Punjab Land Preservation (Chos) Act, 1900 (Punjab Act II of 1900), section 19
2. The Punjab Excise Act, 1914 (Punjab Act I of 1914), sections 61, sub-section (1), clauses (a) and (c) and sub-section (2), clauses (a), (d) and (e)

[1] Notification No. 1008, Home Department, Judicial, dated 6th June 1921, *Gazette of India*, 18th June 1921, Part I, p. 872.

Burma.

[illegible]

Behar and Orissa.

1. The Bengal Embankment Act, 1855 (XXXII of 1855), sections 10 and 17.
2. The Bengal Embankment Act, 1882 (Bengal Act II of 1882), section 77.
3. The Bihar and Orissa Excise Act, 1915 (Bihar and Orissa Act II of 1915), sections 47 and 55.

Central Provinces.

1. [illegible] 1915 (Centr[illegible] 31, cl[illegible] and 36.

Delhi.

1. Section 61, sub-section (1) clauses (a) and (c) and sub-section (2), clauses (a), (b) and (c) of the Punjab Excise Act, 1914 (Punjab Act I of 1914), as applied to the Delhi Province by Government of India notifications No. 321639, dated the 22nd May 1914, and No. 16272, dated the 30th October 1915.

Special provision as to punishment with whipping in frontier districts.

6. Whenever any Local Government has, by notification in the Official Gazette, declared the provisions of this section to be in force in any frontier district or any wild tract of country within the jurisdiction of such Local Government, any person who in such district or tract of country after such notification as aforesaid commits any offence punishable under the Indian Penal Code with imprisonment for three years or upwards, may be punished with whipping in lieu of any other punishment to which he may be liable under the said Code.

Amendment of section 392, Act V, 1898.

7. To section 392, sub-section (2), of the Code of Criminal Procedure, 1898, the words "and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes" shall be added.

Repeals.

8. The enactments mentioned in the Schedule are hereby repealed to the extent specified in the fourth column thereof.

THE SCHEDULE.

1	2		4
Year.	No.	Subject or short title.	Extent of repeal.
		Acts of the Governor-General in Council.	
1864	VI	The Whipping Act, 1864.	So much as is unrepealed.
1895	III	The Indian Criminal Law Amendment Act, 1895.	Section 5.
1898	V	The Code of Criminal Procedure, 1898.	The words "whipping (if specially empowered)" in sub-section (1) and sub-section (3) of section 32. The words and figures "(1) Power to pass sentences of whipping section 32" under the heading "Powers with which a Magistrate of the second class may be invested" in Schedule IV.
"	XIII	The Burma Laws Act, 1898.	Section 4, sub-section (3), clause (b), and the second Schedule.
1900	V	The Whipping Act, 1900.	The whole Act.

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